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HEALTH The Durable Power of Attorney for Health Care Act

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The Durable Power of Attorney For Health Care Act

CODE SECTIONS:	O.C.G.A. §§ 31-36-1 to -13 (new)
BILL NUMBER:	HB 999
ACT NUMBER:	1259
SUMMARY:	The Act allows a competent adult to appoint an agent to make health care decisions on his or her behalf. The Act provides the mechanisms for establishing and enforcing a health care agency relationship and a statutory short form durable power of attorney for health care. The Act also defines the responsibilities of health care providers in health care agency situations and provides for penalties, liability, and immunity from liability under some circumstances for both health care providers and agents.
EFFECTIVE DATE:	July 1, 1990

History

The Georgia Durable Power of Attorney for Health Care Act was originally proposed at the urging of the Georgia AIDS Coalition, Inc. (GAAC) and the American Association of Retired Persons (AARP).[1] The AARP voiced a growing concern among the retired that new legislation was needed to ensure that an individual's right to make personal health care decisions could be assured even if that individual became incapable of continuing to make those decisions himself.[2] The Act was originally submitted to the 1989 legislative session and went through substantial revisions before its passage in 1990.[3] The Bill as enacted by the 1990 General Assembly was the result of a concerted effort and careful consideration of the GAAC, AARP, the Fiduciary Law Section of the State Bar of Georgia, and a number of health care organizations.[4]

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1. Telephone interview with Representative Jim Martin, House District No. 26 (Mar. 26, 1990).
2. *Id.*
3. *Id.*
4. *Id.*

HB 999

The Durable Power of Attorney for Health Care Act is a comprehensive piece of legislation that went through a remarkable transformation. The bill passed by the House Committee on Health and Ecology and ultimately enacted into law in 1990 is dramatically different from the bill introduced in the 1989 session. The entire structure and virtually all of the language of the bill was reworked and many of the key provisions of the Act were substantially altered.

Lawyers with the GAAC helped draft the bill that was presented to the 1989 legislature.[5] The original bill was loosely drafted, however, and, rather than risk losing the legislation altogether, the sponsor held the bill over to the 1990 session so that it might be perfected.[6] During the time between the 1989 and 1990 sessions of the General Assembly, HB 999 went through major revisions. Representatives of the Fiduciary Law Section of the State Bar of Georgia drafted a bill which the sponsor used as the framework for a revised bill which was endorsed by representation of health care organizations and other advocacy groups.[7] This version was based on similar legislation passed by the Illinois legislature and was presented to the House Committee on Health and Ecology.[8] Those who worked in perfecting the bill[9] included representatives from the Hospital Association of Georgia, the Medical Association of Georgia, and several senior citizen groups from around the state.[10] The bill which was passed by the House Committee on Health and Ecology and enacted into law during the 1990 session of the General Assembly was the result of a concerted effort by all of these groups.[11]

Many of the key provisions of the Act were substantially altered. The first alteration occurred in the first provision of the Act. It provided for a short title for the newly established Chapter 36 of Title 31 of the Georgia Code, the Durable Power of Attorney for Health Care Act.[12]

The first substantial change to HB 999 provides a detailed and carefully drafted statement of legislative purpose that was not included in the original bill.[13] The statement of purpose recognizes an individual's right to control all aspects of his health care, including decisions to

5. *Id.*
6. *Id.*
7. Telephone interview with Representative Jim Martin, House District No. 26 (Mar. 26, 1990).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. O.C.G.A. § 31-36-1 (Supp. 1990).
13. O.C.G.A. § 31-36-2 (Supp. 1990).

decline or withdraw from any health care situation.[14] The concern that individuals may lose the right to make personal health care decisions if they become incapacitated or incompetent prompted the legislature to create the Act. Georgia's Living Will Statute applies only in cases of terminal illness.[15] The durable power of attorney created in HB 999 is broader than the Living Will Statute as it would also cover "non-terminal situations such as persistent vegetative states where there is no hope for recovery."[16] The Act allows the creation of a health care agency relationship under which the agent has the equivalent power of the individual to make health care decisions for the principal if he can not reasonably do so himself.[17] The Act is intended to provide rules for the establishment of the health care agency relationship and for the authority of the agent, and to provide guidelines for health care providers affected by health care agency situations.[18]

