
Amending the Illinois Power of Attorney Act: Co-Agents for Health Care Power of Attorney

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Recommended Citation

Isabella F. Loverde, *Amending the Illinois Power of Attorney Act: Co-Agents for Health Care Power of Attorney*, 72 DePaul L. Rev. 731 (2023)

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AMENDING THE ILLINOIS POWER OF ATTORNEY ACT: CO-AGENTS FOR HEALTH CARE POWER OF ATTORNEY

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I. INTRODUCTION

The Illinois General Assembly enacted the Illinois Power of Attorney Act (the Act) in 1987.¹ Article IV of the Act is titled “Powers of Attorney for Health Care Law” and sets out the law for health care power of attorney. In 2011, the Act was amended to prohibit the appointment of co-agents in the Illinois Statutory Short Form Power of Attorney for Health Care.² The Illinois Statutory Short Form Power of Attorney for Health Care is a form provided by the State that enables a principal to appoint an agent to make health care decisions on his behalf when the principal is unwilling or unable to make his own health care decisions.³

1. James N. Zartman, *Illinois Power of Attorney Act*, 13 S. Ill. U. L.J. 1, 5 (1988).

2. Anthony B. Ferraro, *The New 2011 Illinois Power of Attorney Act*, ANTHONY B. FERRARO L. (July 27, 2011), <https://abferrarolaw.com/elder-law-update-the-new-2011-illinois-power-of-attorney-act/> [<https://perma.cc/N9HM-3LGD>].

3. *Illinois Statutory Short Form Power of Attorney for Health Care*, ILL. DEP’T OF PUB. HEALTH, <https://dph.illinois.gov/content/dam/soi/en/web/idph/files/forms/powerofattorneyhealthcareform.pdf> [<https://perma.cc/6SR4-N32U>] (last visited Feb. 26, 2022).

Part II of this Comment will provide an overview of power of attorney laws. Next, this part will discuss the different types of power of attorney with a focus on power of attorney for health care. It will examine the importance of health care power of attorney within the context of medical decision making. This part will also survey jurisdictional differences in power of attorney statutes and analyze the Uniform Health-Care Decisions Act (UHCDA). Finally, it will provide a synopsis of the Act with an emphasis on Article IV, the “Powers of Attorney for Health Care Law.” Part III of this Comment will discuss the necessity of co-agents within power of attorney for health care and argue that co-agents are integral for protecting the principal’s best interests. Next, this part will argue that the Act is ineffective as it does not allow principals to appoint co-agents for health care power of attorney in its statutory form. Then, this part will compare the Act with other state statutes that successfully allow for the appointment of co-agents including Maine, Missouri, Pennsylvania, and Washington. Part IV of this Comment will assess the future impact that co-agents for health care power of attorney has on the current state of the law. It will discuss why amending the Act matters to the legal community and to society as a whole. Part V of this Comment will conclude that the Illinois General Assembly should amend the Act because it does not allow a principal to appoint co-agents when using the Illinois Statutory Short Form Power of Attorney for Health Care.

II. BACKGROUND

This part will begin with an overview of power of attorney. It will cover the legal basis for power of attorney, eligibility to appoint a power of attorney or be appointed as power of attorney, how power of attorney is effectuated, and types of power of attorney. From there, this part will narrow its focus onto one specific type of power of attorney: power of attorney for health care. It will discuss the recent surge of interest into medical decision making and examine how health care power of attorney has gained importance in recent years. Then, it will survey the jurisdictional differences in power of attorney statutes that led to the development of the UHCDA. Finally, this part will provide a synopsis of the Act with an emphasis on Article IV, the “Powers of Attorney for Health Care Law.”⁴

4. 755 ILL. COMP. STAT. ANN. 45/4 §§ (West 2015).

A. Power of Attorney Overview

Power of attorney is a type of advance directive, which is a written document that sets out one's preferences for the future.⁵ Power of attorney provides an agent with the legal power to make decisions on someone else's behalf.⁶ Power of attorney exists to prepare for emergency situations and for convenience.⁷ Without a power of attorney, a person risks the chance that, in the event he cannot competently make decisions or handle his own affairs, his spouse or family would likely have to go to court to be granted the authority to handle his affairs.⁸ Court processes can be costly and slow, and thus inconvenient for an individual's family in such a situation.⁹

The person who appoints a power of attorney is known as the "principal."¹⁰ Anyone over the age of eighteen may be a principal and appoint his own agent. This is because after a person reaches the age of majority, he becomes a legal adult, and, therefore, no one else generally has any right to make decisions on his behalf.¹¹ At this age, parents' legal authority over their child officially ends.¹² While any adult may be a principal, it is more likely that an elderly person or a person with health issues may feel a more urgent need to appoint a decision maker than an average healthy person because it is more likely that an

5. Ashley Huntsberry-Lett, *The Difference between POA, Durable POA and a Living Will*, AGINGCARE, <https://www.agingcare.com/articles/difference-between-poa-durable-power-of-attorney-living-will-140435.htm> [https://perma.cc/SF9K-MBDK] (last visited Nov. 15, 2021).

6. Kimberly Rotter, *Power of Attorney: When You Need One*, INVESTOPEDIA (May 18, 2022), <https://www.investopedia.com/articles/personal-finance/101514/power-attorney-do-you-need-one.asp> [https://perma.cc/3G5U-2MAC].

7. *Power of Attorney*, A.B.A., https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/power_of_attorney/ [https://perma.cc/6BHH-3UUT] (last visited Nov. 15, 2021).

8. *Why Power of Attorney is So Important for Seniors*, HOME INSTEAD (Apr. 8, 2020), <https://www.homeinstead.com/care-resources/care-planning/why-power-of-attorney-is-so-important-for-seniors/> [https://perma.cc/G3QQ-H7KL].

9. Adam Hayes, *Power of Attorney (POA): Meaning, Types and How and Why to Set One Up*, INVESTOPEDIA (Mar. 23, 2023), <https://www.investopedia.com/terms/p/powerofattorney.asp> [https://perma.cc/E3MA-EJ22].

10. *Durable Powers of Attorney*, NAT'L ACAD. OF ELDER L. ATT'YS, https://www.naela.org/web/consumers_tab/consumers_library/consumer_brochures/elder_law_and_special_needs_law_topics/dpoa.aspx [https://perma.cc/3SQS-L4GZ] (last visited Dec. 19, 2022).

11. Valerie Kenne, *Three Important Steps to Take When Your Child Turns 18*, NOLO, <https://www.nolo.com/legal-encyclopedia/three-important-steps-to-take-when-your-child-turns-18.html> [https://perma.cc/8GM9-WW8M] (last visited Nov. 15, 2021).

12. *Making Decisions for a Child with Special Needs Who Becomes an Adult*, SPECIAL NEEDS ANSWERS (Mar. 1, 2017), <https://specialneedsanswers.com/making-decisions-for-a-child-with-special-needs-who-becomes-an-adult-13186> [https://perma.cc/V7F8-SVHY].

emergency could happen at any time.¹³ The person who is appointed to act on behalf of the principal is referred to as the “agent.”¹⁴ In most states, any competent person over the age of eighteen is eligible to be appointed as an agent.¹⁵ The agent may “take any action permitted in the [power of attorney] document” which is prepared by the principal and lists the agent’s duties and responsibilities.¹⁶ The purpose of appointing an agent is so that the agent can make decisions that align with the best interests of the principal when a principal cannot make decisions for himself.¹⁷ Thus, an agent is often a trusted family member who is aware of the principal’s beliefs and values.¹⁸

A power of attorney effectuates in one of two ways, depending on whether it is durable or springing. First, a “durable power of attorney” is effective immediately after the written power of attorney document is executed and remains effective in the event the principal becomes incapacitated.¹⁹ On the other hand, a “springing power of attorney” does not take effect immediately.²⁰ It goes into effect if a specific event that is specified in the written power of attorney document occurs, such as the incapacitation of the principal.²¹

There are three types of power of attorney: general, limited and health care.²² First, a general (or financial) power of attorney gives an agent broad authority to make business, legal, and financial decisions on behalf of the principal.²³ Second, a limited power of attorney gives an agent authority to act only for specific purposes designated by the

13. *What is a Power of Attorney and Why Do Seniors Need One?*, DAILYCARING, <https://dailycaring.com/what-is-a-power-of-attorney-and-why-do-seniors-need-one/> [https://perma.cc/8BXU-LPGV] (last visited Nov. 16, 2021).

