

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

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House Substitute 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 19. The number who voted opposed to this position was 0. 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 for SB 92 \[S0101' 91 11 \(H-2\) Draft 1\]](#) (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:**

March 17, 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:**

19 Voted for position

0 Voted against position

1 Abstained from vote

3 Did not vote

**Position:**

Support and Amend

**Explanation of the position, including any recommended amendments:**

Council supported House Substitute to SB 92 [S0101'91 11 (H-2) Draft 1] but recommended that the signature line of the acceptance proposed in the draft legislation be modified to reflect a signature rather than a printed name.

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

DRAFT 1

HOUSE SUBSTITUTE FOR SENATE BILL NO. 92

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending section 5501 (MCL 700.5501).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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

1 or incapacity and, unless the power states a termination time,  
2 notwithstanding the lapse of time since the execution of the  
3 instrument.

4 (2) A DURABLE POWER OF ATTORNEY UNDER THIS SECTION SHALL BE  
5 DATED AND SIGNED VOLUNTARILY BY THE PRINCIPAL OR SIGNED BY A  
6 NOTARY PUBLIC ON THE PRINCIPAL'S BEHALF PURSUANT TO SECTION 33 OF  
7 THE MICHIGAN NOTARY PUBLIC ACT, 2003 PA 238, MCL 55.293. THE  
8 DURABLE POWER OF ATTORNEY SHALL BE 1 OR BOTH OF THE FOLLOWING:

9 (A) SIGNED IN THE PRESENCE OF 2 WITNESSES, NEITHER OF WHOM  
10 IS THE ATTORNEY-IN-FACT, AND BOTH OF WHOM ALSO SIGN THE DURABLE  
11 POWER OF ATTORNEY.

12 (B) ACKNOWLEDGED BY THE PRINCIPAL BEFORE A NOTARY PUBLIC,  
13 WHO ENDORSES ON THE DURABLE POWER OF ATTORNEY A CERTIFICATE OF  
14 THAT ACKNOWLEDGMENT AND THE TRUE DATE OF TAKING THE  
15 ACKNOWLEDGMENT.

16 (3) AN ATTORNEY-IN-FACT DESIGNATED AND ACTING UNDER A  
17 DURABLE POWER OF ATTORNEY HAS THE AUTHORITY, RIGHTS,  
18 RESPONSIBILITIES, AND LIMITATIONS AS PROVIDED BY LAW WITH RESPECT  
19 TO A DURABLE POWER OF ATTORNEY, INCLUDING, BUT NOT LIMITED TO,  
20 ALL OF THE FOLLOWING:

21 (A) EXCEPT AS PROVIDED IN THE DURABLE POWER OF ATTORNEY, THE  
22 ATTORNEY-IN-FACT SHALL ACT IN ACCORDANCE WITH THE STANDARDS OF  
23 CARE APPLICABLE TO FIDUCIARIES EXERCISING POWERS UNDER A DURABLE  
24 POWER OF ATTORNEY.

25 (B) THE ATTORNEY-IN-FACT SHALL TAKE REASONABLE STEPS TO  
26 FOLLOW THE INSTRUCTIONS OF THE PRINCIPAL.

27 (C) UPON REQUEST OF THE PRINCIPAL, THE ATTORNEY-IN-FACT

1 SHALL KEEP THE PRINCIPAL INFORMED OF THE ATTORNEY-IN-FACT'S  
2 ACTIONS. THE ATTORNEY-IN-FACT SHALL PROVIDE AN ACCOUNTING TO THE  
3 PRINCIPAL UPON REQUEST OF THE PRINCIPAL, TO A CONSERVATOR OR  
4 GUARDIAN APPOINTED ON BEHALF OF THE PRINCIPAL UPON REQUEST OF THE  
5 GUARDIAN OR CONSERVATOR, OR PURSUANT TO JUDICIAL ORDER.

