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BILL ANALYSIS

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Senate Bill 92 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Steven Bieda
Committee: Judiciary

Date Completed: 8-15-11

RATIONALE

Some people are concerned that durable powers of attorney can be used for purposes of financial exploitation, particularly involving the elderly. When a power of attorney is created, an individual, called the principal, authorizes another person, called the attorney-in-fact or agent, to act on the individual's behalf in one or more matters. A power of attorney is "durable" if it either remains in effect, or takes effect, when the principal becomes incompetent to manage his or her affairs; this may occur due to illness, injury, or dementia, for example. Although durable powers of attorney are designed to benefit the individuals who create them, there are concerns that some attorneys-in-fact might abuse their authority, especially if the authority delegated is broad and includes financial decision-making.

The Estates and Protected Individuals Code (EPIC) prescribes requirements for creating a durable power of attorney and addresses related matters, but does not spell out the responsibilities of an agent, indicate prohibited conduct, or expressly obligate the agent to act in the best interests of the principal. It has been suggested that these issues should be addressed in statute, in order to prevent financial exploitation and other abuse of power.

CONTENT

The bill would amend the Estates and Protected Individuals Code to specify required and prohibited conduct of an attorney-in-fact designated and acting under a durable power of attorney; and require an attorney-in-fact to execute an acceptance of obligations before exercising authority under a durable power of attorney.

The bill would apply to a durable power of attorney executed on or after April 1, 2012.

Responsibilities, Limitations, & Rights

The bill specifies that an attorney-in-fact designated and acting under a durable power of attorney would have the authority, rights, responsibilities, and limitations as provided by law, including those described below.

The attorney-in-fact would be required to do the following:

-- Act in accordance with the standards of care applicable to fiduciaries exercising powers under a durable power of attorney.
-- Take reasonable steps to follow the instructions of the principal.
-- Keep the principal informed of the attorney-in-fact's actions.
-- Upon request made at any time, provide an accounting to the principal, a conservator or guardian appointed on behalf of the principal, and others as required by the durable power of attorney, EPIC, or judicial order.
-- Maintain records of his or her actions on behalf of the principal, including transactions, receipts, disbursements, and investments.

Unless provided for in the durable power of attorney, the attorney-in-fact would be prohibited from making a gift of the

principal's assets. The attorney-in-fact also would be prohibited from commingling the principal's assets with assets of the attorney-in-fact, unless provided for in the durable power of attorney or unless the attorney-in-fact was the principal's spouse or ancestor or descendant by blood or adoption.

In addition, unless provided for in the durable power of attorney, the attorney-in-fact would be prohibited from creating an "in trust for", also known as payable-on-death, account, or making, changing, or deleting a transfer-on-death or payable-on-death designation concerning the principal's assets, if the action would alter the payable-on-death designation.

The attorney-in-fact could be liable for any loss to the principal for any action the attorney-in-fact took on behalf of the principal that was not provided for in the durable power of attorney.

The attorney-in-fact could receive reasonable compensation for his or her services if provided for in the durable power of attorney.

Acceptance of Obligations

The bill would require an attorney-in-fact, before exercising authority under a durable power of attorney, to execute an acceptance of his or her obligations. The acceptance would have to contain all of the substantive statements listed in the bill, in substantially the form described in the bill. In addition to statements that reflect the responsibilities and limitations listed above, the form includes a statement that the attorney-in-fact could be subject to civil or criminal penalties for violating his or her duty to the principal. An acceptance would have to be dated and include the name of the attorney-in-fact.

The failure of an attorney-in-fact to comply with the requirement to execute an acceptance would not affect his or her responsibilities and potential liability to the principal.

Third Party Liability

The bill specifies that a third party would not be liable to the principal or any other person because the third party complied with instructions from an attorney-in-fact named in a durable power of attorney who had not executed an acceptance that complied with the bill. A third party also would not be liable to the principal or any other person if the third party required an attorney-in-fact named in a durable power of attorney to execute an acceptance that complied with the bill before the third party recognized the durable power of attorney.

Exceptions

None of the provisions described above would apply to any of the following:

-- A patient advocate designation or a similar power of attorney relating to the principal's health care.
-- A durable power of attorney executed before April 1, 2012.
-- A durable power of attorney that was coupled with an interest in the subject matter of the power.
-- A delegation under Section 5103 of EPIC, or a similar power of attorney created by a parent or guardian regarding the care, custody, or property of a minor child or ward.

(Section 5103 allows a parent or guardian of a minor child or a guardian of a legally incapacitated individual to delegate to another person, for up to six months, any of the parent's or guardian's powers regarding care, custody, or property of the child or ward, except the power to consent to marriage or adoption of a minor ward.)

The bill's provisions also would not apply to a durable power of attorney that was contained in or part of a loan agreement, security agreement, escrow agreement, joint venture agreement, license agreement, shareholder's agreement, operating agreement for a limited liability company, partnership agreement, or other agreement that primarily related to a similar entity.