14. *Durable Powers of Attorney*, *supra* note 10.

15. *Naming an agent for a Power of Attorney (POA)*, ILL. LEGAL AID ONLINE (Feb. 23, 2022), <https://www.illinoislegalaid.org/legal-information/naming-agent-power-attorney-poa> [https://perma.cc/H6DP-23L6].

16. *Power of Attorney*, *supra* note 7.

17. James Chen, *Principal-Agent Relationship: What It Is, How It Works*, INVESTOPEDIA (Apr. 5, 2022), <https://www.investopedia.com/terms/p/principal-agent-relationship.asp> [https://perma.cc/R2T4-7HCU].

18. Lori Johnston, *When Family Members Feud Over Power of Attorney*, AGINGCARE (Mar. 29, 2022), <https://www.agingcare.com/articles/family-fights-over-power-of-attorney-153319.htm> [https://perma.cc/H9PL-XR7M].

19. Mollie Moric, *Types of Power of Attorney: 5 Different Powers of Attorney Explained*, LEGAL TEMPLATES (July 4, 2022), <https://legaltemplates.net/resources/estate-planning/types-of-power-of-attorney/> [https://perma.cc/C574-2FTD].

20. *Springing durable power of attorney*, LEGAL INFO. INST. (Aug. 2021), https://www.law.cornell.edu/wex/springing_durable_power_of_attorney [https://perma.cc/7AP3-623H].

21. Moric, *supra* note 19.

22. *Id.*

23. *Id.*; Adam Hayes, *Financial Power of Attorney*, INVESTOPEDIA (Aug. 16, 2020), <https://www.investopedia.com/terms/f/financial-power-attorney.asp> [https://perma.cc/5DKU-DGX6].

principal.²⁴ Finally, a health care power of attorney enables the principal to appoint an agent to make medical decisions on the principal's behalf in the event that the principal cannot make such decisions for himself.²⁵ A health care power of attorney becomes effective immediately after the document is signed, but may only be used after the principal has been declared incapacitated by his doctor.²⁶ Generally, a person becomes incapacitated when he is deprived of power or made incapable for normal functioning.²⁷

Health care power of attorney is inherently important as it involves one person putting his life into someone else's hands.²⁸ Health care power of attorney is used so an agent can make decisions "about treatment options, medication, surgery, end-of-life care, and more."²⁹ A health care power of attorney is necessary if the principal would like to have control of his medical care and treatment.³⁰ In the absence of a health care power of attorney or other advance directive, doctors will perform any type of treatment deemed necessary in the event a person is in a life-threatening situation.³¹ This is especially risky for people who have religious or moral objections to certain medical treatments.³² Even people who do not have specific objections to medical treatments, in general, when "faced with important health decision, their goals and values are just as important as the medical facts."³³ Without an agent acting on behalf of the principal's best interest, these morals, goals, and values may be disregarded.

24. Moric, *supra* note 19.

25. *Id.*

26. *Id.*

27. *Incapacitated*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/incapacitated> [<https://perma.cc/7DGX-G65Z>] (last visited Nov. 22, 2021). However, each state will likely have its own requirements for "incapacity" in its power of attorney statute.

28. *How to Give Someone a Power of Attorney*, LAW DICTIONARY, <https://thelawdictionary.org/article/how-to-give-someone-a-power-of-attorney/> [<https://perma.cc/53Q6-5HSY>] (last visited Nov. 22, 2021).

29. *What is a medical power of attorney?*, FREEWILL (May 10, 2021), <https://www.freewill.com/learn/what-is-a-medical-power-of-attorney/> [<https://perma.cc/49CH-S33Q>].

30. Hanna Rubin, *Financial vs. Medical Power of Attorney: What's the Difference?*, INVESTOPEDIA (Apr. 30, 2021), <https://www.investopedia.com/articles/managing-wealth/042216/medical-vs-financial-power-attorney-reasons-separate-them.asp> [<https://perma.cc/N7N8-KZEE>].

31. *Id.*

32. For an article regarding religious objections to medical treatments, see Sandee LaMotte, *'Inoculate yourself with the word of God': How religion can limit medical treatment*, CNN (Feb. 7, 2018), <https://www.cnn.com/2018/02/07/health/religion-medical-treatment/index.html> [<https://perma.cc/BJ6C-VRTM>].

33. Sherri Gordon, *5 Ways to Make the Most Informed Health Decisions*, VERYWELL HEALTH (Mar. 22, 2020), <https://www.verywellhealth.com/keys-to-making-informed-health-decisions-4129589> [<https://perma.cc/X7M5-KPUL>].

One drawback of appointing an agent is the risk of power of attorney abuse. Power of attorney abuse occurs when an agent does not act with the principal's best interests in mind.³⁴ It is "the legal claim that a person with power of attorney isn't acting in the best interests of the principal."³⁵ Though power of attorney abuse may exist in any power of attorney agreement,³⁶ in many situations, "a power of attorney abuse case will be part of financial abuse of an elderly person."³⁷ Elderly persons are targets of power attorney abuse because they are often socially isolated and may be incompetent such that it is likely the abuse will never be discovered.³⁸ For example, in *Bedin v. Northwestern Memorial Hospital*, an elderly woman appointed her daughter as her agent for health care power of attorney.³⁹ The hospital petitioned the court to "invalidate, suspend, and/or revoke" the agent's power.⁴⁰ The hospital claimed the agent should not have this power because she "refused to participate with professional staff"⁴¹ and put her elderly mother at an "increased risk of infection"⁴² by prohibiting hospital staff from discharging her mother.⁴³ The court entered an order discharging the elderly woman from the hospital.⁴⁴ The court did not disclose whether the agent's power of attorney was revoked, but this case is a prime example of power of attorney abuse as it underscores an agent's decision making authority and medical staff's lack of power to challenge an agent without court intervention.

B. *The Inquiry into Power of Attorney and Medical Decision Making*

In 1990, the Supreme Court decided the landmark case, *Cruzan v. Director, Missouri Department of Health*.⁴⁵ After a car accident left

34. *Power of Attorney Misuse in Illinois*, LAW OFFS. OF ANTHONY R. SCIFO, <https://scifo-law.com/power-of-attorney-misuse-in-illinois/> [<https://perma.cc/JU35-9DSF>] (last visited Jan. 27, 2022).

35. *Id.*

36. Elizabeth McGuan, *The New Power of Attorney for Property: Protection for the Principal, or Potential for Abuse?*, J. DUPAGE CNTY. BAR ASS'N, <https://www.dcba.org/mpage/vol230611art2> [<https://perma.cc/R2D5-DHC4>] (last visited Jan. 27, 2022).

37. *Power of Attorney Misuse in Illinois*, *supra* note 34.

38. McGuan, *supra* note 36.

39. *Bedin v. Nw. Mem'l Hosp.*, 187 N.E.3d 739, 743–44 (Ill. App. Ct. 2021).

40. *Id.* at 744.

41. *Id.*

42. *Id.*

43. See Deborah L. Shelton, *Hospital in court to discharge elderly woman*, CHI. TRIB. (Nov. 9, 2010), <https://www.chicagotribune.com/news/ct-bn-xpm-2010-11-09-28519415-story.html> [<https://perma.cc/22UM-LP5T>].

44. *Bedin*, 187 N.E.3d at 744.

45. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

twenty-five-year-old Nancy Cruzan in a persistent vegetative state, doctors inserted a feeding tube into her body to keep her alive.⁴⁶ Doctors informed Nancy's parents that Nancy had no hope of recovery and would remain in a vegetative state for the rest of her life, so Mr. and Mrs. Cruzan asked Nancy's doctors to remove her feeding tube.⁴⁷ However, Nancy did not have a power of attorney for health care or any other advance directive that outlined her medical care wishes.⁴⁸ The hospital refused to remove the feeding tube, leading Mr. and Mrs. Cruzan to seek a court order to do so.⁴⁹ The Cruzan's received authorization from a Missouri trial court to remove Nancy's feeding tube.⁵⁰ The trial court relied on evidence from Nancy's friend, who recalled Nancy stating that "if [she were] sick or injured, she would not wish to continue her life unless she could live at least halfway normal[]."⁵¹ The trial court took this statement as evidence that Nancy would not want to continue on with her life-saving treatment.⁵²

The State of Missouri and the guardian ad litem for Nancy appealed the decision.⁵³ The Missouri Supreme Court reversed the trial court's decision and held that Mr. and Mrs. Cruzan were not entitled to order the doctors to terminate Nancy's medical treatment.⁵⁴ The court reasoned that since Nancy was alive and her treatment was not excessive, her right to refuse treatment did not outweigh the state's interest in maintaining her life.⁵⁵ Further, the court found that Nancy's statement to her friend was unreliable evidence to determine what Nancy's preferences would be in this situation.⁵⁶

The United States Supreme Court granted certiorari to review the merits of the case.⁵⁷ The Court affirmed the Missouri Supreme Court's decision and upheld that it was constitutional for a state to require clear and convincing evidence that an incompetent person

46. *The Nancy Cruzan Case*, CDC, <https://www.cdc.gov/training/ACP/page42985.html> [<https://perma.cc/XVQ5-NXVC>] (last visited Mar. 25, 2022); *Cruzan*, 497 U.S. at 266.

47. *Cruzan*, 497 U.S. at 267.

48. *The Missouri Supreme Court Ruling*, CLIMATE CHANGE & PUB. HEALTH L. SITE, <https://biotech.law.lsu.edu/books/lbb/x335.htm> [<https://perma.cc/U96B-RRUG>] (last visited Nov. 22, 2021).

49. *Cruzan*, 497 U.S. at 267–68.

50. *Id.* at 268.

51. *Id.*

52. *Id.*

53. *Cruzan v. Harmon*, 760 S.W.2d 408, 410 (Mo. 1988).

54. *Cruzan*, 497 U.S. at 268.

55. *Cruzan*, 760 S.W.2d at 424. Nancy's medical treatment was artificial hydration and nutrition. *Id.* at 423–24. This treatment was not excessive to Nancy because it did not cause her any pain nor was the treatment burdensome to her given that she did not respond to it. *Id.* at 424.

56. *Cruzan*, 497 U.S. at 268.

57. *Id.* at 265.

would want to die before terminating her life-support treatment.⁵⁸ In sum, since Mr. and Mrs. Cruzan did not provide clear and convincing evidence that Nancy would want to die, they could not order the hospital to remove Nancy's feeding tube.⁵⁹ If Nancy had given her parents health care power of attorney agency rights, Mr. and Mrs. Cruzan could have acted on Nancy's behalf and ordered doctors to remove the feeding tube from the start.⁶⁰ The Supreme Court's ruling has significantly affected the nature of state legislation on power of attorney for health care.⁶¹ Since *Cruzan*, all states have enacted statutes that authorize powers of attorney for health care.⁶²

C. Jurisdictional Differences in Power of Attorney Statutes

While the concept of power of attorney is accepted in all states, every state has different formalities and procedures required to set up power of attorney and appoint an agent.⁶³ Some states provide forms for a principal to use when appointing an agent.⁶⁴ Other states require that witnesses are present when the document appointing the agent is executed.⁶⁵ Finally, states may set different limits on the scope of the agent's powers. Unlike Illinois,⁶⁶ other states, such as Maine, Missouri, Pennsylvania, and Washington, do not prohibit a principal from appointing co-agents for health care power of attorney. In Maine, an agent is "an individual with capacity . . . to make a health care decision for the individual granting the power."⁶⁷ Maine allows the principal to appoint multiple agents, or co-agents for health care power of attor-

58. *Id.* at 284, 286–87.

59. *Id.* at 284–85.

60. *Beyond the Cruzan Case*, WASH. POST, <https://www.washingtonpost.com/archive/opinions/1990/06/27/beyond-the-cruzan-case/171e24bd-b5da-4d10-a6e6-946c38740059/> [https://perma.cc/9GE9-GKGM] (last visited Feb. 26, 2022).

61. UNIF. HEALTH-CARE DECISIONS ACT, PREFATORY NOTE (UNIF. L. COMM'N 1993).

62. David M. English, *The Uniform Health-Care Decisions Act and its Progress in the States*, 15 PROB. & PROP. 19, 19 (2001).

63. *Power of Attorney*, *supra* note 7.

64. For example, Missouri does not provide any form for a principal to use when appointing an agent. *State Health Care Power of Attorney Statutes*, A.B.A. at 13 (Sept. 2019), https://www.americanbar.org/content/dam/aba/administrative/law_aging/state-health-care-power-of-attorney-statutes.authcheckdam.pdf [https://perma.cc/X3R8-XYB9]. Other states, like North Carolina provide an optional form that a principal may use. *Id.* at 17. Wisconsin provides a form where some sections are optional, but other sections are mandatory. *Id.* at 25.

65. For example, Alabama requires that two witnesses over the age of nineteen are present when the legal document appointing an agent is executed. *Id.* at 1. Washington requires that two witnesses are present or that the document is notarized to be valid. *Id.* at 24. Other states, like Idaho and Louisiana do not require that any witnesses are present. *Id.* at 6, 10.

66. 755 ILL. COMP. STAT. ANN. 45/2-10.5.

67. ME. REV. STAT. ANN. tit. 18-C, § 5-802(2) (West 2019).

ney.⁶⁸ The Missouri Durable Power of Attorney-Health Care statute expressly allows the principal to appoint more than one attorney-in-fact.⁶⁹ An attorney-in-fact is “an individual . . . appointed to act as agent of a principal.”⁷⁰ Thus, in Missouri, a principal may appoint co-agents for health care power of attorney.⁷¹ The Pennsylvania Health Care Agents and Representatives Act allows a principal to appoint “[m]ore than one health care agent who shall act jointly unless the health care power of attorney [form] expressly provides otherwise.”⁷² Finally, the Washington Uniform Power of Attorney Act allows a principal to designate more than one agent.⁷³ Specifically, the Washington statute states that “[a] principal may designate in a power of attorney two or more persons to act as co[-]agents.”⁷⁴ The co-agents “must exercise their authority jointly,” but a co-agent is permitted to delegate his authority to another co-agent.⁷⁵

These differences in forms, witness requirements, and agents’ powers have resulted in inconsistencies throughout the states.⁷⁶ In response to such inconsistencies, the UHCDA was created to achieve a degree of consistency among the states because we live in “an increasingly mobile society where an advance health[]care directive given in one state must frequently be implemented in another, [so] there is a greater need for uniformity.”⁷⁷

68. See Westlaw’s cmt. to *id.* (definition of agent is not limited to a single individual, the statute permits the appointment of co-agents). Maine is one of the seven states that has adopted the Uniform Health Care Decisions Act of 1993. *Health-Care Decisions Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=63ac0471-5975-49b0-8a36-6a4d790a4edf> [<https://perma.cc/8ADW-MMTF>] (last visited Jan. 23, 2022).

69. MO. ANN. STAT. § 404.707(1) (West 1989).

70. *Id.* § 404.703(1).

71. The Missouri Durable Power of Attorney-Health Care Act states that “subsections 1 and 2 of section 404.707 . . . shall apply to powers granted under Sections 404.800 to 404.865.” *Id.* § 404.810. Sections 404.800 to 404.865 is the Durable Power of Attorney for Health Care Act. *Id.* § 404.800. Thus, since § 404.707(1) allows the appointment of co-agents and § 404.810 extends that power to health care power of attorney, principals in Missouri may appoint co-agents for health care power of attorney.

72. 20 PA. STAT. AND CONS. STAT. ANN. § 5455(a)(1) (West 2007).

73. *Free Washington Medical Power of Attorney Form*, LEGAL TEMPLATES (May 15, 2022), <https://legaltemplates.net/form/medical-power-of-attorney/washington-wa/> [<https://perma.cc/3AGX-XDDN>].

