

HOUSE BILL NO. 5769

May 13, 2020, Introduced by Rep. Wozniak and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending sections 1104 and 5501 (MCL 700.1104 and 700.5501), section 1104 as amended by 2016 PA 57 and section 5501 as amended by 2012 PA 141.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

- 1 Sec. 1104. As used in this act:
- 2 (a) "Environmental law" means a federal, state, or local law,
- 3 rule, regulation, or ordinance that relates to the protection of
- 4 the environment or human health.



1 (b) "Estate" includes the property of the decedent, trust, or
2 other person whose affairs are subject to this act as the property
3 is originally constituted and as it exists throughout
4 administration. Estate also includes the rights described in
5 sections 3805, 3922, and 7606 to collect from others amounts
6 necessary to pay claims, allowances, and taxes.

7 (c) "Exempt property" means property of a decedent's estate
8 that is described in section 2404.

9 (d) "Family allowance" means the allowance prescribed in
10 section 2403.

11 (e) "Fiduciary" includes, but is not limited to, a personal
12 representative, funeral representative, guardian, conservator,
13 trustee, plenary guardian, partial guardian, **attorney-in-fact under**
14 **a durable power of attorney**, and successor fiduciary.

15 (f) "Financial institution" means an organization authorized
16 to do business under state or federal laws relating to a financial
17 institution and includes, but is not limited to, a bank, trust
18 company, savings bank, building and loan association, savings and
19 loan company or association, credit union, insurance company, and
20 entity that offers mutual fund, securities brokerage, money market,
21 or retail investment accounts.

22 (g) "Foreign personal representative" means a personal
23 representative appointed by another jurisdiction.

24 (h) "Formal proceedings" means proceedings conducted before a
25 judge with notice to interested persons.

26 (i) "Funeral establishment" means that term as defined in
27 section 1801 of the occupational code, 1980 PA 299, MCL 339.1801,
28 and the owners, employees, and agents of the funeral establishment.

29 (j) "Funeral representative" means an individual designated to



1 have the right and power to make decisions about funeral
2 arrangements and the handling, disposition, or disinterment of a
3 decedent's body, including, but not limited to, decisions about
4 cremation, and the right to possess cremated remains of the
5 decedent as provided in section 3206.

6 (k) "Funeral representative designation" means a written
7 document executed and with the effect as described in sections 3206
8 to 3206b.

9 (l) "General personal representative" means a personal
10 representative other than a special personal representative.

11 (m) "Governing instrument" means a deed; will; trust; funeral
12 representative designation; insurance or annuity policy; account
13 with POD designation; security registered in beneficiary form
14 (TOD); pension, profit-sharing, retirement, or similar benefit
15 plan; instrument creating or exercising a power of appointment or a
16 power of attorney; or dispositive, appointive, or nominative
17 instrument of any similar type.

18 (n) "Guardian" means a person who has qualified as a guardian
19 of a minor or a legally incapacitated individual under a parental
20 or spousal nomination or a court appointment and includes a limited
21 guardian as described in sections 5205, 5206, and 5306. Guardian
22 does not include a guardian ad litem.

23 (o) "Hazardous substance" means a substance defined as
24 hazardous or toxic or otherwise regulated by an environmental law.

25 (p) "Heir" means, except as controlled by section 2720, a
26 person, including the surviving spouse or the state, that is
27 entitled under the statutes of intestate succession to a decedent's
28 property.

29 (q) "Homestead allowance" means the allowance prescribed in



1 section 2402.

2 Sec. 5501. (1) A durable power of attorney is a power of
3 attorney by which a principal designates another as the principal's
4 attorney in fact in a writing that contains the words "This power
5 of attorney is not affected by the principal's subsequent
6 disability or incapacity, or by the lapse of time", or "This power
7 of attorney is effective upon the disability or incapacity of the
8 principal", or similar words showing the principal's intent that
9 the authority conferred is exercisable notwithstanding the
10 principal's subsequent disability or incapacity and, unless the
11 power states a termination time, notwithstanding the lapse of time
12 since the execution of the instrument.

13 (2) **Subject to subsection (3), all of the following apply to a**
14 **durable power of attorney executed after September 30, 2012:**

15 (a) A durable power of attorney under this section ~~shall~~**must**
16 be dated and signed voluntarily by the principal or signed by a
17 notary public on the principal's behalf ~~pursuant to~~**under** section
18 33 of the Michigan ~~notary public act,~~**law on notarial acts**, 2003 PA
19 238, MCL 55.293. The durable power of attorney ~~shall~~**must** be 1 or
20 both of the following:

21 (i) ~~(a)~~—Signed in the presence of 2 witnesses, neither of whom
22 is the attorney-in-fact, and both of whom also sign the durable
23 power of attorney.

24 (ii) ~~(b)~~—Acknowledged by the principal before a notary public,
25 who endorses on the durable power of attorney a certificate of that
26 acknowledgment and the true date of taking the acknowledgment.

