



New Power of Attorney Law Challenges Planners

By Douglas G. Chalgian

FAST FACTS

Agents acting under a durable power of attorney created after October 1, 2012, must sign a statutorily prescribed acknowledgement before acting.

Attorneys will need to be more thoughtful in drafting durable financial powers of attorney as a result of the new law.

The new law clarifies that an agent only has gifting authority to the extent expressly authorized.

As our clients age, and as the population of persons with cognitive impairments expands, the importance of the financial power of attorney is elevated. This reality is reflected by the substantial changes recently made to Michigan law regarding financial POAs, found in the Estates and Protected Individuals Code at MCL 700.5501. Attorneys who prepare these documents should note the important developments.

Scope and Effective Date

The requirements set forth in the new law apply to financial POAs created after October 1, 2012, but do not invalidate documents created before that date.

Also, the new rules do not apply to financial POAs used primarily for business transactions. Specifically, MCL 700.5501 excludes the following:

- (d) A durable power of attorney that is coupled with an interest in the subject matter of the power.
- (e) 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.

- (f) A durable power of attorney in connection with a transaction with a joint venture, limited liability company, partnership, limited partnership, limited liability partnership, corporation, condominium, condominium association, condominium trust, or similar entity, including, without limitation, a voting agreement, voting trust, joint venture agreement, royalty agreement, license agreement, proxy, shareholder's agreement, operating agreement, partnership agreement, management agreement, subscription agreement, certification of incorporation, bylaws, or other agreement that primarily relates to such an entity.
- (g) A power of attorney given primarily for a business or a commercial purpose.¹

Agent Acknowledgment Required

MCL 700.5501 now requires that an agent appointed to act in a financial POA sign an acknowledgment or acceptance, with statutorily prescribed language, before the agent can act.² Attorneys who draft financial POAs should include these acceptances with the documents they prepare for their clients.

This change makes financial POA law similar to Michigan's patient advocate designation (health care power of attorney) law, which has long required the agent to sign a statutorily prescribed acceptance. That law is not changed by the revisions to MCL 700.5501.

Execution Requirements

Michigan law now also provides that a financial POA (but not the acknowledgment) be witnessed by two people or be notarized.³ This is a new requirement, although most practitioners likely required such formalities before the change.

Extraordinary Powers

Less advertised, but of at least equal significance, are the provisions of the new law that address an agent's ability to exercise what might be characterized as "extraordinary powers." These powers are especially relevant when the financial POA is used for Medicaid planning or other advanced planning purposes.

The law clarifies that an agent acting under a financial POA may only make gifts with respect to the principal's resources to the extent expressly authorized by the document. It states the following:

- (d) The attorney-in-fact shall not make a gift of all or any part of the principal's assets, unless provided for in the durable power of attorney or by judicial order.
- (e) Unless provided in the durable power of attorney or by judicial order, the attorney-in-fact, while acting as attorney-in-fact, shall not create an account or other asset in joint tenancy between the principal and the attorney-in-fact.⁴

In addition, the Michigan Trust Code previously established that the agent's ability to act with respect to the powers of a settlor

in a revocable trust must be expressly provided in the document. It specifies that:

- [a] settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a durable power of attorney only to the extent expressly authorized by the terms of the trust or the power of attorney.⁵

Exculpation

The new law provides that a financial POA may include language that exculpates the agent from liability for his or her actions, but limits that liability by creating a "bad faith" floor to such provisions. It states:

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 committed by the attorney-in-fact in bad faith or with reckless indifference.⁶

Signature



Conclusion

The financial power of attorney can no longer be an afterthought in the packet of documents included in a client's estate plan. The changes discussed above put planners in the position of having to give more thought to their client's specific needs in deciding which provisions to include in their financial POAs. Gifting powers, the power to alter revocable trusts, and exculpation provisions can be important, but they can also be exploited and misused in the wrong situations. ■

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ENDNOTES

1. MCL 700.5501(7).
2. See MCL 700.5501(4).
3. See MCL 700.5501(2).
4. MCL 700.5501(3)(d) and (e).
5. MCL 700.7602(5).
6. MCL 700.5501(2)(g).