74. WASH. REV. CODE ANN. § 11.125.110(1) (West 2017). The authority to appoint co-agents applies to all types of power of attorney except for the restrictions specifically listed in § 11.125.030(1)(a)–(c), none of which apply in this context. Further, the only stated limitation on health care decision making is that § 11.125.170 (Agent Liability) does not apply to health care power of attorney. See *id.* § 11.125.030(2). Thus, the Washington Uniform Power of Attorney Act applies to health care power of attorney and allows principals to appoint co-agents.

75. *Id.* § 11.125.110(1).

76. UNIF. HEALTH-CARE DECISIONS ACT, PREFATORY NOTE.

77. *Id.*

D. *The Uniform Health-Care Decisions Act*

Enacted in 1993, the UHCDA was drafted by the National Conference of Commissioners on Uniform State Laws.⁷⁸ The UHCDA is a proposed uniform law, so it is non-binding unless a state decides to adopt it into law.⁷⁹ The UHCDA operates under three basic principles: “(1) recognition of individual autonomy; (2) comprehensiveness of decision[]making options; and (3) simplicity consistent with the way individuals and health care providers actually operate.”⁸⁰ To achieve these goals, the UHCDA allows any adult or emancipated minor to become a principal and execute his own power of attorney for medical decision making.⁸¹ Per the UHCDA, the principal must sign a legal document that expresses his desire to appoint an agent.⁸² The UHCDA includes an optional form for principals to use when executing a health care power of attorney.⁸³ Further, the UHCDA allows a principal to appoint multiple agents, or “co-agents,” who share the responsibilities of power of attorney.⁸⁴ The agent is given broad power “to make any health[]care decision the principal could have made while having capacity.”⁸⁵ The agent is responsible for carrying out the principal’s wishes to the best of his ability or acting with the principal’s best interests in mind.⁸⁶ However, such power becomes effective only after the principal’s primary physician finds that the principal lacks the capacity to make his own medical decisions.⁸⁷ The agent’s power terminates if the principal regains capacity,⁸⁸ which the UHCDA defines as the principal’s “ability to understand the significant, benefits, risks, and alternatives to proposed health care and to make and communicate a health[]care decision.”⁸⁹ The UHCDA “en-

78. *Uniform Health-Care Decisions Act Law and Legal Definition*, U.S. LEGAL, <https://definitions.uslegal.com/u/uniform-health-care-decisions-act/> [<https://perma.cc/NM27-8VR2>] (last visited Nov. 22, 2021).

79. *Uniform Laws*, LEGAL INFO. INST., <https://www.law.cornell.edu/uniform> [<https://perma.cc/8WMD-ALZZ>] (last visited Feb. 26, 2022). All states are encouraged to adopt uniform laws. *Id.* However, only seven states have enacted the UHCDA. *Health-Care Decisions Act*, *supra* note 68.

80. Charles P. Sabatino, *The New Uniform Health Care Decisions Act: Paving a Health Care Decisions Superhighway?*, 53 MD. L. REV. 1238, 1239 (1994).

81. UNIF. HEALTH-CARE DECISIONS ACT § 2(b).

82. *Id.*

83. *Uniform Health-Care Decisions Act Law and Legal Definition*, *supra* note 78; See UNIF. HEALTH-CARE DECISIONS ACT § 4.

84. UNIF. HEALTH-CARE DECISIONS ACT § 1(2) cmt.

85. *Id.* § 2(b).

86. *Id.* § 2(e).

87. *Id.* § 2(c)–(d).

88. *Id.* § 2(c).

89. *Id.* §1(3).

able[s] an enacting jurisdiction to replace its existing legislation on the subject with a single statute.”⁹⁰ However, the majority of states have not adopted the UHCDA.⁹¹

E. *The Illinois Power of Attorney Act*

The Illinois Power of Attorney Act was enacted in 1987.⁹² It “provide[s] for the possibility of fully independent, non-court administration of both property and person of those under disability.”⁹³ It allows persons to handle their affairs without intensive involvement of the court.⁹⁴ The idea behind this concept is that persons should not be forced to involve the legal system simply because they are faced with a medically-compromised situation such as illness.⁹⁵ In terms of health care, residents of Illinois are required to comply with Article IV of the Act which outlines the requirements for executing a health care power of attorney.⁹⁶ Article IV is known as the “Powers of Attorney for Health Care Law”⁹⁷ and is based upon the right of an individual to control his own health care and medical decisions.⁹⁸

In Illinois, “any person 18 or older who is a resident of Illinois may create a Power of Attorney for Health Care.”⁹⁹ However, it is recommended that *every* person over eighteen have a power of attorney for health care.¹⁰⁰ Specifically, elder law attorneys advise their clients to have a health care power of attorney in place.¹⁰¹ Without a health care power of attorney, doctors and family members may struggle to make decisions on behalf of the incapacitated person due to disagreement and conflicting opinion. Illinois encourages all persons to execute all types of power of attorney as it “saves [one’s] relatives from the bur-

90. UNIF. HEALTH-CARE DECISIONS ACT, PREFATORY NOTE.

91. See *Health-Care Decisions Act*, *supra* note 68 (only seven states have enacted the UHCDA).

92. Zartman, *supra* note 1, at 5.

93. *Id.* at 6.

94. *Id.*

95. *Id.*

96. See 755 ILL. COMP. STAT. ANN. 45/4 §§.

97. *Id.* § 45/4-2.

98. *Id.* § 45/4-1.

99. *Your Future, Your Health Power of Attorney for Health Care*, STATE OF ILL. DEP’T OF CHILD. & FAM. SERVS. (Dec. 2010), <https://dcfs.illinois.gov/content/dam/soi/en/web/dcfs/documents/about-us/policy-rules-and-forms/documents/cfs-2000/cfs-2032-2-your-future-your-health-power-of-attorney-for-health-care.pdf> [<https://perma.cc/BM88-WK6Q>] (emphasis added).

100. *Advance Care Planning: Making Choices for Your Health Care*, UNIV. CHI. MED., <https://www.uchicagomedicine.org/patients-visitors/patient-information/advance-directives-and-family-decision-planning> [<https://perma.cc/TF3T-3CS2>] (last visited Feb 26, 2022).

101. Jill Roamer, *Caselaw and the Power of Attorney*, ELDER COUNS. BLOG (May 12, 2020), <https://blog.eldercounsel.com/caselaw-and-the-power-of-attorney> [<https://perma.cc/U977-4QQJ>].

den of having to make those decisions without knowing [his] wishes.”¹⁰²

The principal must appoint the agent while the principal is still able to make decisions for himself.¹⁰³ Illinois provides a statutory form that a principal may use to execute power of attorney, but its use is not mandatory.¹⁰⁴ There must be one witness present when the document is executed who, along with the principal, must sign the document,¹⁰⁵ though the document need not be notarized nor filed with the court.¹⁰⁶ Further, a health care physician or any other health care provider cannot act as an agent.¹⁰⁷ The principal may specify when the agent’s powers take effect,¹⁰⁸ though most of the agent’s powers take effect only after the principal has been deemed incapacitated.¹⁰⁹ In Illinois, a person is deemed incapacitated after a licensed physician finds that the principal lacks decision making capacity, the physician produces a written record of this finding within ninety days, and the agent receives the written record.¹¹⁰ Unlike some other states, the Act does not set any express limitations that restrict the agent’s power.¹¹¹ The principal may specify how long the agent’s power shall last,¹¹² which may last even after the principal’s death.¹¹³ The document may be changed at any time or revoked based on the principal’s wishes.¹¹⁴ If the principal decides to revoke the agent’s power after he has become incapacitated, then legal action may be required.¹¹⁵

In 2011, the Act was amended and completely revamped to make “various changes relating [to] the duration of agencies, the agent’s duties, co-agents, [and] successor agents.”¹¹⁶ Specifically, the amendment included a new section titled “Co-agents.”¹¹⁷ The Illinois

102. *Your Future, Your Health Power of Attorney for Health Care*, *supra* note 99.