MCL 700.5501

BACKGROUND

Under common law, a power of attorney did not survive the incompetence of the principal. In order to give individuals an inexpensive, nonjudicial method of delegating property management decisions in the event of their later incapacity, the

National Conference of Commissioners on Uniform State Laws drafted the Uniform Durable Power of Attorney Act. By the late 1980s, most states had enacted this law. Michigan's version of the Uniform Durable Power of Attorney Act currently is found in Article V, Part 5 of the Estates and Protected Individuals Code.

As a private alternative to a guardianship or conservatorship, a durable power of attorney avoids involving the probate court and the need to demonstrate incompetence. A durable power of attorney also represents an alternative to a revocable inter vivos trust, which is commonly used when substantial assets are involved. The authority given to an attorney-in-fact can be either narrow (such as the authority to sell a particular piece of property) or very broad, granting the agent the power to do virtually anything the principal could do.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

When a person becomes unable to manage his or her affairs, he or she may need the protection offered by a durable power of attorney. At the same time, however, the individual can be vulnerable to exploitation by an unethical attorney-in-fact. According to an August 2006 report of the Governor's Task Force on Elder Abuse (described below), "Powers of Attorney are one of the most popular instruments used to abuse elders." If the authority delegated is broad, or "general", the potential for abuse can considerable. As the Michigan Court of Appeals stated, "We are hardpressed to conceive of a more effective and efficient means by which to devastate and destroy the estate of a vulnerable person than through a durable general power of attorney" (*Persinger* v *Holst*, 248 Mich App 499, 2001).

It is commonly understood that an attorney-in-fact is a fiduciary, or a person in a special relationship of trust or responsibility to the principal, and Michigan courts recognize the fiduciary relationship between an attorney-in-fact and a principal (*In Re Susser Estate*, 254 Mich App 323, 2002). The Estates and Protected Individuals Code, however, does not explicitly include attorneys-in-fact in the definition of "fiduciary" or extend fiduciary responsibilities to them. Moreover, EPIC does not otherwise spell out the obligations or standards of conduct of an attorney-in-fact under a durable power of attorney. Even in situations in which there is no wrongdoing, an agent might mismanage the principal's affairs because he or she does not know what is expected or what actions are unacceptable.

The bill would close this gap in the law by expressly requiring an attorney-in-fact to act according to the standards of care that apply to fiduciaries, setting forth specific responsibilities of an attorney-in-fact, and proscribing certain conduct, including giving away the principal's assets. The bill also would require an attorney-in-fact to sign a document accepting these obligations and limitations, and acknowledging the agent's potential liability for violating his or her duties to the principal. This would help ensure that the agent was aware of his or her responsibilities and limitations, and help create a paper trail in the event of abuse. In addition, the bill provides that a third party would not be liable for requiring an attorney-in-fact to execute an acceptance, before the third party recognized the durable power of attorney. This means that a bank teller, for example, could require an agent to sign an acceptance before transferring funds from the principal's account.

Response: Although the bill would require an acceptance of obligations to include the name of the agent and the date, the document also should contain the agent's signature and be witnessed by a third party. This would make the acceptance consistent with other legal documents, and provide additional protection for the parties and the people recognizing the power of attorney.

Supporting Argument

Executive Order 2005-11 created the Governor's Task Force on Elder Abuse as an advisory body in the Office of Services to the Aging. Among other things, the Task Force was charged with reviewing State efforts regarding the prevention of elder abuse, including financial abuse and exploitation, as well as reviewing laws, policies, and practices of other states and recommending changes in Michigan. As noted above, the Task Force found that powers of attorney

are one of the most popular instruments used to abuse the elderly. The Task Force report also stated, "Individuals who obtain Powers of Attorney over another's affairs are not required to obtain any legal advice before or after doing so. The Power of Attorney document (POA) may or may not inform agents of their duties in language they understand…Vulnerable adults often sign multiple Powers of Attorney and create complex situations of uncertainty and insecurity for financial institutions."

The Task Force recommended: "The Governor and legislature should adopt legislation to require agents of Powers of Attorney to sign an acknowledgment of duties informing them of their responsibilities, using a standardized acknowledgment form." The bill would accomplish this with respect to durable powers of attorney.

Opposing Argument

It is questionable whether the bill would provide meaningful protection. A well drafted durable power of attorney will clearly define the power that is granted to the attorney-in-fact and the limits of that authority, and it already is common practice for estate planners to require attorneys-in-fact to sign an acknowledgment or acceptance. In addition, the Michigan Court of Appeals has recognized the fiduciary obligation of an attorney-in-fact "without need for the document itself to include language expressly imposing a fiduciary duty" (*In Re Susser Estate*). Although financial exploitation is a real problem, unscrupulous individuals have many ways of stealing from elderly and vulnerable people without using a durable power of attorney.

Response: Evidently, not all durable power of attorney documents are well drafted, and case law shows that some agents do abuse their authority under a durable power of attorney.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Matthew Grabowski

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