
Folks:

Take-Away: Michigan's more comprehensive durable power of attorney statute is effective come **July 1, 2024**.

Background: Michigan replaced its terse durable power of attorney statute which was part of EPIC [MCL 700.5501-700.5505] with a much more comprehensive durable power of attorney statute, not part of EPIC, which is about 30 pages long. [MCL 556.201.] This new durable power of attorney law comes into effect on **July 1, 2024**. The EPIC provisions regarding durable powers of attorney are **repealed**.

Generalizations: The presence of the new Act will not cause too many drafting changes for attorneys. A power is **presumed to be durable unless** the instrument states to the contrary. There are several **default powers** if the instrument is silent. If **co-agents** are named, either can act without the other, unless stated to the contrary in the instrument. However, a co-agent can be held liable for the acts of the other co-agent in some limited situations. There is a general duty imposed on the agent to **preserve the principal's estate plan**.

What's New? Some key provisions to be aware of with this new statutory power of appointment regime include the following:

Application: The Act applies to powers of attorney created before, on, or after the Act's effective date. **Existing powers will be covered.**

Execution: If the instrument created after July 1, 2024 is not executed in accordance with the Act's requirements, it is **not durable**. This means it must be signed by the principal (or at the

principal's direction), it must be either acknowledged by the principal before a notary or signed by the principal in the presence of two witnesses, neither of whom is the nominated agent, but one witness can be the notary. The agent must also acknowledge his/her acceptance.

Acknowledgement: The agent must sign an acceptance of appointment. If the instrument is silent on this point, the agent need not disclose receipts, disbursements unless ordered by the court or requested by the principal, or another designated in the Act where there is a process for requesting disclosures. An agent will be **deemed** to accept his/her duties if they exercise authority, or they engage in conduct that indicates their acceptance. Before exercising authority under the instrument, the agent **must** execute an acknowledgement of the agent's duties that contains all the substantive statements in the **optional template Agent's Acknowledgement**, in a form that is substantially the same of the optional template. If the agent fails to execute the acknowledgement of duties that will not alter the agent's duties under the instrument nor mitigate the agent's potential liability for breach of those duties.

Statutory Form: Part of the extended length of the Act is due to the presence of a statutory durable power of attorney form. This allows the principal to (i) **pick and choose** the agent's powers; (ii) provides several **warnings** to both the principal and agent, including an **expanded acknowledgement of the agent**; and (iii) encourages those individuals who might use the statutory form to consult with an attorney.

Note: This '**check the box**' approach of the statutory form is a bit misleading. By selecting a discrete power in the statutory form, the principal incorporates the technical, and often broad, definition of the selected power that is contained in the statute.

Agent Powers: The instrument must **expressly provide for the**

following powers and authority given to the agent: (i) to create amend, revoke or terminate a Trust; (ii) to make a gift; (iii) to create or change rights of survivorship; (iv) to create or change beneficiary designations; (v) to delegate authority granted under the instrument to another; (vi) to waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor's benefit under a retirement plan; (vii) to exercise fiduciary powers that the principal has the authority to delegate; (viii) to exercise authority over the content of electronic communications; and (ix) to exercise authority over any bank, securities, or other financial account in a foreign country.

Further Limitations: Even if the agent is given one of these express identified powers, an agent who is **not** an ancestor, spouse, or descendant of the principal may **not** exercise the authority under the instrument to create in the agent, or an individual to whom the agent owes a legal obligation of support, an interest in the principal's property whether by gift, survivorship, beneficiary designation, disclaimer 'or otherwise.'

Guardian or Conservator: The principal can nominate a conservator or guardian of the principal's estate or person under the instrument. If that nomination is consistent with applicable law, the court must make its appointment in accordance with the principal's most recent nomination in the instrument.

Recognition by Third Parties: The Act provides a process for easier recognition of a complying durable power by third parties, including: (i) **a timeline for review- 7 days, 5 days; time to accept;** (ii) certification; and (iii) acceptance or rejection of the power. A third party that accepts in good faith a power without knowledge that it is void, invalid, or terminated, or that the agent exceeded his/her authority, may rely in good faith on the validity of the power, whether the agent properly acknowledged his/her powers.

7-5 Day Rule: The third party is required to either accept the power or request the agent's acknowledgement, or a certification, or a translation, or an opinion of counsel within 7 business days after the instrument is presented. Once that documentation is provided, the third party must accept the agent's power within 5 business days. If the third-party refuses to accept the instrument in violation of the Act, the third-party is subject to a court order that mandates acceptance of the power and liability for reasonable **attorneys' fees and costs** in an action or proceeding that confirms the validity of the power of attorney.

Standing to Petition: The Act gives individuals who are associated with the principal, such as an **heir or caregiver**, or Adult Protective Services, the authority to petition the probate court to review the agent's conduct.

Indemnity: An agent who acts in **good faith** is not liable to any beneficiary of the principal's estate plan for the failure to preserve the principal's estate plan. Nor is the agent automatically liable solely because the agent also benefits from their actions or because he/she has a conflicting interest in relation to the property or affairs of the principal. A provision which relieves the agent of liability for breach of duty is binding on the principal and successors in interest, unless the breach of duty was committed in **bad faith, or the provision was inserted as a result of abuse of a confidential or fiduciary relationship with the principal.**

Delegation: Much like a directed trustee, an agent who exercises authority to delegate will not be liable for an act or error of the person to whom the power is delegated, so long as the agent exercised **care, competence, and diligence in the selection and monitoring of the delegee.**

Damages: As remedies for an agent's abuse of power, the Act

provides: (i) as a remedy the restoration of the value of the principal's property to what it would have been, including **attorney's fees and costs**; (ii) restitution; and (iii) and possibly **treble damages** for embezzlement or conversion by the agent, or if the agent **refuses to transfer possession of the principal's property to the principal on demand**.

Reimbursement of Expenses and Compensation: An agent is entitled to reimbursement of expenses **reasonably incurred** and **reasonable compensation** unless the instrument provides otherwise.

Exceptions: The Act does not apply to powers coupled with an interest, e.g., a power given for the benefit of a creditor, or a patient advocate designation.

Conclusion: In light of the effective date of the new Uniform Durable Power of Attorney Act, as well as the recent changes in the Omnibus EPIC Bill, such as authorizing to co-patient advocates, expressing the process to determine the patient's wishes, and organ and tissue donations, now would be a good time to remind clients and family members that they should review their existing durable powers of attorney, health and financial, to update them to reflect the new legal requirements and options that are now available to them.

If you would like to read additional missives, [click here](#).