103. *Setting up a power of attorney for healthcare*, ILL. LEGAL AID ONLINE (Jan. 2, 2023), <https://www.illinoislegalaid.org/legal-information/setting-power-attorney-healthcare> [https://perma.cc/R624-EEV9].

104. *State Health Care Power of Attorney Statutes*, *supra* note 64, at 7.

105. *Id.*; *Your Future, Your Health Power of Attorney for Health Care*, *supra* note 99.

106. *Illinois Statutory Short Form Power of Attorney for Health Care*, *supra* note 3.

107. 755 ILL. COMP. STAT. ANN. 45/4-5.

108. *Id.* § 2-4(a).

109. Rubin, *supra* note 30.

110. 755 ILL. COMP. STAT. ANN. 45/2-3(c-5).

111. *State Health Care Power of Attorney Statutes*, *supra* note 64.

112. *Your Future, Your Health Power of Attorney for Health Care*, *supra* note 99.

113. 755 ILL. COMP. STAT. ANN. 45/4-3.

114. *Your Future, Your Health Power of Attorney for Health Care*, *supra* note 99.

115. *Id.*

116. Ill. H.R. 96th Gen. Assemb., Deb. Transcript at 147 (Mar. 23, 2010) (statement of Rep. Emily McAsey).

117. 755 ILL. COMP. STAT. ANN. 45/2-10.5.

General Assembly decided that “[c]o-agents may not be named in a . . . statutory short form power of attorney for health care.”¹¹⁸ There is no restriction on naming co-agents if the principal uses a non-statutory form.¹¹⁹

The amendment created new a statutory form for power of attorney for health care.¹²⁰ The statutory form is provided directly in the Act and it is also available online.¹²¹ A goal of the amendment is to “make the [statutory] form[] more user friendly.”¹²² The statutory form includes detailed instructions for its completion,¹²³ which makes it readable and easy for the user to understand.¹²⁴ “Powers of attorney forms are often statutorily driven, whereby many states offer guidance on language to incorporate or even provide a sample form.”¹²⁵ The statutory form is not intended to be exclusive and is not mandatory.¹²⁶ However, since the form is created by the State, it is guaranteed to meet statutory requirements.¹²⁷ In addition, the form is free and accessible to all persons.¹²⁸

However, the statutory form is not the only option for a principal who seeks to appoint a health care power of attorney. In fact, the Statutory Short Form Power of Attorney for Health Care states “that [Illinois] law expressly permits the use of any different form of power of attorney [a principal] . . . may desire.”¹²⁹ Thus, a principal may “create a non-statutory power of attorney.”¹³⁰ A non-statutory form is not created by the State—it is a form drafted by the principal, an attorney, or any other person or entity.¹³¹ If a principal uses a non-statutory

118. *Id.* § 45/2-10.5(a).

119. *See id.*

120. Lindsey Paige Markus, *Changes come to powers of attorney*, CHI. DAILY L. BULL. (Oct. 29, 2012), <https://www.chuhak.com/37D475/assets/files/News/Powers%20of%20Attorney%2010%2029%202012.pdf> [<https://perma.cc/A6ST-8VPZ>].

121. 755 ILL. COMP. STAT. ANN. 45/4-10; *Illinois Statutory Short Form Power of Attorney for Health Care*, *supra* note 3.

122. Mary D. Cascino, *Get Ready for the New Illinois Power of Attorney Act*, 98 ILL. BAR J. 568, 568 (2010).

123. *See Illinois Statutory Short Form Power of Attorney for Health Care*, *supra* note 3.

124. Lindsey Paige Markus et al., *New Illinois Power of Attorney forms effective in 2011*, CHUHAK & TESCO (Apr. 22, 2011), <https://www.chuhak.com/?t=40&an=13472&format=xml&p=5118> [<https://perma.cc/6WSH-9YHA>].

125. Markus, *supra* note 120.

126. 755 ILL. COMP. STAT. ANN. 45/4-1.

127. Betsy Simmons Hannibal, *What Is a Statutory Form*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-is-statutory-form.html> [<https://perma.cc/6D6K-54HT>] (last visited Feb. 26, 2022).

128. *Id.*

129. *Your Future, Your Health Power of Attorney for Health Care*, *supra* note 99.

130. Ferraro, *supra* note 2.

131. *See* Simmons Hannibal, *supra* note 127.

tory form, he is permitted to appoint co-agents, so long as the non-statutory form adheres to the requirements set out by the State.¹³² In sum, the Act enumerates all necessary guidelines for a principal seeking to appoint an agent as a power of attorney in Illinois.¹³³

III. ANALYSIS

This part will analyze whether the Act is effective as it does not allow a principal to appoint co-agents when using the statutory form for power of attorney for health care. Specifically, this part will argue that the Act is ineffective, and that the Illinois General Assembly should amend the Act to allow for the appointment of co-agents in the statutory short form provided by the State. This part will discuss why co-agents are necessary, why the Illinois statutory short form for health care power of attorney is inadequate, and why other states allow co-agents. Finally, this part will dismiss any counterarguments.

A. *Necessity of Co-Agents*

In its current construction, the Act does not allow for the appointment of co-agents in the statutory form for power of attorney for health care.¹³⁴ However, co-agents are necessary to monitor each agent to avoid abuse of the principal, to share the burden of power of attorney, and to work together for the principal's best interest.

First, co-agents are necessary because a single agent may take advantage of the principal,¹³⁵ especially if the principal is significantly incapacitated. In the instance where the principal is an elderly person and the agent is his adult child, the agent may use the principal's medical condition as a way to exploit the principal.¹³⁶ If a child knows that his parent has a sizeable estate, as the agent, he may choose for the principal to forgo certain medical treatments to save money, so that the money can be left to him after his parent dies. The agent may deny that his parent needs medical treatment, such as home health care or to live in a nursing home, which can be very expensive.¹³⁷ In the end,

132. *Id.*

133. See generally 755 ILL. COMP. STAT. ANN. 45/4 §§.

134. *Id.* § 45/2-10.5.

135. See Lori A. Stiegel, *Durable Power of Attorney Abuse: It's a Crime Too*, NAT'L CTR. ON ELDER ABUSE at 2, <https://ncea.acl.gov/NCEA/media/docs/Durable-PofA-Abuse-FactSheet-Criminal-Justice-Professionals.pdf> [<https://perma.cc/2QKN-KTQL>] (last visited Jan. 26, 2022).

136. See *Misusing Someone's POA, Is that Fraud or Elder Abuse?*, HG.ORG, <https://www.hg.org/legal-articles/misusing-someone-s-poa-is-that-fraud-or-elder-abuse-43505> [<https://perma.cc/5B85-T2TQ>] (last visited Jan. 23, 2022).

137. For a breakdown of home health care costs in Illinois, see *In-Home Care in Illinois*, CARING.COM, <https://www.caring.com/senior-care/in-home-care/illinois> [<https://perma.cc/4MQL->

the principal is left without necessary medical treatment because the agent is working for the sole interest of saving money. This may seem like an unlikely issue, but this is “far more common than many people may realize.”¹³⁸ Co-agents are necessary to prevent this dilemma. Co-agents monitor each other to ensure that the best and most effective decisions are made. To illustrate this idea, co-agents act similarly to a system of checks and balances much like the United States government.¹³⁹ This system “reduce[s] mistakes and prevent[s] improper behavior.”¹⁴⁰ Co-agents are empowered to prevent harmful acts by the other agent and are “induced to share power.”¹⁴¹ Checks and balances work because it ensures that no person becomes too powerful.¹⁴² The co-agents “check” each other to make sure that they are carrying out the principal’s wishes in good faith and to the best of their ability. Contrast this with a single agent, where no one else has the legal power to “check” the agent to make sure that he is making good faith decisions that the principal would desire.

