

DURABLE POWER OF ATTORNEY: REQUIRE WRITTEN ACKNOWLEDGEMENT OF RESPONSIBILITIES

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House Bill 5188 with committee amendment

Sponsor: Rep. Tory Rocca

Committee: Judiciary

First Analysis (8-5-10)

BRIEF SUMMARY: The bill would require that when one person designates another as his or her "agent" or "attorney in fact" under a durable power of attorney, the designated "attorney in fact," before exercising authority, sign an acceptance of the designation to acknowledge and accept certain obligations, liabilities, and rights as specified in the bill.

FISCAL IMPACT: House Bill 5188 would have no fiscal impact on state or local government, including the judicial branch.

THE APPARENT PROBLEM:

One of five Americans over the age of 65 has already been victimized by a financial swindle; that's according to a recently released survey by the Investor Protection Trust, a nonprofit education organization, as discussed in an article in *The Washington Post* entitled "Look for Signs of Fraud against the Elderly," (6-20-10). The *Post* article goes on to say that the number of victimizations are particularly troubling considering a 2008 study by a national team of university researchers that found that more than one-third of people over 70 years of age have some form of memory impairment (e.g., dementia). Cognitive impairments make persons of any age more vulnerable to fraud.

One legal instrument that is easily abused is a durable power of attorney. Similar to a power of attorney, a DPOA allows a person (called the principal) to grant authority to another person (the agent or attorney in fact) to conduct various financial and business transactions on behalf of the principal such as writing and cashing checks, buying goods and services, and even changing a will or the beneficiaries to a life insurance policy. Unlike a power of attorney, which expires if the principal becomes legally incapacitated (e.g., in a coma, unconscious, advanced Alzheimer's Disease, etc.), a DPOA remains in effect until the principal dies.

Seniors in particular are often encouraged to designate one or more persons as agents under a DPOA in case they need assistance paying bills or authorizing medical care such as nursing home admittance. However, according to the Final Report by the Governor's Task Force on Elder Abuse, dated 8-23-06, a person acting as agent under a DPOA is not required to obtain any legal advice from an attorney either before taking on those powers or after doing so. Power of attorney documents do not always inform agents of their duties or responsibilities. As a result, many well-intentioned friends or relatives make mistakes administering the affairs of their loved ones because they are unaware they have the authority to hire attorneys, accountants, or other professionals to help and advise

them. Even worse is the number of people who target seniors with the intention of obtaining a DPOA with the sole purpose of stealing their assets.

To address this issue, the Task Force recommended the adoption of legislation to require agents of powers of attorney to sign a standardized acknowledgement of duties informing them of their responsibilities.

THE CONTENT OF THE BILL:

A power of attorney allows a person, known as the "principal", to name another person or a bank as his or her agent or attorney in fact. The attorney in fact can then conduct business transactions and make other decisions on behalf of the principal; for instance, pay bills, write checks, sell property, contract for medical or professional services, and make decisions or transactions regarding retirement and pension benefits. A power of attorney expires when a person dies or becomes disabled or incapacitated by illness, injury, accident, or old age. In contrast, a durable power of attorney is not affected by the principal's subsequent disability, and remains in effect until such time as the principal dies.

House Bill 5188 would amend Section 5501 of the Estates and Protected Individuals Code (EPIC), MCL 700.5501. Section 5501 defines a "durable power of attorney" as a power of attorney by which a principal designates another as his or attorney in fact in a writing that contains the words "This power of attorney is not affected by the principal's subsequent disability or incapacity, or by the lapse of time", or "This power of attorney is effective upon the disability or incapacity of the principal", or similar words that show the principal intended the authority being conferred to be exercisable even if he or she became disabled or incapacitated and despite the amount of time that had lapsed since its execution, unless the document had a termination time.

The bill would retain these provisions and add that before exercising authority as attorney in fact under a durable power of attorney, a person would have to sign an acceptance of the designation, acknowledging and accepting all of the following obligations, liabilities, and rights:

- To act in the best interest of the principal.
- To keep the principal informed of his or her actions and give an account to the principal.
- To not make gifts of the principal's property unless specifically authorized by the power of attorney.
- To be prosecuted and punished for any criminal acts.
- To keep the principal's money in a separate account from the attorney in fact.
- To only use the principal's property and income for the benefit of the principal, unless otherwise specifically authorized in the power of attorney.
- Upon request, to provide an accounting to the principal, a fiduciary appointed on behalf of the principal, or to a court.

