

Agent Actions Under Durable Power that Implicate the Principal's Estate Plan

Quick-Take: The 2024 Michigan Uniform Power of Attorney Act provides helpful guidance to an agent who under a durable power of attorney acts in a manner that might impact the principal's existing estate plan.

Background: In 2024 Michigan adopted its version of the Uniform Power of Attorney Act. The Act provides some clarity regarding an agent's duties and liability. There is also a helpful provision on when, or how, an agent acting under a durable power of attorney, can implement, or affect, the principal's existing estate plan. In the past an agent's actions that implicated the principal's estate plan has created some confusion as to the scope of the agent's powers to change (by its actions, or at times by its inaction) the principal's estate plan.

Michigan Uniform Power of Attorney Act: A quick overview of this new legislation follows.

Non-Waivable Responsibilities: MCL 556.214(1) provides that notwithstanding the provisions to the contrary in the principal's durable power of attorney instrument, the agent who accepts the appointment ***shall do all of the following:***

Duty to Fulfill Reasonable Expectations: To act in accordance with reasonable expectations of the principal *actually known* to the agent.

Duty of Good Faith: To act in good faith.

Duty to Act Within Scope of Authority: To act only within the scope of authority granted by the principal.

Duty to Keep Records: An agent must keep reasonable records of receipts, disbursements, and transactions made by the agent on behalf of the principal. Accordingly,

the agent's duty to keep records when exercising his/her powers cannot be waived in the power of attorney instrument; this will come as a surprise to many agents, but probably a relief to judges asked to review the agent's actions and reasons for acting.

Duty to Disclose Information: If the power of attorney instrument is silent on the duty to disclose, the agent is not required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless ordered by a court, or requested by the principal, a guardian, a conservator, or another fiduciary who is acting for the principal, e.g., a trustee, adult protective services, or on the death of the principal by a Personal Representative or successor in interest of the principal's estate, e.g., a beneficiary. If a request for this information is asked from the agent, the agent has 30 days to comply with the request, or 'provide a record substantiating why additional time is needed.' [MCL 556.214(9).] Note, however, that the duty to disclose information to others does not relieve the agent of its nonwaivable obligation to maintain records of regarding his/her actions, all receipts, and all disbursements.

Waivable Responsibilities: MCL 556.214(2) identifies several of the agent's responsibilities and duties that can be expressly *waived* by the principal in the durable power of attorney instrument.

Duty of Loyalty: To act loyally for the principal.

Duty to Avoid Conflict of Interest: To act so as to not create a conflict of interest that impairs the agent's ability to act impartially.

Duty of Prudence Dealing with Property: To act with the care competence and diligences that a prudent person would in dealing with another's property.

Duty to Cooperate with Patient Advocate: To cooperate with a person who has authority to make health care decisions for the principal to carry out reasonable expectations concerning health care actually known to the agent.

Duty to Preserve Estate Plan: To attempt to preserve the principal's estate plan to the extent that the plan is actually known to the agent and preserving the plan is consistent with the principal's best interests based on all relevant factors.

Duty to Preserve the Principal's Estate Plan: The agent's waivable duty to preserve the principal's estate plan is described in greater detail in the Michigan statute. [MCL 556.214(2)(e)]. It provides that to the extent that the principal's estate plan is *actually known* by the agent, and consistent with the principal's *best interests best based on relevant factors*, the agent must *consider all* of the following in the exercise of his/her powers on behalf of the principal:

- (i) the value and nature of the principal's property.
- (ii) the principal's foreseeable obligations and need for maintenance.
- (iii) the desirability of minimizing taxes, including income, estate, inheritance, GST, and gift taxes.
- (iv) eligibility for a benefit, program, or assistance under a statute or regulation.

An agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for the agent's failure to preserve that estate plan. [MCL 556.214(2)(e)(3).]

Statutory Exoneration of Agent: Other provisions in the Act also provide some protection for the agent who makes decisions on behalf of the principal that might implicate the principal's estate plan. Those provisions include:

Conflicting Interest: If the instrument waives the duty, the agent is not liable solely because the agent also benefits from his/her act or has an individual or conflicting interest in the property or the affairs of the principal. [MCL 556.214(4).]

Declines in Value: A decline in the value of the principal's property is not in itself sufficient to establish a breach of fiduciary duty. [MCL 556.214(6).]

Monitoring Coagents or Predecessors: If the agent does not have knowledge of a breach or imminent breach of fiduciary duty by another agent who is or was serving under the power does not have duty to investigate the conduct of any coagent or predecessor agent to rule out the possibility of a breach. [MCL 556.214(7).]

Delegation of Powers: If the agent possesses the authority to delegate power to another, he/she is not liable for an error of judgment, or default of the person to whom the power is delegated so long as the agent exercises care, competence and diligence in selecting, *and monitoring*, the person to whom the power was delegated. [MCL 556.214(8).]

A recent Court of Appeals decision held that an agent acting under an 'old' durable power of attorney, not formally covered by the 'new' Michigan Power of Attorney act, had breached her fiduciary duty and was liable for conversion of the principal's assets.

