



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL



ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 92 (as enacted)
Sponsor: Senator Steven Bieda
Senate Committee: Judiciary
House Committee: Judiciary

PUBLIC ACT 141 of 2012

Date Completed: 6-20-12

RATIONALE

Some people raised concerns about the potential use of durable powers of attorney for purposes of financial exploitation, particularly involving the elderly. When a power of attorney is created, an individual, called the principal, authorizes another person, called the attorney-in-fact or agent, to act on the individual's behalf in one or more matters. A power of attorney is "durable" if it either remains in effect, or takes effect, when the principal becomes incompetent to manage his or her affairs; this may occur due to illness, injury, or dementia, for example. Although durable powers of attorney are designed to benefit the individuals who create them, there are concerns that some attorneys-in-fact might abuse their authority, especially if the authority delegated is broad and includes financial decision-making.

The Estates and Protected Individuals Code (EPIC) prescribes requirements for creating a durable power of attorney and addresses related matters, but it did not spell out the responsibilities of an attorney-in-fact, indicate prohibited conduct, or expressly obligate the attorney-in-fact to act in the best interests of the principal. It was suggested that these issues should be addressed in statute, in order to prevent financial exploitation and other abuse of power.

CONTENT

The bill amended the Estates and Protected Individuals Code to do the following:

-- **Specify required and prohibited conduct of an attorney-in-fact**

designated and acting under a durable power of attorney.

- **Require an attorney-in-fact to execute an acknowledgment of responsibilities before exercising authority under a durable power of attorney.**
- **Require a durable power of attorney to be signed by the principal or a notary public acting on his or her behalf, and to be witnessed or notarized.**

The bill took effect on May 22, 2012, and the amendments apply to a durable power of attorney executed on or after October 1, 2012.

Responsibilities, Limitations, & Rights

The bill specifies that an attorney-in-fact designated and acting under a durable power of attorney has the authority, rights, responsibilities, and limitations as provided by law with respect to a durable power of attorney, including those described below.

The attorney-in-fact is required to do the following:

- Act in accordance with the standards of care applicable to fiduciaries exercising powers under a durable power of attorney, except as provided in the durable power of attorney.
- Take reasonable steps to follow the instructions of the principal.
- Keep the principal informed of the attorney-in-fact's actions, upon request of the principal.
- Provide an accounting to the principal upon his or her request; to a

conservator or guardian appointed on behalf of the principal, upon request of the conservator or guardian; or pursuant to judicial order.

- Maintain records of the attorney-in-fact's actions on behalf of the principal, including transactions, receipts, disbursements, and investments.

Unless provided for in the durable power of attorney or by judicial order, the attorney-in-fact is prohibited from making a gift of all or any part of the principal's assets.

In addition, unless provided for in the durable power of attorney or by judicial order, the attorney-in-fact, while acting in that capacity, is prohibited from creating an account or other asset in joint tenancy between the principal and the attorney-in-fact.

The attorney-in-fact may be liable for any damage or loss to the principal, and may be subject to any other available remedy, for breach of fiduciary duty owed to the principal. In the durable power of attorney, the principal may exonerate the attorney-in-fact of any liability to the principal for breach of fiduciary duty except for actions the attorney-in-fact committed in bad faith or with reckless indifference. An exoneration clause will not be enforceable if it is inserted as the result of an abuse by the attorney-in-fact of a fiduciary or confidential relationship with the principal.

The attorney-in-fact may receive reasonable compensation for his or her services if provided for in the durable power of attorney.

Acknowledgment of Responsibilities

The bill requires an attorney-in-fact, before exercising authority under a durable power of attorney, to execute an acknowledgment of his or her responsibilities. The acknowledgment must contain all of the substantive statements listed in the bill, in substantially the form described in the bill. In addition to statements that reflect the responsibilities and limitations listed above, the form includes a statement that the attorney-in-fact may be subject to civil or criminal penalties for violating his or her duties to the principal. An acknowledgment must be signed and dated.

The failure of an attorney-in-fact to comply with the requirement to execute an acknowledgment of responsibilities will not affect his or her authority to act for the principal as provided for in the durable power of attorney, or the attorney-in-fact's responsibilities or potential liability to the principal.

Third Party Liability

The bill specifies that a third party is not liable to the principal or any other person because the third party has complied in good faith with instructions from an attorney-in-fact named in a durable power of attorney, whether or not the attorney-in-fact has executed an acknowledgment that complies with the bill. A third party also is not liable to the principal or any other person if the third party requires an attorney-in-fact named in a durable power of attorney to execute an acknowledgment that complies with the bill before the third party recognizes the durable power of attorney.

Signature Requirements

The bill requires a durable power of attorney to be dated and signed voluntarily by the principal or by a notary public on the principal's behalf. The durable power of attorney also must be one or both of the following:

- Signed in the presence of two witnesses, neither of whom is the attorney-in-fact, who also sign the durable power of attorney.
- Acknowledged by the principal before a notary public, who endorses on the durable power of attorney a certificate of that acknowledgment and the true date of taking it.

Exceptions

None of the provisions described above applies to any of the following:

- A durable power of attorney executed before October 1, 2012.
- A patient advocate designation or a similar power of attorney relating to the principal's health care.
- A durable power of attorney that is coupled with an interest in the subject matter of the power.

- A durable power of attorney that is contained in or is part of a loan agreement, security agreement, pledge agreement, escrow agreement, or other similar transaction.
- A power of attorney given primarily for a business or a commercial purpose.
- A power of attorney created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

The bill's provisions also do not apply to a delegation under Section 5103 of EPIC, or a similar power of attorney created by a parent or guardian regarding the care, custody, or property of a minor child or ward. (Section 5103 allows a parent or guardian of a minor child or a guardian of a legally incapacitated individual to delegate to another person, for up to six months, any of the parent's or guardian's powers regarding care, custody, or property of the child or ward, except the power to consent to marriage or adoption of a minor ward.)