Next, caring for an incapacitated loved one is time-consuming,¹⁴³ emotionally draining, and incredibly burdensome. An agent will likely need to accompany the principal to doctor appointments, hospital visits, and perform other tasks. Children who are agents for their elderly parents have reported negative effects on their careers and not being able to earn or save enough for themselves due to taking long periods of time off work in order to tend to their parents.¹⁴⁴ Also, caring for a

LQ7B] (last visited Jan. 28, 2022) (\$4,481 monthly). For a breakdown of nursing home costs in Illinois, see *Nursing Homes in Illinois*, CARING.COM, <https://www.caring.com/senior-living/nursing-homes/illinois> [<https://perma.cc/VG2L-4GZ7>] (last visited Jan. 28, 2022) (\$6,235 monthly for a semi-private room).

138. *Sibling Taking Advantage of Elderly Parents: Signs & Solutions*, SUDDENLY SENIOR (Apr. 26, 2021), <https://www.suddenlysenior.com/sibling-taking-advantage-of-elderly-parents/> [<https://perma.cc/6R2D-JQP8>].

139. *Separation of Powers*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/separation_of_powers_0# [<https://perma.cc/WFM4-6JGB>] (last visited Mar. 27, 2022) (“The Checks and Balances system provides each branch of government with individual powers to check the other branches and prevent any one branch from becoming too powerful.”).

140. Brian Beers, *Checks and Balances: Definition, Examples, and How They Work*, INVESTOPEDIA (Sept. 21, 2022), <https://www.investopedia.com/terms/c/checks-and-balances.asp> [<https://perma.cc/H2V6-RMPN>].

141. See *Checks and Balances*, BRITANNICA, <https://www.britannica.com/topic/checks-and-balances> [<https://perma.cc/X6VD-Q388>] (last visited Jan. 23, 2022).

142. See *id.*

143. *3 Challenges Caregivers Face – and How to Conquer them*, OWN YOUR HEALTH, <https://www.ownyourhealthwa.org/caring-for-others/3-challenges-caregivers-face-and-how-to-conquer-them/> [<https://perma.cc/K36T-SEJ9>] (last visited Jan. 23, 2022).

144. Aidan Gardiner, *‘I Put My Own Life on Hold’: The Pain and Joy of Caring for Parents*, N.Y. TIMES (Sept. 5, 2019), <https://www.nytimes.com/2019/09/05/reader-center/taking-care-of-elderly-relatives.html> [<https://perma.cc/9245-DJUE>].

sick loved one can be “exhausting and challenging.”¹⁴⁵ It is especially difficult for an agent to manage the changing circumstances of the principal’s medical condition “as they are still emotionally coming to terms” with the change in their loved one’s health.¹⁴⁶ Children who take care of their parents’ medical condition may report anxiety and stress that is “impossible to describe.”¹⁴⁷ Others report exhaustion and depression.¹⁴⁸ One caregiver reports guilt from moving her parents from their home to a group home.¹⁴⁹ Co-agents will share this emotional, mental, and physical burden such that no one person feels the pressure and guilt involved with making important medical decisions. Sharing the agent responsibility is important because it will lighten the burden felt by each agent.

Finally, in the event that the co-agents have good faith motives in accepting the agent responsibility—not to exploit the principal—then the co-agents will have the same interest in the matter to make medical decisions that are in the best interest of the principal. With that, two or more minds are better than one. Working with a group of people allows for collaboration and brainstorming.¹⁵⁰ These combined prospective will allow the co-agents to find the right solution and solve problems effectively.¹⁵¹

B. *The Illinois Power of Attorney Act is Ineffective*

The Illinois General Assembly should amend the Act since the statutory short form for health care does not permit the appointment of co-agents, thus making the form inadequate. Co-agents should be permitted in the statutory form provided by the State because the statutory form is most familiar to health care professionals, free, and easy to understand and complete. Thus, the statutory form eliminates the need to hire an attorney to execute a power of attorney.

First, a statutory form should be used to appoint an agent as opposed to a non-statutory form. “[T]he statutory form is most familiar

145. *Caring for a Loved One*, PALLIATIVE DRs., <https://palliativedoctors.org/start/caregiver> [<https://perma.cc/N4R5-5EWT>] (last visited Jan. 23, 2022).

146. *Challenges of Caring for Elderly Parents*, EMOHA (Nov. 16, 2020), <https://emoha.com/blogs/lifestyle/challenges-of-caring-for-elderly-parents> [<https://perma.cc/JRW9-WWNQ>].

147. Gardiner, *supra* note 144.

148. *Id.*

149. *Id.*

150. See Becky Simon, *A Winning Combination: Collaborative Teamwork Equals Teamwork and Collaboration*, SMARTSHEET (Jan. 31, 2023), <https://www.smartsheet.com/collaborative-teamwork> [<https://perma.cc/Y73E-8PYC>].

151. *See id.*

to many health care providers.”¹⁵² Since doctors and medical staff see the same form repeatedly, it is easy for them to read and understand. It succinctly sets out the principal’s wishes and there is less chance that a statutory form will be misread, or that the agent’s powers will be confused. Doctors and medical staff need not spend extra time reading through an unknown form with unfamiliar language and provisions that are set forth in a form created by the principal himself or an attorney.

Next, the statutory short form is free.¹⁵³ The form is accessible to all Illinoisans and is available on the Illinois Department of Public Health Website.¹⁵⁴ Since there is no need to hire an attorney to complete the statutory form, it is widely accessible. Even those with access to legal resources do not have to spend time and money to hire an attorney to execute power of attorney since the free statutory form is available. Thus, since the statutory form is free and widely attainable, more people are drawn to using it.

Finally, the form is easy to understand and includes detailed instructions for its completion, making it sure to meet State requirements for health care power of attorney if executed properly.¹⁵⁵ The statutory form is “user friendly.”¹⁵⁶ The State will not deny the statutory form if filled out according to the requirements in the instructions.¹⁵⁷ A person seeking to execute a power of attorney will take no risk by filling out the statutory form.¹⁵⁸ This makes it the safest and likely quickest option.

152. Susan Dawson-Tibbits, *Powers of Attorney: Pitfalls and Best Practices*, JOHNSON BOUNCE & NOBLE P.C., <https://www.isba.org/sites/default/files/cle/Breakout%20Session%207A%20-%20The%20Power%20of%20Attorney%20for%20My%20Aging%20Client.pdf> [https://perma.cc/VFA4-T2EF] (last visited Jan. 27, 2022).

153. Simmons Hannibal, *supra* note 127. There is no filing fee and no need to have the form notarized. *Illinois Statutory Short Form Power of Attorney for Health Care*, *supra* note 3. The State simply instructs a principal to give copies of the completed form to the agent and his physician and to bring it to the hospital. *Id.*

154. *Search Results*, ILL. DEP’T OF PUB. HEALTH, <https://dph.illinois.gov/search.html?content-Type=document&stateLevelCategory=%2Fagency%2Fidph%2Fcontent-category%2Fforms%2C%2Fagency%2Fidph%2Fcontent-category%2Fpublications&q=> [https://perma.cc/LSA6-UBKQ] (last visited Jan. 27, 2022) (search for power of attorney for health care in search bar).

155. Markus et al., *supra* note 124.

156. Cascino, *supra* note 122.

157. Simmons Hannibal, *supra* note 127.

158. See *Illinois Statutory Short Form Power of Attorney for Health Care*, *supra* note 3. The statutory form is incredibly user friendly. There are detailed instructions for a principal to follow. The entirety of the form consists of checking appropriate boxes and listing the names and information for the principal and agent. Thus, there is a minimal chance it will be filled out incorrectly.

These factors combined eliminate the need for a person to hire an attorney to execute a non-statutory power of attorney form. “On average, trust and estate attorneys charge a minimum of \$250 per hour and a maximum of \$310” per hour.¹⁵⁹ However, “more than one out of every [ten] Americans live[] in a . . . low income household.”¹⁶⁰ In 2020, the Illinois median individual income was about \$34,500.¹⁶¹ The 2021 Illinois poverty rate was 12.1%.¹⁶² This equates to 1 in every 8.3 residents living in poverty, or 1,498,523 people.¹⁶³ It follows from these statistics that many Illinois residents likely do not have the resources to hire an attorney. However, the statutory form accomplishes the same thing as the non-statutory form—it effectively appoints a health care power of attorney agent.¹⁶⁴ The statutory form just happens to be accessible to all Illinoisans, not only the select persons who can afford an attorney to create a non-statutory form. The many people without the money, resources, and knowledge required to hire an attorney should not be forced to limit their wants and needs in terms of the details of their power of attorney—such as co-agents—just because they are limited to using the statutory form.

