

HOUSE BILL No. 5369

February 26, 2014, Introduced by Reps. Leonard, LaFontaine, Cotter, Geiss, Lauwers,
Kowall and Jenkins and referred to the Committee on Judiciary.

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
9 principal's subsequent disability or incapacity and, unless the
10 power states a termination time, notwithstanding the lapse of time

1 since the execution of the instrument.

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

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

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

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

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

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

23 (c) Upon request of the principal, the attorney-in-fact shall
24 keep the principal informed of the attorney-in-fact's actions. The
25 attorney-in-fact shall provide an accounting to the principal upon
26 request of the principal, to a conservator or guardian appointed on
27 behalf of the principal upon request of the guardian or

1 conservator, or pursuant to judicial order.

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

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

9 (F) UNLESS PROVIDED IN THE DURABLE POWER OF ATTORNEY OR BY
10 JUDICIAL ORDER AND SUBJECT TO THE APPLICABLE TERMS-OF-SERVICE
11 AGREEMENT, THE ATTORNEY-IN-FACT, WHILE ACTING AS ATTORNEY-IN-FACT,
12 SHALL NOT DO ANY OF THE FOLLOWING:

13 (i) EXERCISE CONTROL OVER DIGITAL PROPERTY.

14 (ii) EXERCISE A RIGHT IN DIGITAL PROPERTY.

15 (iii) CHANGE A GOVERNING INSTRUMENT AFFECTING THE DIGITAL
16 PROPERTY.

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

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

1 attorney-in-fact of a fiduciary or confidential relationship to the
2 principal.

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

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

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

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

18 (b) I must take reasonable steps to follow the instructions of
19 the principal.

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

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

27 (e) Unless provided in the durable power of attorney or by

judicial order, I, while acting as attorney-in-fact, ~~shall not~~
CANNOT create an account or other asset in joint tenancy between
 the principal and me.

**(F) UNLESS PROVIDED IN THE DURABLE POWER OF ATTORNEY OR BY
 JUDICIAL ORDER AND SUBJECT TO THE APPLICABLE TERMS-OF-SERVICE
 AGREEMENT, I, WHILE ACTING AS ATTORNEY-IN-FACT, CANNOT DO ANY OF
 THE FOLLOWING:**

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

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

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

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

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

(I) ~~(h)~~—I may be subject to civil or criminal penalties if I
 violate my duties to the principal.

Signature: _____ Date: _____

(5) A third party is not liable to the principal or any other

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

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

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

17 (a) A durable power of attorney executed before October 1,
 18 2012. **SUBSECTIONS (3)(F) AND (4)(F) DO NOT APPLY TO A DURABLE POWER**
 19 **OF ATTORNEY EXECUTED BEFORE OCTOBER 1, 2014.**

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

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

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

27 (e) A durable power of attorney that is contained in or is

1 part of a loan agreement, security agreement, pledge agreement,
2 escrow agreement, or other similar transaction.

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

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

15 (h) A power of attorney created on a form prescribed by a
16 government or a governmental subdivision, agency, or
17 instrumentality for a governmental purpose.

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

26 (2) A DIGITAL CUSTODIAN SHALL COMPLY NOT LATER THAN 56 DAYS
27 AFTER RECEIPT OF A REQUEST MADE UNDER SUBSECTION (1). IF THE

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

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

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

12 (a) Senate Bill No. ____ or House Bill No. 5368 (request no.
13 01198'13).

14 (b) Senate Bill No. ____ or House Bill No. 5367 (request no.
15 04550'13).

16 (c) Senate Bill No. ____ or House Bill No. 5366 (request no.
17 04551'13).

18 (d) Senate Bill No. ____ or House Bill No. 5370 (request no.
19 04553'13).