

Tug of War

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The status of durable powers of attorney have been in flux over the past several years. The legislature has gone back and forth on whether durable powers of attorney terminate upon the appointment of a guardian or conservator. In 1988, Oklahoma became the 19th state to adopt the Uniform Durable Power of Attorney Act. Since then, 10 more states have joined in adopting the Uniform Act in various forms.

One feature of the durable powers of attorney is that the authority given to the "attorney-in-fact" is intended to remain in place even after the "principal" becomes incapacitated. Of course, when a person becomes incapacitated, it is possible that the courts will appoint a guardian or conservator to handle her affairs.

Section 3 of the Uniform Act provides that an attorney-in-fact appointed under a durable power of attorney must answer to a court-appointed guardian, in the same manner that he would answer to the principal. The guardian is given the authority to terminate the power of attorney if necessary. This language was included in Section 1074 of Oklahoma's version of the Uniform Act.

In 2009, the Oklahoma Supreme Court confirmed that a durable power of attorney survives the appointment of a general guardian, that the attorney-in-fact must answer to the guardian, and that the guardian can terminate the power of attorney. The Supreme Court explained that the Uniform Act and Oklahoma's guardianship statutes were designed to work together.

In 2010, things changed. The legislature approved two separate amendments to Section 1074, both of which were signed into law. One of the amendments provided that a durable power of attorney would terminate upon appointment of a guardian or conservator. The other amendment kept the original statute in place.

These two amendments both remained on the books for two years, resulting in confusion regarding the effect of guardianships on durable powers of attorney. In 2012, the legislature repealed the latter of the two amendments. As a result, since 2012, durable powers of attorney have terminated upon the appointment of a guardian or conservator.

This year, the legislature restored the original structure of this provision. Sen. Patrick Anderson (R-

Enid) and Rep. Wade Rousselot (D-Wagoner) co-authored SB109, which eliminates the termination language and restores the language contained in the Uniform Act. Gov. Fallin signed SB109 on April 2, 2015.

To add further certainty to the process, SB109 requires that, if a durable power of attorney is recorded with a county clerk, and revocation of the instrument must also be recorded.

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