6 (D) THE ATTORNEY-IN-FACT SHALL NOT MAKE A GIFT OF ALL OR ANY

7 PART OF THE PRINCIPAL'S ASSETS, UNLESS PROVIDED FOR IN THE  
8 DURABLE POWER OF ATTORNEY OR BY JUDICIAL ORDER.  
9 (E) UNLESS PROVIDED IN THE DURABLE POWER OF ATTORNEY OR BY  
10 JUDICIAL ORDER, THE ATTORNEY-IN-FACT, WHILE ACTING AS ATTORNEY-  
11 IN-FACT, SHALL NOT CREATE AN ACCOUNT OR OTHER ASSET IN JOINT  
12 TENANCY BETWEEN THE PRINCIPAL AND THE ATTORNEY-IN-FACT.  
13 (F) THE ATTORNEY-IN-FACT SHALL MAINTAIN RECORDS OF THE  
14 ATTORNEY-IN-FACT'S ACTIONS ON BEHALF OF THE PRINCIPAL, INCLUDING  
15 TRANSACTIONS, RECEIPTS, DISBURSEMENTS, AND INVESTMENTS.  
16 (G) THE ATTORNEY-IN-FACT MAY BE LIABLE FOR ANY DAMAGE OR  
17 LOSS TO THE PRINCIPAL, AND MAY BE SUBJECT TO ANY OTHER AVAILABLE  
18 REMEDY, FOR BREACH OF FIDUCIARY DUTY OWED TO THE PRINCIPAL. IN  
19 THE DURABLE POWER OF ATTORNEY, THE PRINCIPAL MAY EXONERATE THE  
20 ATTORNEY-IN-FACT OF ANY LIABILITY TO THE PRINCIPAL FOR BREACH OF  
21 FIDUCIARY DUTY EXCEPT FOR ACTIONS COMMITTED BY THE ATTORNEY-IN-  
22 FACT IN BAD FAITH OR WITH RECKLESS INDIFFERENCE. AN EXONERATION  
23 CLAUSE IS NOT ENFORCEABLE IF INSERTED AS THE RESULT OF AN ABUSE  
24 BY THE ATTORNEY-IN-FACT OF A FIDUCIARY OR CONFIDENTIAL  
25 RELATIONSHIP TO THE PRINCIPAL.  
26 (H) THE ATTORNEY-IN-FACT MAY RECEIVE REASONABLE COMPENSATION  
27 FOR THE ATTORNEY-IN-FACT'S SERVICES IF PROVIDED FOR IN THE

1 DURABLE POWER OF ATTORNEY.

2 (4) BEFORE EXERCISING AUTHORITY UNDER A DURABLE POWER OF  
3 ATTORNEY, AN ATTORNEY-IN-FACT SHALL EXECUTE AN ACKNOWLEDGMENT OF  
4 THE ATTORNEY-IN-FACT'S RESPONSIBILITIES THAT CONTAINS ALL OF THE  
5 SUBSTANTIVE STATEMENTS IN SUBSTANTIALLY THE FOLLOWING FORM:

6 I, \_\_\_\_\_, HAVE BEEN APPOINTED AS ATTORNEY-IN-FACT  
7 FOR \_\_\_\_\_, THE PRINCIPAL, UNDER A DURABLE POWER OF  
8 ATTORNEY DATED \_\_\_\_\_. BY SIGNING THIS DOCUMENT, I  
9 ACKNOWLEDGE THAT IF AND WHEN I ACT AS ATTORNEY-IN-FACT, ALL OF  
10 THE FOLLOWING APPLY:

11 (A) EXCEPT AS PROVIDED IN THE DURABLE POWER OF ATTORNEY, I  
12 MUST ACT IN ACCORDANCE WITH THE STANDARDS OF CARE APPLICABLE TO  
13 FIDUCIARIES ACTING UNDER DURABLE POWERS OF ATTORNEY.

14 (B) I MUST TAKE REASONABLE STEPS TO FOLLOW THE INSTRUCTIONS  
15 OF THE PRINCIPAL.

16 (C) UPON REQUEST OF THE PRINCIPAL, I MUST KEEP THE PRINCIPAL  
17 INFORMED OF MY ACTIONS. I MUST PROVIDE AN ACCOUNTING TO THE  
18 PRINCIPAL UPON REQUEST OF THE PRINCIPAL, TO A GUARDIAN OR  
19 CONSERVATOR APPOINTED ON BEHALF OF THE PRINCIPAL UPON THE REQUEST  
20 OF THAT GUARDIAN OR CONSERVATOR, OR PURSUANT TO JUDICIAL ORDER.

21 (D) I CANNOT MAKE A GIFT FROM THE PRINCIPAL'S PROPERTY,  
22 UNLESS PROVIDED FOR IN THE DURABLE POWER OF ATTORNEY OR BY  
23 JUDICIAL ORDER.

24 (E) UNLESS PROVIDED IN THE DURABLE POWER OF ATTORNEY OR BY  
25 JUDICIAL ORDER, I, WHILE ACTING AS ATTORNEY-IN-FACT, SHALL NOT  
26 CREATE AN ACCOUNT OR OTHER ASSET IN JOINT TENANCY BETWEEN THE  
27 PRINCIPAL AND ME.

1 (F) I MUST MAINTAIN RECORDS OF MY TRANSACTIONS AS ATTORNEY-  
2 IN-FACT, INCLUDING RECEIPTS, DISBURSEMENTS, AND INVESTMENTS.