In addition, the bill's provisions do not apply to a durable power of attorney in connection with a joint venture agreement, limited liability company, partnership, limited partnership, limited liability partnership, corporation, condominium, condominium association, condominium trust, or similar entity, including a voting agreement, voting trust, joint venture agreement, royalty agreement, license agreement, proxy, shareholder's agreement, operating agreement, partnership agreement, management agreement, subscription agreement, certificate of incorporation, bylaws, or other agreement that primarily relates to such an entity.

MCL 700.5501

BACKGROUND

Under common law, a power of attorney was no longer effective after the principal became incompetent. In order to give individuals an inexpensive, nonjudicial method of delegating property management decisions in the event of their later incapacity, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Durable Power of Attorney Act. By the late 1980s, most states had enacted this law. Michigan's

version of the Uniform Durable Power of Attorney Act currently is found in Article V, Part 5 of the Estates and Protected Individuals Code.

As a private alternative to a guardianship or conservatorship, a durable power of attorney avoids involving the probate court and the need to demonstrate incompetence. A durable power of attorney also represents an alternative to a revocable inter vivos trust, which is commonly used when substantial assets are involved. The authority given to an attorney-in-fact can be either narrow (such as the authority to sell a particular piece of property) or very broad, granting the agent the power to do virtually anything the principal could do.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

When a person becomes unable to manage his or her affairs, he or she may need the protection offered by a durable power of attorney. At the same time, however, the individual can be vulnerable to exploitation by an unethical attorney-in-fact. According to an August 2006 report of the Governor's Task Force on Elder Abuse (described below), "Powers of Attorney are one of the most popular instruments used to abuse elders." If the authority delegated is broad, or "general", the potential for abuse can be considerable. As the Michigan Court of Appeals stated, "We are hardpressed to conceive of a more effective and efficient means by which to devastate and destroy the estate of a vulnerable person than through a durable general power of attorney" (*Persinger v Holst*, 248 Mich App 499, 2001).

It is commonly understood that an attorney-in-fact is a fiduciary, or a person in a special relationship of trust or responsibility to the principal, and Michigan courts recognize the fiduciary relationship between an attorney-in-fact and a principal (*In Re Susser Estate*, 254 Mich App 323, 2002). Until now, however, the Estates and Protected Individuals Code did not explicitly extend fiduciary responsibilities to attorneys-in-fact, or otherwise spell out the obligations or standards of conduct of an attorney-in-fact

under a durable power of attorney. Even in situations in which there is no wrongdoing, an agent might mismanage the principal's affairs because he or she does not know what is expected or what actions are unacceptable.

The bill closes this gap in the law by expressly requiring an attorney-in-fact to act according to the standards of care that apply to fiduciaries, setting forth specific responsibilities of an attorney-in-fact, and proscribing certain conduct, including giving away the principal's assets. The bill also requires an attorney-in-fact to sign a document acknowledging these responsibilities and limitations, as well as his or her potential liability for breaching the fiduciary duty to the principal. This will help ensure that the attorney-in-fact is aware of his or her responsibilities and limitations, and help create a paper trail in the event of abuse. In addition, the bill provides that a third party will not be liable for requiring an attorney-in-fact to execute an acceptance, before the third party recognizes the durable power of attorney. This means that a bank teller, for example, could require an attorney-in-fact to sign an acceptance before transferring funds from the principal's account.

Also, by requiring an acknowledgment of responsibilities to contain the attorney-in-fact's signature and be witnessed by two people or notarized, the bill makes this document consistent with other legal instruments, and provides additional protection for the parties and the people recognizing the power of attorney.

Supporting Argument

Executive Order 2005-11 created the Governor's Task Force on Elder Abuse as an advisory body in the Office of Services to the Aging. Among other things, the Task Force was charged with reviewing State efforts regarding the prevention of elder abuse, including financial abuse and exploitation, as well as reviewing laws, policies, and practices of other states and recommending changes in Michigan. As noted above, the Task Force found that powers of attorney are one of the most popular instruments used to abuse the elderly. The Task Force report also stated, "Individuals who obtain Powers of Attorney over another's affairs are not required to obtain any legal advice before or after doing so. The Power of

Attorney document (POA) may or may not inform agents of their duties in language they understand...Vulnerable adults often sign multiple Powers of Attorney and create complex situations of uncertainty and insecurity for financial institutions."

The Task Force recommended: "The Governor and legislature should adopt legislation to require agents of Powers of Attorney to sign an acknowledgment of duties informing them of their responsibilities, using a standardized acknowledgment form." The bill accomplishes this with respect to durable powers of attorney.

Opposing Argument

It is questionable whether the bill will provide meaningful protection. A well drafted durable power of attorney will clearly define the power that is granted to the attorney-in-fact and the limits of that authority, and it already is common practice for estate planners to require attorneys-in-fact to sign an acknowledgment or acceptance. In addition, the Michigan Court of Appeals has recognized the fiduciary obligation of an attorney-in-fact "without need for the document itself to include language expressly imposing a fiduciary duty" (*In Re Susser Estate*). Although financial exploitation is a real problem, unscrupulous individuals have many ways of stealing from elderly and vulnerable people without using a durable power of attorney.

Response: Evidently, not all durable power of attorney documents are well drafted, and case law shows that some agents do abuse their authority under a durable power of attorney.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: Dan O'Connor

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.