

SENIOR BULLETIN: MEDICAID

Paid caregivers with durable powers of attorney: issues and options

Many people who serve as paid in-home caregivers under the COPES or Medicaid Personal Care (MPC) programs have durable powers of attorney for the individuals they work for. This practice is permitted for caregivers who are individual providers. It is not permitted, according to the Department of Social & Health Services, for caregivers who are employed by home care agencies.² This presents a problem for some individuals who want both care giving and decision making to be done by a particular family member or friend who is employed by a homecare agency.

What can people who are affected do?

There are a number of options available when agency-employed caregivers or those they are caring for are told that the caregiver may not continue to provide COPES or MPC care because of a durable power of attorney.

If the person who gave the durable power of attorney is competent and understands the problem, he or she can solve it by revoking the power of attorney or by altering it so that the power of attorney is not durable. (For an explanation of the difference between an ordinary and a durable power of attorney, see the Columbia Legal Services pamphlet "Questions and Answers on Powers of Attorney.") The statutory prohibition is applied to caregivers with durable powers but not with ordinary powers. Before an individual revokes or changes a power of attorney, it is desirable to have individual legal advice, since there may be other issues to consider aside from those affecting choice of caregiver.

Even if the person who gave the durable power of attorney has lost the capacity to make decisions about legal affairs (for example, as a result of dementia), there are other options available.

The caregiver may terminate his or her relationship with the home care agency and seek to provide services as an individual provider.

Individual providers are not barred from holding durable powers of attorney for individuals they care for. To learn the steps required to become an individual provider, contact should be made with the social services case manager for the person in need of care.

Alternatively, a caregiver or prospective caregiver might file a petition in superior court to be appointed as the individual's guardian. Whether a guardianship filing would be justified, and whether it would be likely to solve the care-giving problem, should be discussed with a lawyer before any decisions are made. RCW 70.127.150 does not bar an individual's guardian from employment by a homecare agency serving the individual.

Where can I get additional legal information or advice?

You will find a great deal of information about powers of attorney and guardianships at www.washingtonlawhelp.org, including "Questions and Answers on Powers of Attorney" and "Questions and Answers on Guardianship." You may also seek legal advice by calling the Northwest Justice Project at 1-888-201-1014.

Endnotes:

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² RCW 70.127.150 reads as follows: "**Durable power of attorney – Prohibition for licensees, contractees, or employees.** No licensee, contractee, or employee may hold a durable power of attorney on behalf of any individual who is receiving care from the licensee." There is some controversy about whether RCW 70.127.150 should apply to family members who hold a DPOA for relatives for whom they work as agency employees, based on language in RCW 70.127.040 (Persons, activities, or entities not subject to regulation under chapter). The Department interprets RCW 70.127.150 as prohibiting home care agencies from employing anyone who has a durable power of attorney for any individual served by the agency, even if the employee is a relative of the individual served. So, unless there is a different interpretation by a court or a change in the law, a person who holds a durable power of attorney will not be able to be employed as a COPES or MPC provider by a homecare agency that provides services to the individual who granted the power of attorney.