

Revised Durable Power of Attorney Statute

The Effective Date

The State of Michigan recently enacted an Amended Durable Power of Attorney Statute. Before you rush off to change your estate plan, there are two important facts to know:

1. A Durable Power of Attorney (DPOA) signed before October 1, 2012 remains valid. You do not need to amend your DPOA to comply with the new Statute.
2. If you amend your existing DPOA or sign a new DPOA on or after October 1, 2012, you must comply with the new Statute.

Even if you have an existing DPOA, you may wish to amend that form to take advantage of some of the changes in the law. The new statute imposes additional requirements on the appointed Attorney-in-Fact (the AIF) to report to the Principal and beneficiaries, keep and maintain records of DPOA transactions, and conform to fiduciary standards when acting as Attorney-in-Fact.

The Amended Statute

The most striking feature of the Amended DPOA statute is that it requires the appointed AIF to sign an acknowledgement of his or her appointment. This was not necessary under previous Michigan law. This change better assures the AIF's compliance with the DPOA, since the AIF is now an express party to that instrument.

This statute provides a savings clause which imposes the new statutory duties regardless of whether the AIF signs the acknowledgement. It remains to be seen whether the Courts will distinguish between AIFs who sign or don't sign acknowledgements.

The acknowledgement goes hand-in-hand with many important changes to the duties and responsibilities of the AIF. The most critical change is the imposition of fiduciary duties upon the AIF, which were lacking under prior practice unless imposed by the express terms of the DPOA. Now the AIF will be required to act in accordance with fiduciary standards developed for such persons in case law.

This statutory requirement is soft since the DPOA can water down or even eliminate the fiduciary duties of the AIF. Such adjustments to the normal fiduciary duties make sense when the spouse is the primary beneficiary of the estate and the AIF, and it appears he or she will be so for a significant period of time. In other cases, however, the better practice is to impose the full range of fiduciary responsibilities upon the AIF.

The statute also imposes the following obligations on the AIF:

- Take reasonable steps to follow the instructions of the principal.
- Keep the principal informed of the AIF's actions, upon request of the principal.

- Provide an accounting upon request, or as stated in the statute.
- Maintain proper records.

These obligations are not subject to dilution or elimination by the DPOA. Since these obligations are imposed by statute, the AIF will be required to comply with these requirements (as applicable after October 1, 2012) regardless of whether an acknowledgement has been delivered or signed.

What You Should Do

If you already have a DPOA from estate planning that was signed prior to October 1, 2012, you should seriously consider amending your DPOA to take advantage of the new requirements of the amended Statute. In most cases, your beneficiaries will benefit from the more stringent requirements the new statute imposes. This is not true for everyone, particularly where the spouse is likely to be the sole beneficiary and AIF for a sustained period.

If you do not have a DPOA, you should sign one that conforms to this statute. You and your beneficiaries will benefit from the security of knowing that you have properly planned matters for the benefit of your loved ones even when you are disabled and unable to make your own decisions.

In all cases, you should contact us to consider and decide upon your best course of action; take advantage of this opportunity to improve your estate plan.