# SENATE BILL REPORT
# SB 5635

As of February 3, 2016

**Title**: An act relating to the uniform power of attorney act.

**Brief Description**: Enacting the uniform power of attorney act.

**Sponsors**: Senators Pedersen and O'Ban; by request of Uniform Law Commission.

**Brief History:**
**Committee Activity**: Law & Justice: 2/02/16.

## SENATE COMMITTEE ON LAW & JUSTICE

**Staff**: Melissa Burke-Cain (786-7755)

**Background**: A power of attorney is an adaptable document permitting a person, known as the "principal," to designate someone else to act on the principal's behalf as their surrogate, called the "attorney-in-fact" or "agent." A power of attorney may be very narrow, for a specific action and a specific circumstance. A power of attorney may also be very broad, granting power to make financial and personal decisions. It may also be written to allow the agent to act even if the principal is incapacitated, the principal's whereabouts are not known, or it is not known whether the is still alive. A power of attorney may have a specific end-date, but the principal may also revoke it in writing at any time. The broadest form of a power of attorney is the general durable power of attorney. If it specifically grants the power, the surrogate may have broad decision-making power and may continue to use the power if the principal is incapacitated, or their condition or whereabouts are unknown. A durable power of attorney may be terminated or revoked by the principal, a court-appointed guardian, or court order.

Washington's current power of attorney law is chapter 11.94 RCW. The Uniform Law Commission produced a Uniform Power of Attorney Act (UPOAA) in 2006. Currently, 18 states have adopted the 2006 Act: AL, AR, CO, CT, HI, ID, IA, ME, MD, MT, NB, NV, NM, OH, PA, VA, WV, and WI. It has been introduced in 2016 in South Carolina and Utah.

**Summary of Bill**: The bill as referred to committee not considered.

**Summary of Bill (Proposed Substitute)**: Washington's power of attorney act is repealed in favor of the UPOAA, but with some differences from the UPOAA. A power of attorney must

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be signed, dated, and either notarized or witnessed by a non-relative who is someone other than the principal's caregiver.

A power of attorney is assumed to terminate when the  is incapacitated, so it is not assumed to be durable unless specific language in the document expressly provides that it survives the incapacity of the principal. Co-agents exercise their authority jointly unless specifically provided otherwise. A power of attorney granted to a spouse or a domestic partner terminates upon filing for a dissolution from the spouse or domestic partner. The power also terminates when the court appoints a guardian for the principal. If a limited guardianship is granted, the power of attorney may continue as permitted by the court.

The attorney-in-fact's fiduciary duties are listed. The agent is empowered to give informed consent for the principal under a power of attorney for health care decisions. The principal may designate an agent to make health care decisions for the principal's minor children. The agent has access to all of the health care information that the principal would have under the Health Insurance Portability and Accountability Act (HIPAA).

Some powers are assumed to be granted under a general power of attorney unless specifically excluded. Other powers are not assumed, but must be specifically called out in the document in order for the agent to exercise them. The principal may provide liability protection in the case of negligence or gross negligence on the agent's part if an agent hires someone to perform some of the agent's task. The agent is not held liable for discretionary acts of the hired person. Judicial review of an agent's proposed action is broadly available. An attorney-in-fact may give specified notice and resign as the agent. Third parties may be held liable for wrongfully rejecting a power of attorney. A third party can protect their interests from someone using an invalid power of attorney by asking the agent to certify the power of attorney's validity.

**Appropriation**: None

**Fiscal Note**: Not requested

**Committee/Commission/Task Force Created**: No.

**Effective Date**: Ninety days after the adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony**: PRO: The bill is the result of significant work by a joint task force comprised of members of the Washington State Bar Assn.'s Elder Law section and Real Estate, Probate, and Trust Section. This bill integrates the current Washington power of attorney law with the uniform law. Provisions of the uniform law were modeled after Washington's current law and this bill represents improvements to both the current Washington law and the uniform law. The current RCW is not a concern. Powers of attorney were developed in the 1960s as a tool for disability planning for poor people who did not have money for court proceedings, guardianship, or trust arrangements. The durable power of attorney concept is that a person can be identified to manage the affairs of another without a court proceeding, dealing with modest amounts of money, in an instrument that can continue in effect after disability. The durable power of attorney is a common instrument today regardless of means. The current laws lack detail and there is a problem with abuse of

the power, and use of the instrument with third parties. Many states have bolstered their power of attorney statutes to provide protections to prevent misuse, and provide reassurances to third parties. The uniform power of attorney act makes the power of attorney instrument subject to well-defined rules in law. It fleshes out the gaps in other statutes, and it is a lengthy bill because the power of attorney is a complicated document. Under the bill, health care powers are not given by default, the bill is identical in that respect to current Washington law. Health care powers must be specifically spelled out in the instruments. I would be concerned if too much detail is required because health care providers, for example those at Harborview Medical Center and the VA hospital, rely very much on health care provisions in power of attorney documents. An "off the rack" version of a POA might not be as detailed as some suggest it should be. We need to be cautious that these documents are still useful to allow doctors to do their jobs, especially for patients who may not have family but still need assistance. For disabled persons, a power of attorney is an important tool that allows individuals to maintain autonomy to the extent possible and to avoid more restrictive arrangements such as guardianships. The uniform act has been reviewed, and a document from the AARP has been published that identifies the sections that promote individual autonomy or add protection from fraud and abuse. The WSBA task force has made some small changes that accomplish these intended results. A power of attorney can be a real blessing for those without money but the document can also be used for financial exploitation and inappropriate isolation of a disabled person.

OTHER: This bill has improvements over both the uniform power of attorney act and Washington's power of attorney statute, chapter 11.94 RCW. There is the potential for incapacitated principals to be vulnerable to substitute decisions in end-of-life situations. Some changes could be made to increase protection of the principal. Some of the improvements in the bill are that the power of attorney instrument is not durable by default, as well as the formal execution and witnessing of the documents and broader judicial review provisions. These are well done, and very helpful. Some concerns are that the broad authority for decisions over health care could bind a principal in ways the principal doesn't contemplate when the document is signed. The provision allowing an agent to continue exercising power even after the power of attorney is terminated as long as the agent is not aware of the termination seems overly broad. Authority to make health care decisions should be an expressly granted power especially as to end-of-life or long-term incapacity. Otherwise, there is a risk that the principal could be subjected to medical procedures that they would not have approved if they had known. Work is still needed on the bill to protect and limit post-termination actions, to limit default medical consent, and to tighten language around what constitutes incapacity.

**Persons Testifying**: PRO: Senator Pedersen, prime sponsor; Karen Boxx, WSBA Elder Law and Real Property, Probate, and Trust Sections; David Lord, Disability Rights WA.

OTHER: Professor Mark De Forrest, Gonzaga University School of Law

**Persons Signed In To Testify But Not Testifying:** No one.