

**SUBSTITUTE FOR
HOUSE BILL NO. 5369**

A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"
by amending section 5501 (MCL 700.5501), as amended by 2012 PA 141,
and by adding section 5501a.

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 principal's
3 attorney-in-fact in a writing that contains the words "This power
4 of attorney is not affected by the principal's subsequent
5 disability or incapacity, or by the lapse of time", or "This power
6 of attorney is effective upon the disability or incapacity of the
7 principal", or similar words showing the principal's intent that
8 the authority conferred is exercisable notwithstanding the

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

4 (2) A durable power of attorney under this section ~~shall~~**MUST**
5 be dated and signed voluntarily by the principal or signed by a
6 notary public on the principal's behalf ~~pursuant to~~**UNDER** section
7 33 of the Michigan notary public act, 2003 PA 238, MCL 55.293. The
8 durable power of attorney ~~shall~~**MUST** be 1 or both of the following:

9 (a) Signed in the presence of 2 witnesses, neither of whom is
10 the attorney-in-fact, and both of whom also sign the durable power
11 of attorney.

12 (b) Acknowledged by the principal before a notary public, who
13 endorses on the durable power of attorney a certificate of that
14 acknowledgment and the true date of taking the acknowledgment.

15 (3) An attorney-in-fact designated and acting under a durable
16 power of attorney has the authority, rights, responsibilities, and
17 limitations as provided by law with respect to a durable power of
18 attorney, including, but not limited to, all of the following:

19 (a) Except as provided in the durable power of attorney, the
20 attorney-in-fact shall act in accordance with the standards of care
21 applicable to fiduciaries exercising powers under a durable power
22 of attorney.

23 (b) The attorney-in-fact shall take reasonable steps to follow
24 the instructions of the principal.

25 (c) Upon request of the principal, the attorney-in-fact shall
26 keep the principal informed of the attorney-in-fact's actions. The
27 attorney-in-fact shall provide an accounting to the principal upon

1 request of the principal, to a conservator or guardian appointed on
2 behalf of the principal upon request of the guardian or
3 conservator, or pursuant to judicial order.

4 (d) The attorney-in-fact shall not make a gift of all or any
5 part of the principal's assets, unless provided for in the durable
6 power of attorney or by judicial order.

7 (e) Unless provided in the durable power of attorney or by
8 judicial order, the attorney-in-fact, while acting as attorney-in-
9 fact, shall not create an account or other asset in joint tenancy
10 between the principal and the attorney-in-fact.

11 (F) UNLESS PROVIDED IN THE DURABLE POWER OF ATTORNEY OR BY
12 JUDICIAL ORDER AND SUBJECT TO STATE AND FEDERAL LAW, INCLUDING
13 COPYRIGHT LAW, AND THE APPLICABLE TERMS-OF-SERVICE AGREEMENT, THE
14 ATTORNEY-IN-FACT, WHILE ACTING AS ATTORNEY-IN-FACT, SHALL NOT DO
15 ANY OF THE FOLLOWING:

16 (i) EXERCISE CONTROL OVER DIGITAL PROPERTY.

17 (ii) EXERCISE A RIGHT IN DIGITAL PROPERTY.

18 (iii) CHANGE A GOVERNING INSTRUMENT AFFECTING THE DIGITAL
19 PROPERTY.

20 (G) ~~(f)~~—The attorney-in-fact shall maintain records of the
21 attorney-in-fact's actions on behalf of the principal, including
22 transactions, receipts, disbursements, and investments.

23 (H) ~~(g)~~—The attorney-in-fact may be liable for any damage or
24 loss to the principal, and may be subject to any other available
25 remedy, for breach of fiduciary duty owed to the principal. In the
26 durable power of attorney, the principal may exonerate the
27 attorney-in-fact of any liability to the principal for breach of

1 fiduciary duty except for actions committed by the attorney-in-fact
2 in bad faith or with reckless indifference. An exoneration clause
3 is not enforceable if inserted as the result of an abuse by the
4 attorney-in-fact of a fiduciary or confidential relationship to the
5 principal.