27 (b) ~~(3)~~—An attorney-in-fact designated and acting under a
28 durable power of attorney has the authority, rights,
29 responsibilities, and limitations as provided by law with respect



1 to a durable power of attorney, including, but not limited to, all
2 of the following:

3 (i) ~~(a)~~—Except as provided in the durable power of attorney,
4 the attorney-in-fact shall act in accordance with the standards of
5 care applicable to fiduciaries exercising powers under a durable
6 power of attorney.

7 (ii) ~~(b)~~—The attorney-in-fact shall take reasonable steps to
8 follow the instructions of the principal.

9 (iii) ~~(c)~~ ~~Upon~~ ~~On~~ request of the principal, the attorney-in-fact
10 shall keep the principal informed of the attorney-in-fact's
11 actions. The attorney-in-fact shall provide an accounting to the
12 principal ~~upon~~ ~~on~~ request of the principal, to a conservator or
13 guardian appointed on behalf of the principal ~~upon~~ ~~on~~ request of
14 the guardian or conservator, or ~~pursuant to~~ ~~under~~ judicial order.

15 (iv) ~~(d)~~—The attorney-in-fact shall not make a gift of all or
16 any part of the principal's assets, unless provided for in the
17 durable power of attorney or by judicial order.

18 (v) ~~(e)~~—Unless provided in the durable power of attorney or by
19 judicial order, the attorney-in-fact, while acting as attorney-in-
20 fact, shall not create an account or other asset in joint tenancy
21 between the principal and the attorney-in-fact.

22 (vi) ~~(f)~~—The attorney-in-fact shall maintain records of the
23 attorney-in-fact's actions on behalf of the principal, including
24 transactions, receipts, disbursements, and investments.

25 (vii) ~~(g)~~—The attorney-in-fact may be liable for any damage or
26 loss to the principal, and may be subject to any other available
27 remedy, for breach of fiduciary duty owed to the principal. In the
28 durable power of attorney, the principal may exonerate the
29 attorney-in-fact of any liability to the principal for breach of



1 fiduciary duty except for actions committed by the attorney-in-fact
 2 in bad faith or with reckless indifference. An exoneration clause
 3 is not enforceable if inserted as the result of an abuse by the
 4 attorney-in-fact of a fiduciary or confidential relationship to the
 5 principal.

6 (viii) ~~(h)~~—The attorney-in-fact may receive reasonable
 7 compensation for the attorney-in-fact's services if provided for in
 8 the durable power of attorney.

9 (c) ~~(4)~~—Before exercising authority under a durable power of
 10 attorney, an attorney-in-fact shall execute an acknowledgment of
 11 the attorney-in-fact's responsibilities that contains all of the
 12 substantive statements in substantially the following form:

13 I, _____, have been appointed as attorney-in-
 14 fact for _____, the principal, under a durable
 15 power of attorney dated _____. By signing this document, I
 16 acknowledge that if and when I act as attorney-in-fact, all of the
 17 following apply:

18 1. ~~(a)~~—Except as provided in the durable power of attorney, I
 19 must act in accordance with the standards of care applicable to
 20 fiduciaries acting under durable powers of attorney.

21 2. ~~(b)~~—I must take reasonable steps to follow the instructions
 22 of the principal.

23 3. ~~(c)~~ ~~Upon~~ **On** request of the principal, I must keep the
 24 principal informed of my actions. I must provide an accounting to
 25 the principal ~~upon~~ **on** request of the principal, to a guardian or
 26 conservator appointed on behalf of the principal ~~upon~~ **on** the
 27 request of that guardian or conservator, or ~~pursuant to~~ **under**
 28 judicial order.

29 4. ~~(d)~~—I cannot make a gift from the principal's property,



1 unless provided for in the durable power of attorney or by judicial
2 order.

3 5. ~~(e)~~—Unless provided in the durable power of attorney or by
4 judicial order, I, while acting as attorney-in-fact, shall not
5 create an account or other asset in joint tenancy between the
6 principal and me.

7 6. ~~(f)~~—I must maintain records of my transactions as attorney-
8 in-fact, including receipts, disbursements, and investments.

9 7. ~~(g)~~—I may be liable for any damage or loss to the
10 principal, and may be subject to any other available remedy, for
11 breach of fiduciary duty owed to the principal. In the durable
12 power of attorney, the principal may exonerate me of any liability
13 to the principal for breach of fiduciary duty except for actions
14 committed by me in bad faith or with reckless indifference. An
15 exoneration clause is not enforceable if inserted as the result of
16 my abuse of a fiduciary or confidential relationship to the
17 principal.

18 8. ~~(h)~~—I may be subject to civil or criminal penalties if I
19 violate my duties to the principal.

20 Signature: _____ Date: _____

21 **(d)** ~~(5)~~—A third party is not liable to the principal or any
22 other person because the third party has complied in good faith
23 with instructions from an attorney-in-fact named in a durable power
24 of attorney whether or not the attorney-in-fact has executed an
25 acknowledgment that complies with ~~subsection (4)~~. **subdivision (c)**.
26 A third party is not liable to the principal or any other person if
27 the third party requires an attorney-in-fact named in a durable
28 power of attorney to execute an acknowledgment that complies with
29 ~~subsection (4)~~ **subdivision (c)** before recognizing the durable power



1 of attorney.

