Folks:

Take-Away: Individuals need to review their existing durable powers of attorney to confirm if the powers given to their agent are consistent with, or available, under Michigan's new Uniform Durable Power of Attorney Act.

Background: When I practiced law, I usually did not let my clients out the door without them executing a durable power of attorney, unless they already had that instrument in place. My durable power of attorney form was admittedly long, ponderous, comprehensive, fitting the classic 'legal document' which often drew eyerolls from clients. Considering the predictable client responses and their regular observation that I must 'bill by the word', I began to prepare a companion, much shorter, as in one-page, durable power of attorney form, one that my client could easily read, understand, sign, and take with them if they were travelling. This short form fell into the '*anything I can do, my agent can do'* category, which my client easily understood (if not appreciated.)

Uniform Act: With the new Michigan Uniform Durable Power of Attorney Act, 2023 PA 187, effective on July 1, 2024, (the Act) those 'short-form' durable powers of attorney instruments are probably now of highly questionable value. [MCL 556.201 et seq.] That short-form durable power of attorney often simply provided *"Any power that I can exercise, I hereby give to my Agent to exercise under this instrument."* Rather than provide a long summary or litany of powers given to the agent, the 'any power that I possess over my property, my agent possesses' was the gist of the broad, if not sweeping, power delegation to the agent, all covered in a single, short, paragraph. The new Act is now a long, stand-alone, statute [over 30 pages] which is no longer buried in the bowels of EPIC. Act even contains model forms for acceptance, certification, and requests for verification of

authority by third-parties.

General Agent Powers: The Act's general powers held by an agent include real property, tangible personal property; stocks and bonds; banks and financial institutions; entities and business interests; insurance and annuities; estates, trusts, and beneficial interests; claims and litigation; personal and family maintenance; governmental benefits; retirement plans; taxes, and gifts {subject to the limitations below.} [MCL 556.304-MCL 556.317.]

Express Agent Powers: Under the Act, an agent who acts under a durable power of attorney may exercise the following specified powers on behalf of the principal, **but only if the durable power of attorney instrument expressly grants the agent the specific authority or power.** Only a few exceptions to this limitation are under the Act. A one-page durable power of attorney no longer 'cuts it' if any of these powers are intended to be given to the agent. Those express or explicit delegated powers, all which impact estate planning, or which could be exercised by an agent, to alter the principal's existing estate plan, include the power to:

1. **amend**, revoke, or terminate a revocable Trust;
2. make a **gift;**
3. make or change **rights of survivorship**;
4. **delegate authority** under the power of attorney;
5. **waive** the right to a joint and survivor annuity under a retirement plan, e.g., a 401(k) plan;
6. **exercise fiduciary powers** that the principal has the authority to delegate;
7. **exercise authority over digital assets and electronic communications** sent or received by the principal; and
8. **exercise authority over any foreign bank account, securities, or other financial accounts.**

These enumerated powers may **not** be inferred from the grant of general authority to an agent that the Act provides. [MCL 556.301(3).] Accordingly,

if a short-form type of durable power of attorney is used with reference to the Act's general powers presumed to have been given to the agent [MCL 556.304 to MCL 556.317] any of these enumerated powers will **not** be held by the agent. This will be important limitation if changes need to be made to an individual's estate planning documents and an agent's involvement will be necessary. Only the general authority given to an agent under the statute, not these extraordinary, identified powers, will be presumed as a *default* power(s) that are to be held by the agent. [MCL 556.304 through MCL 556.316.]

The Act contemplates that these specific statutory powers can be incorporated by reference in the durable power of attorney form, by citing the specific section number of the authorized power in the Act. My guess is that this authorization to use incorporation by reference is an effort to enable a principal to sign a 'semi-short' form durable power of attorney to respond to an individual's reluctance to read long legal documents. [MCL 556.301(1).]

Default Rules: The Act's default rules **restrict** to whom an agent may make a gift, right of survivorship, beneficiary designation, or make a similar transfer of the principal's assets.

> **Gifting Authority Limitation: The Act directly limits the class of individuals who can exercise the Act's general statement of authority to make gifts.** [MCL 556.301.]
>
> **Inability to 'Self-Deal:' Unless the agent is the principal's ancestor, spouse, or descendant, the default rule provides that the agent <u>cannot</u> exercise authority under the instrument to grant to the agent, or an individual to whom the agent owes a legal obligation, an interest in the principal's property.** Example: A friend who is named as the principal's agent cannot make a gift to himself by relying on the general delegation of the 'power to make gifts.'

Identify the Powers in the Instrument: The Act's rule is a bit more permissive than the prior law, which prohibited gifts to all agents unless the gift was expressly authorized in the power of attorney instrument. However, if the principal wishes to override this restriction to transfer/gift assets or interests, e.g., beneficiary designations, either to expand or narrow the class of agents permitted to make gifts or beneficiary designations, that power must be clearly spelled out in the durable power of attorney.

Rules of Construction: The Act also provides some 'rules of construction' that apply to all grants of general authority or powers given to an agent. [MCL 556.303.] Hopefully, these rules will be useful to clarify to what extent an agent can exercise the statutory general powers that are identified in MCL 556.304 through MCL 556.317.

Conclusion: Clearly these provisions which tend to limit an agent's powers without the principal expressly granting the power to their agent, is a step towards curbing elder financial abuse by agents, (particularly agents who are not family members of the principal) and 'estate-planning' by the agent under the broad powers of a durable power of attorney. It will take some time getting used to what the Act requires, and how agents exercise their powers, but the Act is clearly needed to either stop financial abuse by agents or require the principal to confront and understand the scope of powers (and apparent risks created) when an agent uses a durable power of attorney.