The Act offers protection from both civil and criminal liability for both health care agents and providers who act reasonably and with good faith under a health care agency relationship as defined by the Act.[19] There is a requirement of due care to act in the best interest of the principal under the health care agency. The Act also provides for liability for negligence. The Act emphatically states that enactment of this legislation neither encourages nor condones euthanasia, suicide or any violation of any criminal statute.[20] This Act is not exclusive, however, and other powers of attorney that satisfy the formalities of Section 31-36-5 may offer basically the same protection offered under this Act.[21]

The Durable Power of Attorney for Health Care Act establishes standards and limitations on the formalities of the health care agency.[22] The Act permits principals to give the health care agent powers identical to those of the principal, including the right to be informed about, consent to, or refuse or withdraw from any health care situation.[23] The agency may also be set up to continue after the death of the principal and the agent may make decisions concerning organ donorship, autopsy, and disposition of the remains.[24] The 1989 version of HB 999 did not provide specifically for withdrawal from life support measures.[25]

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14. O.C.G.A. § 31-36-2(a) (Supp. 1990).
15. Medical Association of Georgia Legislative Bulletin (Mar. 29, 1990).
16. *Id.*
17. O.C.G.A. § 31-36-2(a) (Supp. 1990).
18. O.C.G.A. § 31-36-2(c) (Supp. 1990).
19. *Id.*
20. O.C.G.A. § 31-36-2(b) (Supp. 1990).
21. O.C.G.A. § 31-36-2(c) (Supp. 1990).
22. O.G.G.A. §§ 31-36-4, -5 (Supp. 1990).
23. O.C.G.A. § 31-36-4 (Supp. 1990).
24. *Id.*
25. HB 999, as introduced, 1989 Ga. Gen. Assem.

The Act establishes formalities for executing the agency similar to the formalities for executing wills.[26] The health care agency agreement must be in writing, signed by the principal or someone signing at his direction, and must be so signed in his presence. The agency must also be attested and subscribed by at least two competent witnesses in the presence of the principal.[27] If the principal is already under the care of a health care provider, the agency agreement must also be witnessed and attested to by the attending physician.[28]

HB 999 originally included a detailed attestation form to be used as a guideline for witnesses.[29] In the original bill, if the principal was already under the care of a health care provider at the time of the agency agreement, the chief of the hospital medical staff or a nonattending physician had to attest to the agreement with the other witnesses.[30]

The original bill stated that a health care provider could only become a health care agent if he were a relative of the principal.[31] The Act provides that a health care provider may become the health care agent as long as he is not directly or indirectly involved in the care of that particular principal.[32]

Both the original bill and the Act as passed provide that the agent is preempted in his power if the principal has the capacity to make the particular decision himself.[33]

The original bill provided fairly narrow situations under which the agency relationship could be revoked by the principal and appears to have required that the principal have the capacity to revoke in order to do so.[34] The Act allows the principal several ways to revoke the agency agreement at any time, without regard to his mental or physical condition at the time of the revocation.[35] The Act provides, in greater detail than the original bill, the methods by which the health care agency may be revoked.[36] The original bill required an automatic termination of the health care agency if the principal was not incapacitated at the end of seven years from the date of the agreement.[37] No similar provision appears in the Act as passed.

Under the Act, a subsequent divorce or annulment of a marriage revokes the health care agency as to the former spouse.[38] A subsequent

26. O.C.G.A. § 31-36-5 (Supp. 1990).
27. O.C.G.A. § 31-36-5(a) (Supp. 1990).
28. *Id.*
29. HB 999, as introduced, 1989 Ga. Gen Assem.
30. *Id.*
31. *Id.*
32. O.C.G.A. § 31-36-5(b) (Supp. 1990).
33. O.C.G.A. § 31-36-5(c) (Supp. 1990).
34. HB 999, as introduced, 1989 Ga. Gen. Assem.
35. O.C.G.A. § 31-36-6(a) (Supp. 1990).
36. *Id.*
37. HB 999, as introduced, 1989 Ga. Gen. Assem.
38. O.C.G.A. § 31-36-6(b) (Supp. 1990).

marriage, however, revokes the health care agency only if the agent is not in fact the new spouse.[39]

Unless a court orders otherwise, the appointment of a guardian or receiver for the principal will not destroy the health care agency.[40] The agent will still have superior power over the guardian to make health care decisions and the guardian will not be subject to any liability for any matter covered by the health care agency.[41] Amendment of the health care agency agreement must meet the formal formation requirements of the original agreement.[42]