2 **(e)** ~~(6)~~—An attorney-in-fact's failure to comply with
3 ~~subsection (4)~~ **subdivision (c)** does not affect the attorney-in-
4 fact's authority to act for the principal as provided for in the
5 durable power of attorney and does not affect the attorney-in-
6 fact's responsibilities or potential liability to the principal.

7 ~~(7)~~ Subsections (2) to (6) do not apply to any of the
8 following:

9 ~~(a)~~ A durable power of attorney executed before October 1,
10 2012.

11 **(f)** Subdivisions (a) to (e) do not apply to any of the
12 following:

13 **(i)** ~~(b)~~—A delegation under section 5103 or a similar power of
14 attorney created by a parent or guardian regarding the care,
15 custody, or property of a minor child or ward.

16 **(ii)** ~~(c)~~—A patient advocate designation or a similar power of
17 attorney relating to the principal's health care.

18 **(iii)** ~~(d)~~—A durable power of attorney that is coupled with an
19 interest in the subject matter of the power.

20 **(iv)** ~~(e)~~—A durable power of attorney that is contained in or is
21 part of a loan agreement, security agreement, pledge agreement,
22 escrow agreement, or other similar transaction.

23 **(v)** ~~(f)~~—A durable power of attorney in connection with a
24 transaction with a joint venture, limited liability company,
25 partnership, limited partnership, limited liability partnership,
26 corporation, condominium, condominium association, condominium
27 trust, or similar entity, including, without limitation, a voting
28 agreement, voting trust, joint venture agreement, royalty
29 agreement, license agreement, proxy, shareholder's agreement,



1 operating agreement, partnership agreement, management agreement,
2 subscription agreement, certification of incorporation, bylaws, or
3 other agreement that primarily relates to such an entity.

4 (vi) ~~(g)~~—A power of attorney given primarily for a business or
5 a commercial purpose.

6 (vii) ~~(h)~~—A power of attorney created on a form prescribed by a
7 government or a governmental subdivision, agency, or
8 instrumentality for a governmental purpose.

9 (3) All of the following apply to a power of attorney executed
10 after June 30, 2021:

11 (a) An attorney-in-fact shall not do any of the following on
12 behalf of the principal or with the principal's property unless the
13 durable power of attorney expressly grants the attorney-in-fact the
14 authority and is certified under subdivision (b):

15 (i) Make a gift of any of the principal's assets.

16 (ii) Create or change rights of survivorship.

17 (iii) Create or change a beneficiary designation.

18 (iv) Create an account or other asset in joint tenancy between
19 the principal and the attorney-in-fact.

20 (v) Delegate authority granted under the durable power of
21 attorney.

22 (vi) Waive the principal's right to be a beneficiary of a joint
23 and survivor annuity, including a survivor benefit under a
24 retirement plan.

25 (vii) Renounce or disclaim property, including a power of
26 appointment.

27 (viii) Receive reasonable compensation for the attorney-in-
28 fact's services.



1 (b) If a power of attorney grants an attorney-in-fact a power
 2 described in subdivision (a), the attorney-in-fact shall not
 3 exercise the granted power unless the power of attorney contains
 4 the following certification signed under oath by an attorney who
 5 has an attorney-client relationship with the principal:

6 I, _____, under the penalties of perjury, certify
 7 that to my knowledge:

8 1. I am a licensed attorney for the principal.

9 2. The principal understands the significance of giving the
 10 attorney-in-fact the powers described in this document as listed in
 11 section 5501(3) (a) of the estates and protected individuals code,
 12 1998 PA 386, MCL 700.5501, and is knowingly granting those powers
 13 to the attorney-in-fact.

14 (c) Notwithstanding an express grant of authority to do an act
 15 described in subdivision (a), an attorney-in-fact may exercise the
 16 authority only as the attorney-in-fact determines is consistent
 17 with the principal's objectives, and is consistent with the
 18 principal's best interest based on 1 or more of the following
 19 factors:

20 (i) The value and nature of the principal's property.

21 (ii) The principal's foreseeable obligations and need
 22 maintenance.

23 (iii) Minimization of taxes, including income, estate,
 24 inheritance, generation-skipping transfer, and gift taxes.

25 (iv) Eligibility for a benefit, a program, or assistance under
 26 a statute or regulation.

27 (v) The principal's personal history of making or joining in
 28 making gifts.

29 (vi) The principal's existing estate plan.



1 (d) Without limiting other criminal or civil remedies, if the
2 attorney-in-fact takes an action that violates this subsection, the
3 action can be used as evidence in a criminal or civil proceeding,
4 and the attorney-in-fact is liable to the principal or the
5 principal's successors in interest for the amount required to do
6 both of the following:

7 (i) Restore the total value of the principal's property to what
8 it would have been had the violation not occurred.

9 (ii) Reimburse the principal or the principal's successors in
10 interest for the attorney fees and costs paid on the principal's
11 and attorney-in-fact's behalf.