The statutory form for health care power of attorney will likely be the first choice for principals when executing power of attorney due to the combined effect of the statutory form being most familiar to health care providers, free, and easy to understand. As such, the Illinois General Assembly should amend the Act to allow for co-agents in the statutory form to achieve the main purpose of the Act: to recognize “the right of an individual to control all aspects of his . . . personal care and medical treatment.”¹⁶⁵ Persons who desire co-agents should have the right to declare so in the statutory form without needing to use external resources to create a non-statutory form.

159. Martindale-Nolo Research, *Hourly Rates for Trust and Estate Attorneys Across the Country*, LAWYERS.COM (Dec. 18, 2021), <https://www.lawyers.com/legal-info/trusts-estates/cost-of-creating-an-estate-plan-and-administering-an-estate/how-much-does-an-estate-planning-attorney-cost.html> [perma.cc/PGY2-SGXD].

160. ELIZABETH T. POWERS & EMILIE BAGBY, POVERTY AND INEQUALITY IN ILLINOIS 50 (2008), https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s_illfis04c02.pdf [https://perma.cc/2Z8Q-Q99V].

161. *Illinois*, DATA COMMONS PLACE EXPLORER, https://datacommons.org/place/geoId/17?utm_medium=Explore&mprop=income&popt=person&cpv=age%2CYears15Onwards&hl=EN [https://perma.cc/WUQ3-DKCQ] (last visited Jan. 27, 2022).

162. *Poverty in Illinois*, WELFARE INFO, <https://www.welfareinfo.org/poverty-rate/illinois/> [https://perma.cc/EX87-BG2U] (last visited Jan. 27, 2022).

163. *Id.*

164. *See Illinois Statutory Short Form Power of Attorney for Health Care*, *supra* note 3.

165. 755 ILL. COMP. STAT. ANN. 45/4-1.

A principal may oppose using the statutory form since it is mass produced and may not be unique to each person's individual needs.¹⁶⁶ However, the only trustworthy alternative to using a statutory form is to hire an attorney to "craft a document that takes [the] unique situation into account."¹⁶⁷ As explained, many people do not have sufficient resources to hire an attorney,¹⁶⁸ unless they find a pro bono attorney or someone else pays for their attorney, so the statutory form is their only option to execute a power of attorney. In this instance, it seems inequitable that a person who can afford or has access to an attorney to create a non-statutory form has more freedom and options in appointing their agent than a person who does not have an attorney and must use the statutory form.

C. States that Allow Co-Agents

Illinois should follow other states like Maine, Missouri, Pennsylvania, and Washington that allow co-agents for health care power of attorney.¹⁶⁹ These states allow co-agents because co-agents can better meet the individual needs of each principal.¹⁷⁰ There is no one-size-fits all health care power of attorney; each person has different wants and needs that drive the creation of a power of attorney for health care. Due to these individual considerations, co-agents should be, at the very least, an option for all persons, as in Maine, Missouri, Pennsylvania, and Washington. Further, co-agency is permitted in these states because of the level of responsibility involved in power of attorney for health care.¹⁷¹ "[I]t makes sense to share that responsibility with someone else."¹⁷² When persons work together in joint agency, it allows the parties to negotiate health care. After negotiation and in the light of multiple opinions, the most rational decisions will be made for the principal. Further, opting for co-agency is most common when "two or more children are given . . . power of attorney for

166. Simmons Hannibal, *supra* note 127.

167. *Id.*

168. See Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, A.B.A. J. (July 22, 2010), https://www.abajournal.com/news/article/middle-class-dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid [<https://perma.cc/F8Q5-AA6A>] (even the middle class has difficulty accessing and affording legal representation).

169. See *supra* Part II.C.

170. See D.C. Bar Pro Bono Center, *Frequently Asked Questions About General Powers of Attorney*, LAWHELP.ORG (May 11, 2015), <https://www.lawhelp.org/dc/resource/frequently-asked-questions-about-general-powe> [<https://perma.cc/S6LB-2JSL>].

171. *Resolving Conflicts Between Co-Agents on a Power of Attorney*, ELDER L. ANSWERS (Apr. 12, 2011), <https://www.elderlawanswers.com/resolving-conflicts-between-co-agents-on-a-power-of-attorney-9079> [<https://perma.cc/2CRT-HZ6X>].

172. *Id.*

health care.” These states allow the principal to appoint co-agents because it is very likely that the principal will seek to avoid showing favoritism when choosing between multiple children in selecting their agent.¹⁷³ Allowing co-agents can preclude family disagreements because it prevents a parent from having to prioritize one child over another.¹⁷⁴ A parent should not be forced or expected to make a decision that may spark a family disagreement when there are multiple agents willing to take on and share the agent responsibility. With that, the State should not limit the private right of a principal to delegate responsibility in his own family as he sees fit, whether that be to one or multiple agents. Therefore, Illinois should follow the example set by these states and allow the appointment of co-agents in the statutory form for health care power of attorney set forth in the Act.

D. *Dismissing Counterarguments*

One argument against allowing co-agents for health care power of attorney is that co-agents are problematic. Co-agents with joint decision making power must make all decisions together,¹⁷⁵ and sometimes they may disagree. In the event of a disagreement, a doctor may disregard all co-agents’ opinions¹⁷⁶ and make the medical decision on his own. In an emergency, a doctor may make a decision that is against the principal’s wishes. When conflict between co-agents cannot be resolved but the situation is not urgent, the parties may involve the court which can be expensive and time consuming.¹⁷⁷ Ultimately, going to court delays decision making and could harm the principal. The court may “modify the power of attorney, revoke an [] agent’s power of attorney or appoint a new power of attorney to resolve the conflict.”¹⁷⁸

While this argument does have merit, the alternative of selecting a single agent may end up putting the principal in a dangerous situation.

173. *Issues Involved in Giving Joint Powers of Attorney*, FINITY L. FIRM (May 12, 2020), <https://finitylaw.com/blog/issues-involved-50-50-power-of-attorney/> [https://perma.cc/XNS9-34PX].

174. *Id.*

175. *Beware of Naming Co-Agents in your Power of Attorney Documents*, STOFFER LEGAL (Aug. 10, 2020), <https://www.stoufferlegal.com/blog/beware-of-naming-co-agents-in-your-power-of-attorney-documents> [https://perma.cc/UQ8S-99E8].

176. *Medical Power of Attorney Co-Agents a Troubling Idea*, TEX. MED. ASS’N (Apr. 21, 2015), <https://app.texmed.org/tma.archive.search/33506.html> [https://perma.cc/EPZ5-NTN6].

177. *Resolving Conflicts Between Co-Agents on a Power of Attorney*, *supra* note 171; *What Happens If Two People Listed As Power of Attorney Disagree*, O’FLAHERTY L. (Feb. 15, 2021), <https://www.oflaherty-law.com/learn-about-law/what-happens-if-two-people-listed-as-power-of-attorney-disagree> [https://perma.cc/RP5V-ETCH].

178. *What Happens If Two People Listed As Power of Attorney Disagree*, *supra* note 177.

A single agent increases the likelihood of abuse of the principal. Power of attorney abuse is when an agent “takes unfair advantage of their position,” “whether due to negligence or malice,” such that it harms the principal.¹⁷⁹ In *Bedin v. Northwestern Memorial Hospital*, the singular agent abused the principal by disagreeing with hospital staff and keeping the principal in the hospital longer than necessary.¹⁸⁰ Another example of possible abuse is “mak[ing] poor medical decisions on behalf of the [p]rincipal. These decisions may include . . . fail[ing] to place the elderly person in an appropriate care facility.”¹⁸¹ Abuse may be in the form of the agent spending money on unnecessary medical purchases.¹⁸² The risk of these kinds of abuses can be avoided by simply appointing co-agents to make all decisions together. If two or more agents work together, one agent cannot take advantage of the principal without facing legal consequences. In effect, co-agents are often “worth the extra effort to have an extra set of eyes on the use of the power of attorney”¹⁸³ and are an added layer of protection for a principal to help combat power of attorney abuse and misuse.