6 (I) ~~(h)~~—The attorney-in-fact may receive reasonable
7 compensation for the attorney-in-fact's services if provided for in
8 the durable power of attorney.

9 (4) Before exercising authority under a durable power of
10 attorney, an attorney-in-fact shall execute an acknowledgment of
11 the attorney-in-fact's responsibilities that contains all of the
12 substantive statements in substantially the following form:

13 I, _____, have been appointed as attorney-in-
14 fact for _____, the principal, under a durable
15 power of attorney dated _____. By signing this document, I
16 acknowledge that if and when I act as attorney-in-fact, all of the
17 following apply:

18 (a) Except as provided in the durable power of attorney, I
19 must act in accordance with the standards of care applicable to
20 fiduciaries acting under durable powers of attorney.

21 (b) I must take reasonable steps to follow the instructions of
22 the principal.

23 (c) Upon request of the principal, I must keep the principal
24 informed of my actions. I must provide an accounting to the
25 principal upon request of the principal, to a guardian or
26 conservator appointed on behalf of the principal upon the request
27 of that guardian or conservator, or pursuant to judicial order.

1 (d) I cannot make a gift from the principal's property, unless
2 provided for in the durable power of attorney or by judicial order.

3 (e) Unless provided in the durable power of attorney or by
4 judicial order, I, while acting as attorney-in-fact, ~~shall not~~
5 **CANNOT** create an account or other asset in joint tenancy between
6 the principal and me.

7 **(F) UNLESS PROVIDED IN THE DURABLE POWER OF ATTORNEY OR BY**
8 **JUDICIAL ORDER AND SUBJECT TO STATE AND FEDERAL LAW, INCLUDING**
9 **COPYRIGHT LAW, AND THE APPLICABLE TERMS-OF-SERVICE AGREEMENT, I,**
10 **WHILE ACTING AS ATTORNEY-IN-FACT, CANNOT DO ANY OF THE FOLLOWING:**

11 **(i) EXERCISE CONTROL OVER THE PRINCIPAL'S DIGITAL PROPERTY.**

12 **(ii) EXERCISE A RIGHT IN THE PRINCIPAL'S DIGITAL PROPERTY.**

13 **(iii) CHANGE A GOVERNING INSTRUMENT AFFECTING THE PRINCIPAL'S**
14 **DIGITAL PROPERTY.**

15 **(G) ~~(f)~~—**I must maintain records of my transactions as
16 attorney-in-fact, including receipts, disbursements, and
17 investments.

18 **(H) ~~(g)~~—**I may be liable for any damage or loss to the
19 principal, and may be subject to any other available remedy, for
20 breach of fiduciary duty owed to the principal. In the durable
21 power of attorney, the principal may exonerate me of any liability
22 to the principal for breach of fiduciary duty except for actions
23 committed by me in bad faith or with reckless indifference. An
24 exoneration clause is not enforceable if inserted as the result of
25 my abuse of a fiduciary or confidential relationship to the
26 principal.

27 **(I) ~~(h)~~—**I may be subject to civil or criminal penalties if I

1 violate my duties to the principal.

2 Signature: _____ Date: _____

3 (5) A third party is not liable to the principal or any other
4 person because the third party has complied in good faith with
5 instructions from an attorney-in-fact named in a durable power of
6 attorney whether or not the attorney-in-fact has executed an
7 acknowledgment that complies with subsection (4). A third party is
8 not liable to the principal or any other person if the third party
9 requires an attorney-in-fact named in a durable power of attorney
10 to execute an acknowledgment that complies with subsection (4)
11 before recognizing the durable power of attorney.

