

## DURABLE POWER OF ATTORNEY RESPONSIBILITIES

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**Senate Bill 92 (Substitute H-1)**

**Sponsor: Sen. Steven Bieda**

**House Committee: Judiciary**

**Senate Committee: Judiciary**

### First Analysis (3-6-12)

**BRIEF SUMMARY:** The bill would specify the rights and responsibilities of a person designated and acting under a durable power of attorney (DPOA); require the DPOA to be signed by two witnesses; require the designated "attorney in fact" to first sign an acknowledgement of the designation to acknowledge certain responsibilities, liabilities, and rights; provide for exemptions; and exempt the bill's provisions from a DPOA executed before October 1, 2012.

**FISCAL IMPACT:** This bill would have no direct fiscal impact on state or local government.

### THE APPARENT PROBLEM:

One of five Americans over the age of 65 has already been victimized by a financial swindle, according to a survey released 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 went 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 (attorney-in-fact) under a DPOA in case they need assistance paying bills or authorizing medical care such as nursing home admittance. Under Michigan law, a person acting as an attorney-in-fact under a DPOA is not required to obtain any legal advice from an attorney either before taking on those powers or after doing so. This is unfortunate as power of attorney documents do not always inform attorneys-in-fact 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, legislation has been offered to outline duties of an attorney-in-fact, require them to sign a standardized acknowledgement informing them of their responsibilities, and to .  
provide exemptions for certain durable powers of attorneys.

### ***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.

**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 would place into statute specific rights and responsibilities of an attorney-in-fact, require the DPOA to be signed by two witnesses, require execution of an acknowledgement of attorney-in-fact responsibilities, create exemptions from the bill's requirements, and exempt from the bill's requirements DPOAs executed before October 1, 2012.

#### Requirements for a DPOA.

A durable power of attorney would have to be signed by the principal, dated, and executed voluntarily in the presence of and signed by two witnesses who are not the attorney-in-fact.

#### Authority, rights, responsibilities, and limitations of an attorney-in-fact.

An attorney-in-fact designated and acting under a DPOA would have the authority, rights, responsibilities, and limitations with respect to a DPOA including at least all of the following:

- Except as provided in the DPOA, act in accordance with standards of care for fiduciaries exercising powers under a DPOA.
- Take reasonable steps to follow the principal's instructions.
- Upon request of the principal, keep the principal informed of his or her actions.
- Upon request by the principal, provide an accounting to the principal; upon request by a conservator or court-appointed guardian, provide an account to the conservator or guardian; or under judicial order.
- Not make a gift of all or part of the principal's assets unless provided for in the DPOA.
- Unless provided for in the DPOA or by court order, not create an account or other asset in joint tenancy between the principal and the attorney-in-fact.
- Maintain records of his or her actions on behalf of the principal, including transactions, receipts, disbursements, and investments.
- Except as otherwise provided in the durable power of attorney, be potentially liable for any damage or loss, and subject to any other available remedy, for breach of fiduciary duty owed by an attorney-in-fact to a principal for actions 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 acknowledgement of responsibilities 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 for violating his or her duties to the principal.

An attorney-in-fact's failure to comply with the requirement to execute a signed acknowledgement of responsibilities form would not affect his or her authority to act for principal under the DPOA or potential liability to the principal.

Further, a third-party who complied with instructions from an attorney-in-fact named in a DPOA would not be liable to the principal or any other person whether or not the attorney-in-fact has executed an acknowledgement of responsibilities.

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 acknowledgement 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 October 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, or other similar transaction.
- A DPOA in connection with a transaction with a type of arrangement listed in the bill such as a joint venture, limited liability company, condominium association, or similar entity and including, without limitation, a voting agreement, voting trust, proxy, shareholder's agreement, certification of incorporation, bylaws, or other agreement that primarily relates to such an entity.
- A DPOA given primarily for a business or a commercial purpose.
- A DPOA created on a form prescribed by a government or a governmental subdivision, agency, or instrumentality for a governmental purpose.

MCL 700.5501

***HOUSE COMMITTEE ACTION:***

The committee substitute added the requirement that a DPOA be voluntary and signed by two witnesses; applied the bill's provisions to a DPOA executed on or after October 1, 2012; revised several elements of the responsibilities of an attorney-in-fact and the corresponding acknowledgement of responsibilities; and added several new exemptions.

***BACKGROUND INFORMATION:***

Senate Bill 92 is similar to House Bill 5188 of the 2009-2010 legislation session, which also would have required an attorney-in-fact to sign an acceptance of the designation of a DPOA. That bill was reported from the Judiciary Committee, but was subsequently sent back to the committee.

Statewide Phone Numbers and Other Information

The following information is provided on the MI Seniors Michigan Office of Services to the Aging website – [www.michigan.gov/miseniors](http://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.

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.

In addition, [www.investorprotection.org](http://www.investorprotection.org) has useful tips that can alert seniors, caregivers, and others to possible financial frauds as well as helpful information on investing.

### ***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 take control away from the elderly and steal their assets.

Currently, a DPOA must be signed by the principal while he or she is still legally competent. But, many individuals may be unclear as to the financial power they are giving to the person named in the DPOA. By listing the duties and responsibilities of a DPOA, the bill may inform the principal as to the potential for abuse and thus may encourage him or her to give serious consideration as to party entrusted to act as the attorney-in-fact. Secondly, the acknowledgement form that an attorney-in-fact is required to sign would both educate and prepare an attorney-in-fact as to the duties under the DPOA. The form could also be used for future reference, thus increasing the likelihood that the duties would be executed in a competent manner and decreasing the risk for mismanagement of the principal's affairs.

The bill would also require greater accountability on the part of the attorney-in-fact as to how assets are being spent or invested. Plus, by warning an attorney-in-fact that he or she would be prosecuted for actions constituting a criminal offense, or that he or she could be liable in a civil action, the bill would act as a deterrent for those who would consider using a DPOA to steal money or property from a vulnerable person.

#### ***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.

#### ***For:***

The H-1 substitute clarifies that whether or not an acknowledgement form is completed, a bank or other business complying with instructions from an attorney-in-fact under a DPOA would not be liable to the principal. A business that required the attorney-in-fact to execute an acknowledgment prior to recognizing the DPOA also would not be liable to the principal. Failure to execute an acknowledgment would not affect an attorney-in-fact's authority to act for the principal under the DPOA. Thus, signing or not signing the form would not interfere with the conduct of business as authorized by a DPOA.

However, an attorney-in-fact could not avoid criminal or civil liability by not signing the acknowledgment form. Whether the acknowledgment is executed or not, the bill clearly

delineates the conduct required of an attorney-in-fact and specifies that the potential liability to the principal remains the same.

***Response:***

The bill may need further tweaking to conform the provisions to other statutes such as the Michigan Trust Code or current business practices. Plus, a violation appears to trigger potential criminal and/or civil liability even if it were a result of a good faith effort to do right by the principal and regardless of whether the principal wished to hold the attorney-in-fact liable.

In addition, the bill fails to address several questions regarding how the signed acknowledgement form would be used. In particular, would the original form be kept by the principal, the attorney-in-fact, or the attorney who prepared the DPOA? Would the signed form, or a copy of it, be stapled to the durable power of attorney?

***POSITIONS:***

A representative of the Michigan Bankers Association testified in support of the bill. (2-16-12)

A representative of the Probate Council, Probate and Estate Planning Section/State Bar of Michigan, testified in support of the bill. (2-16-12)

The Michigan Probate Judges Association indicated support for the bill. (2-16-12)

The Michigan Long Term Care Ombudsman Program indicated support for the bill. (2-16-12)

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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.