One of the most important areas of the Act concerns the liability of health care providers and health care agents. The original bill contained broad language concerning liability. The Act as passed, however, is carefully drafted and protects the health care provider from liability in a number of situations. The Act provides that a health care provider, who relies in good faith upon the direction of an agent that does not clearly contradict the instrument of agency, will be protected from liability as though the provider received directions from the principal himself.[43] If the principal is injured or dies, the health care provider will not be liable unless he would be liable when taking his directions from the principal.[44] At the same time, the Act protects the health care provider from liability for not complying with the direction of a health care agent as long as the agent is informed promptly and the health care provider continues to provide the principal adequate care until the agent can arrange for his transfer.[45] No agent who acts in good faith reliance on the terms of the agency will be liable, even if the agency has been revoked, if the agent acts without proper notice of the revocation.[46]

The Act expressly provides that if the principal's death is the result of a health care agency decision to withdraw from life support systems, as provided under the agency agreement, the death will not constitute either a suicide or a homicide.[47] This provision not only prevents possible criminal actions, but also prevents the operation of suicide clauses in insurance contracts. It also prevents the impairment of an annuity or any other contract conditioned on life or death of the principal.[48]

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39. *Id.*
40. O.C.G.A. § 31-36-6(c) (Supp. 1990).
41. *Id.*
42. O.C.G.A. § 31-36-6(d) (Supp. 1990).
43. O.C.G.A. § 31-36-8 (Supp. 1990).
44. O.C.G.A. § 31-36-8(1) (Supp. 1990).
45. O.C.G.A. § 31-36-8(2) (Supp. 1990).
46. O.C.G.A. § 31-36-8(5) (Supp. 1990).
47. O.C.G.A. § 31-36-8(6) (Supp. 1990).
48. *Id.*

The Act provides for liability, sanctions, and penalties for persons who falsify the existence of a health care agency or who condition insurance or health care upon the establishment of a health care agency under the Act.[49] Any person who conceals, alters or amends an agency agreement without the consent of the principal is subject to civil liability.[50] If such concealment or alteration of the health care agency agreement results in the death of the principal, the guilty party may face criminal homicide charges.[51] An insurance carrier or health care provider who denies coverage or care on the condition of a health care agency will be subject to both civil liability and possible criminal action under the Act.[52]

The Act provides a detailed statutory power of attorney form for the health care agency relationship.[53] The original bill contained only a warning section to potential principals in a health care agency relationship.[54] The form provided in the Act includes the notice section and a number of detailed options concerning the scope of the health care agency relationship.[55]

The Act expressly defines an agent's authority under a health care agency agreement.[56] Under this section, the agent may be authorized to make virtually any health care decision for the principal with the exceptions of consenting to psychosurgery, sterilization, or statutory commitment to a mental institution.[57]

The Act gives express authority to create an agency under which the agent will have powers identical to those of the principal to make health care decisions.[58] These powers include choosing health care providers, contracting for health care services, having access to all health care records and information, and having the power to make decisions regarding the principal's remains after death.[59]

While the Act states that it is independent of any provision of Title 53 relating to the administration of estates,[60] it expressly provides that a health care agency established under the Act is superior to any other

49. O.C.G.A. § 31-36-9 (Supp. 1990).
50. O.C.G.A. § 31-36-9(1) (Supp. 1990).
51. O.C.G.A. § 31-36-9(2) (Supp. 1990).
52. O.C.G.A. § 31-36-9(3) (Supp. 1990).
53. O.C.G.A. § 31-36-10(a) (Supp. 1990).
54. HB 999, as introduced, 1989 Ga. Gen. Assem.
55. O.C.G.A. § 31-36-10(a) (Supp. 1990).
56. O.C.G.A. § 31-36-10(b) (Supp. 1990).
57. O.C.G.A. § 31-36-10(a)(1) (Supp. 1990).
58. O.C.G.A. § 31-36-10(b) (Supp. 1990).
59. *Id.*
60. O.C.G.A. § 31-36-13 (Supp. 1990).

person, including any guardian of the principal, in the making of health care decisions for the principal.[61]

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61. O.C.G.A. § 31-36-11 (Supp. 1990).