12 (6) An attorney-in-fact's failure to comply with subsection
13 (4) does not affect the attorney-in-fact's authority to act for the
14 principal as provided for in the durable power of attorney and does
15 not affect the attorney-in-fact's responsibilities or potential
16 liability to the principal.

17 (7) ~~Subsections~~ **EXCEPT AS OTHERWISE PROVIDED IN THIS**
18 **SUBSECTION, SUBSECTIONS** (2) to (6) do not apply to any of the
19 following:

20 (a) A durable power of attorney executed before October 1,
21 2012. **SUBSECTIONS (3) (F) AND (4) (F) DO NOT APPLY TO A DURABLE POWER**
22 **OF ATTORNEY EXECUTED BEFORE OCTOBER 1, 2014.**

23 (b) A delegation under section 5103 or a similar power of
24 attorney created by a parent or guardian regarding the care,
25 custody, or property of a minor child or ward.

26 (c) A patient advocate designation or a similar power of
27 attorney relating to the principal's health care.

1 (d) A durable power of attorney that is coupled with an
2 interest in the subject matter of the power.

3 (e) A durable power of attorney that is contained in or is
4 part of a loan agreement, security agreement, pledge agreement,
5 escrow agreement, or other similar transaction.

6 (f) A durable power of attorney in connection with a
7 transaction with a joint venture, limited liability company,
8 partnership, limited partnership, limited liability partnership,
9 corporation, condominium, condominium association, condominium
10 trust, or similar entity, including, without limitation, a voting
11 agreement, voting trust, joint venture agreement, royalty
12 agreement, license agreement, proxy, shareholder's agreement,
13 operating agreement, partnership agreement, management agreement,
14 subscription agreement, certification of incorporation, bylaws, or
15 other agreement that primarily relates to such an entity.

16 (g) A power of attorney given primarily for a business or a
17 commercial purpose.

18 (h) A power of attorney created on a form prescribed by a
19 government or a governmental subdivision, agency, or
20 instrumentality for a governmental purpose.

21 **SEC. 5501A. (1) ON RECEIPT OF AN ATTORNEY-IN-FACT'S WRITTEN**
22 **REQUEST UNDER THIS SUBSECTION FOR ACCESS TO DIGITAL PROPERTY,**
23 **OWNERSHIP OF DIGITAL PROPERTY, OR A COPY OF A DIGITAL ASSET, A**
24 **DIGITAL CUSTODIAN SHALL PROVIDE THE ATTORNEY-IN-FACT WITH THE**
25 **REQUESTED ACCESS, OWNERSHIP, OR COPY, AS APPLICABLE. AN ATTORNEY-**
26 **IN-FACT'S WRITTEN REQUEST UNDER THIS SUBSECTION MUST BE ACCOMPANIED**
27 **BY A COPY OF THE DURABLE POWER OF ATTORNEY GRANTING THE ATTORNEY-**

1 IN-FACT POWER OVER DIGITAL PROPERTY.

2 (2) A DIGITAL CUSTODIAN SHALL COMPLY NOT LATER THAN 56 DAYS
3 AFTER RECEIPT OF A REQUEST MADE UNDER SUBSECTION (1). IF, NOT LATER
4 THAN 56 DAYS AFTER RECEIVING A REQUEST MADE UNDER SUBSECTION (1),
5 THE DIGITAL CUSTODIAN FAILS TO COMPLY WITH THE REQUEST, THE
6 ATTORNEY-IN-FACT MAY PETITION THE COURT FOR AN ORDER DIRECTING
7 COMPLIANCE.

8 (3) A DIGITAL CUSTODIAN IS NOT LIABLE FOR AN ACTION DONE IN
9 COMPLIANCE WITH THIS SECTION.

10 Enacting section 1. This amendatory act does not take effect
11 unless all of the following bills of the 97th Legislature are
12 enacted into law:

13 (a) House Bill No. 5366.

14 (b) House Bill No. 5367.

15 (c) House Bill No. 5368.

16 (d) House Bill No. 5370.