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

12 (H) I MAY BE SUBJECT TO CIVIL OR CRIMINAL PENALTIES IF I  
13 VIOLATE MY DUTIES TO THE PRINCIPAL.

1145 (NAME) DATE:

16 (5) A THIRD PARTY IS NOT LIABLE TO THE PRINCIPAL OR ANY  
17 OTHER PERSON BECAUSE THE THIRD PARTY HAS COMPLIED IN GOOD FAITH  
18 WITH INSTRUCTIONS FROM AN ATTORNEY-IN-FACT NAMED IN A DURABLE  
19 POWER OF ATTORNEY WHETHER OR NOT THE ATTORNEY-IN-FACT HAS  
20 EXECUTED AN ACKNOWLEDGMENT THAT COMPLIES WITH SUBSECTION (4). A  
21 THIRD PARTY IS NOT LIABLE TO THE PRINCIPAL OR ANY OTHER PERSON IF  
22 THE THIRD PARTY REQUIRES AN ATTORNEY-IN-FACT NAMED IN A DURABLE  
23 POWER OF ATTORNEY TO EXECUTE AN ACKNOWLEDGMENT THAT COMPLIES WITH  
24 SUBSECTION (4) BEFORE RECOGNIZING THE DURABLE POWER OF ATTORNEY.

25 (6) AN ATTORNEY-IN-FACT'S FAILURE TO COMPLY WITH SUBSECTION  
26 (4) DOES NOT AFFECT THE ATTORNEY-IN-FACT'S AUTHORITY TO ACT FOR

1 THE PRINCIPAL AS PROVIDED FOR IN THE DURABLE POWER OF ATTORNEY  
2 AND DOES NOT AFFECT THE ATTORNEY-IN-FACT'S RESPONSIBILITIES OR  
3 POTENTIAL LIABILITY TO THE PRINCIPAL.

4 (7) SUBSECTIONS (2) TO (6) DO NOT APPLY TO ANY OF THE  
5 FOLLOWING:

6 (A) A DURABLE POWER OF ATTORNEY EXECUTED BEFORE OCTOBER 1,  
7 2012.

8 (B) A DELEGATION UNDER SECTION 5103 OR A SIMILAR POWER OF  
9 ATTORNEY CREATED BY A PARENT OR GUARDIAN REGARDING THE CARE,  
10 CUSTODY, OR PROPERTY OF A MINOR CHILD OR WARD.

11 (C) A PATIENT ADVOCATE DESIGNATION OR A SIMILAR POWER OF  
12 ATTORNEY RELATING TO THE PRINCIPAL'S HEALTH CARE.

13 (D) A DURABLE POWER OF ATTORNEY THAT IS COUPLED WITH AN  
14 INTEREST IN THE SUBJECT MATTER OF THE POWER.

15 (E) A DURABLE POWER OF ATTORNEY THAT IS CONTAINED IN OR IS  
16 PART OF A LOAN AGREEMENT, SECURITY AGREEMENT, PLEDGE AGREEMENT,  
17 ESCROW AGREEMENT, OR OTHER SIMILAR TRANSACTION.

18 (F) A DURABLE POWER OF ATTORNEY IN CONNECTION WITH A  
19 TRANSACTION WITH A JOINT VENTURE, LIMITED LIABILITY COMPANY,  
20 PARTNERSHIP, LIMITED PARTNERSHIP, LIMITED LIABILITY PARTNERSHIP,  
21 CORPORATION, CONDOMINIUM, CONDOMINIUM ASSOCIATION, CONDOMINIUM  
22 TRUST, OR SIMILAR ENTITY, INCLUDING, WITHOUT LIMITATION, A VOTING  
23 AGREEMENT, VOTING TRUST, JOINT VENTURE AGREEMENT, ROYALTY  
24 AGREEMENT, LICENSE AGREEMENT, PROXY, SHAREHOLDER'S AGREEMENT,  
25 OPERATING AGREEMENT, PARTNERSHIP AGREEMENT, MANAGEMENT AGREEMENT,  
26 SUBSCRIPTION AGREEMENT, CERTIFICATION OF INCORPORATION, BYLAWS,  
27 OR OTHER AGREEMENT THAT PRIMARILY RELATES TO SUCH AN ENTITY.

1 (G) A POWER OF ATTORNEY GIVEN PRIMARILY FOR A BUSINESS OR A  
2 COMMERCIAL PURPOSE.

3 (H) A POWER OF ATTORNEY CREATED ON A FORM PRESCRIBED BY A  
4 GOVERNMENT OR A GOVERNMENTAL SUBDIVISION, AGENCY, OR  
5 INSTRUMENTALITY FOR A GOVERNMENTAL PURPOSE.