

DURABLE POWER OF ATTORNEY RESPONSIBILITIES

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Senate Bill 92

Sponsor: Sen. Steven Bieda

House Committee: Judiciary

Senate Committee: Judiciary

Complete to 1-25-12

A SUMMARY OF SENATE BILL 92 AS PASSED BY THE SENATE 5-3-11

The bill would specify the rights and responsibilities of a person designated and acting under a durable power of attorney (DPOA); require the designated "attorney in fact" to first sign an acceptance of the designation to acknowledge and accept certain obligations, liabilities, and rights; provide for exemptions; and apply the bill's provisions to a DPOA executed on or after April 1, 2012.

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.

Senate Bill 92 would amend Section 5501 of the Estates and Protected Individuals Code (EPIC). 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 this definition but add specific rights and responsibilities of attorney-in-fact, require execution of an acceptance of attorney-in-fact obligations, create exemptions from the bill's requirements, and apply the bill's requirements only to DPOAs executed on or after April 1, 2012.

Authority, rights, responsibilities, and limitations.

An attorney-in-fact designated and acting under a DPOA would be required to do at least all of the following:

- Act in accordance with standards of care for fiduciaries exercising powers under a DPOA.
- Take reasonable steps to follow the principal's instructions.
- Keep the principal informed of his or her actions. Upon request, provide an accounting to the principal, a conservator or court-appointed guardian, or others as required by the DPOA, the act, or judicial order.
- Not make a gift of the principal's asset unless provided for in the DPOA.
- Unless provided for in the DPOA, not create an "in trust for" (known as payable-on-death) account, or make, change, or delete a transfer-on-death or payable-on-death designation concerning the principal's assets if such action would alter the payable-on-death designation.
- Not commingle the principal's assets with his or her own unless provided for in the DPOA or he or she is the principal's spouse or ancestor or descendant by blood or adoption.
- Maintain records of his or her actions on behalf of the principal, including transactions, receipts, disbursements, and investments.
- Be liable for any loss to the principal for actions taken by him or her on behalf of the principal not provided for in the DPOA.
- Receive reasonable compensation for his or her services if provided for in the DPOA.

Acceptance of Obligations.

Before exercising authority under a DPOA, an attorney-in-fact would have to execute a signed and dated acceptance of obligations that contains the substantive statements detailed above in a form as specified in the bill. The form would also have to include a statement that the attorney-in-fact may be subject to civil or criminal penalties if he or she violated his or her duties to the principal.

An attorney-in-fact's failure to comply with the requirement to execute a signed acceptance of obligations form would not affect his or her responsibilities and potential liability to the principal.

Further, a third-party who complied with instructions from an attorney-in-fact named in a DPOA who had not executed the acceptance of obligations form would not be liable to the principal. A third party would also not be liable to the principal or any other person if the third party required the attorney-in-fact to execute an acceptance that complies with the bill's requirements before recognizing the DPOA.

Exemptions.

The bill's provisions would not apply to the following:

- A DPOA executed before April 1, 2012.
- A delegation under Sec. 5103 or similar power of attorney (POA) regarding the car, custody, or property of a minor child or ward. (Sec. 5103 allows a parent or guardian to delegate the care of a minor or legally incapacitated person to another for up to six months or during the time of a military deployment through a POA.)

- A patient advocate designation or a similar POA relating to the principal's health care.
- A DPOA coupled with an interest in the subject matter of the power.
- A DPOA contained in or that is a part of a type of agreement listed in the bill, such as a loan agreement, security agreement, escrow agreement, or partnership agreement.

MCL 700.5501

FISCAL IMPACT:

This bill would have no direct fiscal impact on state or local government.

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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.