- To maintain sufficient records of every transaction and be prepared to defend each action.
- To be held financially responsible for any transaction not specifically authorized in the power of attorney.
- To hire an advisor, attorney, accountant, or other professional as reasonably required to comply with the duties of attorney in fact and to pay for those services from the principal's estate.
- Unless prohibited by the power of attorney, to receive reasonable compensation for the attorney in fact's services; the compensation may be subject to scrutiny by the court.

BACKGROUND INFORMATION:

The following information is provided on the MI Seniors Michigan Office of Services to the Aging website – www.michigan.gov/miseniors: if you believe an older adult to be the victim of abuse, neglect or exploitation, you can report your suspicions or concerns to the Vulnerable Adult Help Line 24 hours a day, 7 days a week at 1-800-996-6228.

Statewide Phone Numbers and Other Information

Vulnerable Adult Helpline, 1-800-996-6228 for statewide, toll-free, 24 hours/7 days, adult abuse information and adult protective services.

Long Term Care Ombudsman, 1-866-485-9393: the Ombudsman helps long-term care residents and concerned relatives with complaints and long-term care issues.

Elder Law of Michigan, Inc., 517-372-0792 for professional staff who provide legal assistance, pension counseling, and other assistance to Michigan seniors.

Legal Hotline for Michigan Seniors, 1-800-347-5297 for free legal advice and information and/or referral to a local attorney for Michigan seniors aged 60 and older.

Michigan Protection and Advocacy, 1-800-288-5923: the agency provides assistance to individuals with disabilities.

ARGUMENTS:

For:

The very nature of a power of attorney, and in particular, a durable power of attorney (DPOA), lends itself to being of great assistance to a senior, child, or person with disabilities who can no longer manage his or her affairs alone. Unfortunately, it also is one of the most popular instruments used to abuse the elderly, according to the Governor's Task Force on Elder Abuse. The bill may reduce the number of incidents of abuse involving a DPOA in several ways. First, a DPOA must be signed by the principal while he or she is still legally competent. Reading over the duties and responsibilities of the agent may inform the person/principal as to the potential for abuse and thus may

encourage him or her to give serious consideration as to whom he or she will entrust to act as the agent. Secondly, clearly stating the duties and responsibilities under a DPOA will help educate and prepare a person selected to act as an agent to execute their duties in a competent manner and thus may decrease the likelihood that mismanagement of the principal's assets will occur. Requiring a person chosen to act as agent to acknowledge in writing that he or she may have to give an account to others as to how assets are being spent or invested, and that he or she will be prosecuted for actions constituting a criminal offense, may act as a deterrent for some who considered using a DPOA to steal money or property. At the very least, in conjunction with other legislation under consideration to adopt other recommendations of the Governor's Task Force on Elder Abuse, the bill will have a positive impact on protecting the assets of seniors and other vulnerable persons.

Response:

The bill is a good first step, but does not apply to all powers of attorney, only durable powers of attorney. Some of the same abuses or mismanagement occur under POAs as well as DPOAs. Further, the bill fails to address several questions regarding how the signed acknowledgement form would be used. In particular, the bill is silent as to how banks, insurance companies, and other businesses would know that an agent had properly executed an acknowledgement form. Would the signed form, or a copy of it, be stapled to the durable power of attorney? If not, would/could a bank or business refuse to accept a transaction without proof of the signed acknowledgement form? Would an agent need to present the acknowledgement form each time he or made a transaction on behalf of the principal? Would the original form be kept by the principal, the agent, or the attorney who prepared the DPOA?

The bill also is silent as to whether a DPOA would be enforceable if the agent refused to sign the acknowledgement form and if the agent would be bound by the standards in the form if he or she did not sign it. It is also not clear if a bank or business would be liable if it did not require proof of a signed acknowledgement form and the agent perpetrated fraud against the principal. Lastly, would the requirement to sign the acknowledgement form only pertain to a DPOA prepared after the bill's effective date, or would the bill's provisions apply to all existing durable powers of attorney? If so, how would principals and their agents find out about the acknowledgement form, especially since some of the DPOAs may have been prepared years or even decades ago?

POSITIONS:

The Prosecuting Attorneys Association indicated support for the bill. (7-21-10)

The Michigan Bankers Association indicated support for the bill with amendments. (7-21-10)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.