Another argument against co-agency is that it is easier for one person to make a decision in a time sensitive emergency. “[H]ealth[]care providers should not have to deal with a committee” of people when treating a patient.¹⁸⁴ Co-agents may reach different determinations on an issue and make it difficult for the doctor if he is faced with inconsistent directions.¹⁸⁵ This argument fails because if the co-agents are working together with the best interests of the principal in mind, they are likely to reach similar conclusions. For example, when the principal’s desires are clearly known, like a religious or moral objection to certain treatment, then the agents will likely reach the same conclusion in a short period. If the principal’s desires are unknown, then co-agents can discuss what they believe the principal would have wanted.

179. *Chicago Elder Law Lawyers for Misuse of Power of Attorney*, LAW OFFS. OF ANTHONY R. SCIFO, <https://scifolaw.com/elder-law-litigation/power-of-attorney-misuse/> [perma.cc/9H4F-NDPD] (last visited Jan. 27, 2022). “The agent shall act in good faith for the benefit of the principal using due care, competence, and diligence . . . and shall be liable for negligent exercise.” 755 ILL. COMP. STAT. ANN. 45/2-7(a).

180. See *supra* Part II.A. (discussing *Bedin v. Northwestern Memorial Hospital*).

181. *Chicago Elder Law Lawyers for Misuse of Power of Attorney*, *supra* note 179.

182. *Id.*

183. Christine Fletcher, *9 Things You Need To Know About Power Of Attorney*, FORBES (Sept. 12, 2019), <https://www.forbes.com/sites/christinefletcher/2019/09/12/9-things-you-need-to-know-about-power-of-attorney/?sh=79d11a8a65b9> [https://perma.cc/7MHP-67NU].

184. Daniel M. Moore Jr., *Helping Clients Make the Most of Health-Care and Property POAs*, 91 ILL. BAR J. 35, 36 (2003).

185. Timothy P. O’Sullivan, *Drafting Health Care Advance Directives in a Rapidly Changing Legal and Sociological Environment*, 86 J. KAN. BAR ASS’N 32, 36 (2017).

This helps to alleviate the pressure that one person may feel when making life or death decisions for a loved one.

In sum, the purpose of the Act is better suited by allowing the appointment of co-agents. The Act states that “powers concerning life and death and the other issues involved in health care . . . are more sensitive than property matters . . . [such that] particular rules and forms are necessary.”¹⁸⁶ Thus, it makes sense to allow special accommodations for power of attorney for health care. By allowing a principal to appoint co-agents to work together, the agents will have a better ability to understand the principal’s wishes and act in accordance with those wishes. This will achieve one of the fundamental purposes of the Act, to protect the right of an individual to control his own health care and medical decisions.¹⁸⁷

IV. IMPACT

People are living longer than ever.¹⁸⁸ Many people can expect to live well into their seventies, with the average life expectancy at 76.8 years in Illinois.¹⁸⁹ Life expectancy is increasing because medical care continues to improve, and more people have access to health care than ever before.¹⁹⁰ *Cruzan* is important to note in this context because it “spurred enormous interest in . . . advance directives that allow people to spell out . . . who should make decisions for them if they become incapacitated.”¹⁹¹ For example, after the Supreme Court ruled on *Cruzan*, the Society for the Right to Die received nearly 300,000 requests from persons who sought advance directives, like power of attorney for health care.¹⁹² Even people in a vegetative state, like Nancy Cruzan, have the ability to live longer than ever before due to advanced medical treatment.¹⁹³ It is necessary to appoint agents

186. 755 ILL. COMP. STAT. ANN. 45/4-1.

187. *Id.*

188. *Ageing and health*, WHO (Oct. 1, 2022), <https://www.who.int/news-room/fact-sheets/detail/ageing-and-health> [<https://perma.cc/3B5T-V374>].

189. *Life Expectancy at Birth by State*, CDC (Aug. 24, 2022), https://www.cdc.gov/nchs/press-room/sosmap/life_expectancy/life_expectancy.htm [<https://perma.cc/T63F-GJV7>] (statistic is based on data gathered in 2020).

190. *4 Reasons Life Expectancy Has Increased In The Past 200 Years*, FORBES (Sept. 15, 2022), <https://www.forbes.com/sites/quora/2022/09/15/4-reasons-life-expectancy-has-increased-in-the-past-200-years/?sh=56c50b0a4d57> [<https://perma.cc/EHH9-ELFK>].

191. Tamar Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. TIMES (Dec. 27, 1990), <https://www.nytimes.com/1990/12/27/us/nancy-cruzan-dies-outlived-by-a-debate-over-the-right-to-die.html> [<https://perma.cc/F9AN-WKHS>].

192. *Id.*

193. For a report regarding the details of artificial nutrition similar to that given to Nancy Cruzan, see ST. JOSEPH’S HEALTHCARE, DECIDING ABOUT TUBE FEEDING (2005), <https://>

who understand the principal's values and belief system because it is increasingly likely that the principal could be treated using advanced methods that did not exist when the principal executed his power of attorney or had the capacity to understand his options. If the suggested treatment is new or unfamiliar, multiple agents will work together to make the decision for the principal to undergo treatment based on their collective knowledge of the individual. In terms of the elderly, living longer comes with many questions and concerns as the elderly are less able to care for themselves and handle their affairs.¹⁹⁴ However, all persons should feel confident in and trust that their medical needs will be handled if they become incapacitated. This matters to society as a whole because principals will be better protected in the event that their agent(s) must use the power granted in power of attorney. One of the main purposes for power of attorney in general is to afford the principal with autonomy.¹⁹⁵ However, a principal cannot achieve autonomy if the State limits and restricts his ability to appoint co-agents as his power of attorney. Immunity from authority and personal independence should equate to making whatever decisions the principal feels are best, and that may be appointing co-agents without any input or restriction from the State.

Amending the Act to allow for co-agents will improve the statutory form for health care power of attorney provided by the State. The State should spend time crafting its statutory forms to ensure that the forms encompass all the possible wants and needs of their residents, knowing that these free forms will be widely utilized by persons without access to legal resources.

V. CONCLUSION

In its current construction, the Act is ineffective because it does not allow a principal to appoint co-agents when using the Illinois Statutory Short Form Power of Attorney for Health Care. Co-agency is necessary because it enables agents to monitor each other to avoid abuse of the principal, to share in the burdens involved with power of attorney authority, and to work together in the principal's best interest and carry out the principal's wishes. Further, since the Act permits

[www.stjoes.ca/pdfs/PD3307_Deciding_Tube_Feeding\(Internal\).pdf](http://www.stjoes.ca/pdfs/PD3307_Deciding_Tube_Feeding(Internal).pdf) [<https://perma.cc/Y7JT-QRQN>] (“Tube feeding can keep a person alive for days, months or years.”).

194. *When a Senior Can't Manage Their Personal Affairs, Who Will?*, SENIORS AT HOME, <https://seniorsathome.jfcs.org/when-a-senior-cant-manage-their-personal-affairs-who-will/> [<https://perma.cc/72DC-QLUX>] (last visited Jan. 27, 2022).

195. *Dementia: Ethical Issues*, MED. ENCYCLOPEDIA, <https://medicine.jrank.org/pages/440/Dementia-Ethical-Issues-Autonomy.html> [<https://perma.cc/N69Y-9GSL>] (last visited Jan. 27, 2022).

co-agency when power of attorney is executed through use of a non-statutory form, it should allow co-agency for the many persons who rely on the free statutory form to execute a power of attorney. Finally, Illinois should follow the lead taken by other states that allow co-agents, such as Maine, Missouri, Pennsylvania, and Washington to ensure that power of attorney is individualized to best meet all principal's specific and unique needs. In conclusion, the Illinois General Assembly should amend the Act to allow for the appointment of co-agents in the Illinois Statutory Short Form Power of Attorney for Health Care.

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