

PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

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House Substitute 1 for SB 0092

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The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 4,128.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 15. The number who voted opposed to this position was 1. The number who abstained from voting was 1.

Report on Public Policy Position

Name of section:

Probate & Estate Planning Section

Contact person:

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Bill Number:

[House Substitute 1 for Senate Bill 0092](#) (Bieda) Probate; powers of attorney; written acknowledgment of responsibilities by agent appointed under a power of attorney; require. Amends sec. 5501 of [1998 PA 386](#) (MCL [700.5501](#)).

Date position was adopted:

February 18, 2012

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

23

Number who voted in favor and opposed to the position:

15 Voted for position

1 Voted against position

1 Abstained from vote

6 Did not vote

Position:

Support and Amend

Explanation of the position, including any recommended amendments:

The Section Council voted to support House Substitute 1 for Senate Bill 92 with the following amendments:

Section 2 be modified so that instead of two witnesses, a notary be required and that the language concerning execution by the principal be consistent with language concerning execution in the statutes dealing with deeds and the statute concerning notaries. The proposed draft language is as follows:

(2) A DURABLE POWER OF ATTORNEY UNDER THIS SECTION SHALL BE SIGNED VOLUNTARILY BY THE PRINCIPAL OR SIGNED BY A NOTARY PUBLIC ON THE PRINCIPAL'S BEHALF PURSUANT TO SECTION 33 OF THE MICHIGAN NOTARY PUBLIC ACT (MCL 55.293). THE DURABLE POWER

OF ATTORNEY SHALL BE ACKNOWLEDGED BY THE PRINCIPAL BEFORE A NOTARY PUBLIC. THE NOTARY PUBLIC TAKING THE ACKNOWLEDGMENT SHALL ENDORSE ON THE DURABLE POWER OF ATTORNEY A CERTIFICATE OF THAT ACKNOWLEDGMENT AND THE TRUE DATE OF TAKING THE ACKNOWLEDGMENT.

Sections 3(D) and 4(D): add at the end of each section: "or by judicial order."

Sections 3(E) and 4(E): change "court order" to "judicial order."

Section 3(G): replace what is in the House Substitute with the following language:

(G) THE ATTORNEY-IN-FACT MAY BE LIABLE FOR ANY DAMAGE OR LOSS TO THE PRINCIPAL, AND MAY BE SUBJECT TO ANY OTHER AVAILABLE REMEDY, FOR BREACH OF FIDUCIARY DUTY OWED TO THE PRINCIPAL. 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. AN EXONERATION CLAUSE IS NOT ENFORCEABLE IF INSERTED AS THE RESULT OF AN ABUSE BY THE ATTORNEY-IN-FACT OF A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP TO THE PRINCIPAL.

Section 4(G) be changed to conform with the change to Section 3(G).
The proposed draft is as follows:

(G) I MAY BE LIABLE FOR ANY DAMAGE OR LOSS TO THE PRINCIPAL, AND MAY BE SUBJECT TO ANY OTHER AVAILABLE REMEDY, FOR BREACH OF FIDUCIARY DUTY OWED TO THE PRINCIPAL. IN THE POWER OF ATTORNEY, THE PRINCIPAL MAY EXONERATE ME OF ANY LIABILITY TO THE PRINCIPAL FOR BREACH OF FIDUCIARY DUTY EXCEPT FOR ACTIONS COMMITTED BY ME IN BAD FAITH OR WITH RECKLESS INDIFFERENCE. AN EXONERATION CLAUSE IS NOT ENFORCEABLE IF INSERTED AS THE RESULT OF AN ABUSE BY ME OF A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP TO THE PRINCIPAL.

Section 5 be modified to add "in good faith" in the second line after "complied" so that the first two lines read as follows:

(5) A THIRD PARTY IS NOT LIABLE TO THE PRINCIPAL OR ANY OTHER PERSON BECAUSE THE THIRD PARTY HAS COMPLIED IN GOOD FAITH WITH

This change will make the statute similar to the Michigan Trust Code, MCL 700.7912. (E.g., 700.7912(1) states that "A person other than a trust beneficiary who in good faith assists a trustee" 700.7912(2): "A person other than a trust beneficiary who in good faith deals with a trustee"

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

<http://legislature.mi.gov/doc.aspx?2011-SB-0092>