Manny v. Fox, Michigan Court of Appeals, 2026 LX 404290, August 13, 2026

Facts: The facts are convoluted and long, so this is limited to the basics. Niece Cynthia was named as agent under a durable power of attorney in 2013. The principal, after a stroke and dementia, moves into a nursing home in Toledo.

Instrument: The durable power of attorney instrument had some interesting, aka limiting, provisions. That instrument expressly provided, in part: (i) the agent was not authorized to make a gift of any or all of the principal's property; (ii) the agent was not authorized to create an account or other assets in joint tenancy between herself and her agent; (iii) her agent was not to be exonerated for any action that resulted from an abuse of fiduciary or confidential relationship; and (iv) the agent was not authorized to receive any reasonable compensation for her services.

Agent's Actions: Several actions taken by the agent were the focus of the trial court and the Court of Appeals. [Interestingly, the claim for breach of fiduciary duty and conversion was filed in the Circuit Court, which has concurrent jurisdiction with the probate court.

MCL 700.1303.] Those noted by the courts included: (i) the agent withdrew \$4,575 from the principal's savings account, which had a POD designation of another, and deposited the funds in an account in the agent's name alone; (2) the agent received at least one Social Security check, when another was a representative payee, which check(s) the agent endorsed and cashed; (3) the agent reinstated the principal's auto insurance when the principal no longer was capable of driving, living in a nursing home; (4) the agent permitted a nephew to drive the principal's vehicle without paying any rent or lease payments; (5) the principal's Home Depot credit card was entrusted to the principal's grandson by the agent, on which multiple charges were made, which the agent paid without ever examining the account statements; and (6) the agent apparently purchased using the principal's charge cards two Louis Vuitton handbags at over \$2,000 each which were delivered to the agent's PO Box. While the agent denied that she used the principal's charge cards, she nonetheless paid them without any review.

Circuit Court: The court found that Cynthia had breached her fiduciary duties under the durable power of attorney and converted the principal's property. It entered a judgment in favor of the principal's estate in the amount of \$41,028 plus attorney's fees and costs awarded to the principal's estate.

Court of Appeals: The Court sustained the circuit court's decision.

Statute of Limitations: Cynthia claimed that the statute of limitations had run on the claims against her. The Court found that the statute of limitations for breach of fiduciary duty and/or breach of trust is 3 years when the beneficiary knew or should have known of the breach.

Breach of Fiduciary Duty: While several of the actions taken by Cynthia were mentioned by the Court in finding a breach of fiduciary duty, the principal focus was on her placing money taken from the POD account and depositing those funds in an account in the agent's name alone. Noting the express prohibition in the durable power of attorney on creating joint accounts the Court noted that *"Thus, [Cynthia] violated the power of attorney in this regard, constituting a breach of her fiduciary duty, and the trial court did not clearly err in reaching the same conclusion."*

Other Breaches: Other breaches of fiduciary duty the Court identified when the Social Security checks were endorsed and cashed by the agent despite the presence of the representative payee, the reinstatement of the principal's car insurance, the permitted use of the principal's vehicle by her grandson, the grandson's use of the principal's Home Depot credit cards, and the purchase of the Louis Vuitton handbag's using the principal's charge card. All were viewed as gifts or a misuse of the principal's funds since none of the transactions were authorized by her durable power of attorney.

Conversion: Cynthia claimed that she was not the individual who was using the principal's charge cards. But she was unable to explain in her testimony how the cards were used to purchase items close to her home while the principal was living in a nursing home in Toledo. Moreover, the deposit of the funds in the agent's own account was not only a breach of fiduciary duty but also an act of conversion. By wrongfully exerting control over the principal's property inconsistent with her rights as agent, the trial court had not erred when it concluded that Cynthia had committed conversion.

Observation: Under Michigan's 'new' Power of Attorney statute, an agent who 'wrongfully converts the principal's property, or who refuses without colorable claim of right to transfer possession of the principal's property to the principal's successor in interest, is liable to those successors in interest for **treble in value** of any property converted or wrongfully withheld from the successors in interest.' This exposure to triple damages is comparable with the Michigan Trust Code which imposes a duty on the trustee to locate trust property and to compel the delivery of that property and to obtain relief if a person converts trust property or refuses without colorable claim to transfer property to the trustee upon demand, with exposure to **double damages**. [MCL 700.7813(4).]

Conclusion: How an agent manages the principal's assets under the 'new' Michigan Power of Attorney state should change. The statute's guidance on how an agent's decisions can impact the principal's estate plan will be of some help, along with its exoneration provisions. However, the level of flexibility accorded the agent will have to be reflected in the durable power of attorney instrument itself with respect to what duties the statute imposes that can be waived by the principal, and possibly the level of exposure the agent might face with breach of trust and/or conversion claims. Clearly the courts in the *Manny* case had little trouble in finding both breach of trust and conversion by the agent, who under the new statute could have faced treble damages for conversion. How many agents

understand this exposure is doubtful, so it's important to alert them to their responsibilities under the law, e.g., recordkeeping, and their need to avoid actions that look like a conversion of the principal's property.

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