

UNIFORM POWER OF ATTORNEY ACT

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House Bill 4180

Sponsor: Rep. Lorence Wenke

Committee: Judiciary

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A SUMMARY OF HOUSE BILL 4180 AS INTRODUCED 1-30-07

Citing the need to address concerns not addressed in the original Uniform Durable Power of Attorney Act, and the need to better protect a principal (the one granting authority to another under a power of attorney) who has become incapacitated, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Power of Attorney Act in the summer of 2006 and urged all states to quickly adopt it.

House Bill 4180 would repeal the sections of the Estates and Protected Individuals Code that currently regulate the designation of a durable power of attorney (MCL 700.5501 to 700.5505) and would instead adopt the model act proposed by the NCCUSL, known as the Uniform Power of Attorney Act. A brief overview of the uniform act follows.

Article I: General provisions and powers.

Article I contains, among other things, definitions, applications of the act, exemptions, portability of a power of attorney, duties of an agent, penalties for refusing to accept the authority of a power of attorney, and immunity from liability for good faith actions.

"Power of attorney" would be defined to mean an instrument in which a principal granted authority to an agent to act as attorney in fact for the principal. A power of attorney under the new act would be durable, meaning it would not terminate upon the principal becoming incapacitated, unless it expressly provided that it would be so terminated. In addition, some of the significant provisions of Article I would include:

- Specify that a power of attorney executed in another state would be valid and enforceable in this state if it met certain criteria.
- Specify how a determination of incapacity would be made.
- Specify conditions under which a power of attorney would terminate.
- Allow for the appointment of multiple agents and successor agents.
- Entitle the agent to reasonable compensation and reimbursement of reasonable expenses.
- Require certain duties of an agent, i.e., act loyally for the principal's benefit, avoid conflicts of interest, keep certain records, and try to preserve the principal's estate plan.

- Exempt an agent acting in good faith from liability in numerous situations; for example, an agent would not be liable solely because he or she also benefits from the act.
- Allow a court to construe a power of attorney, review the agent's conduct, and grant appropriate relief, and list those with standing to petition the court to do so.
- Provide that an agent who violates the act be liable to the principal or the principal's successors in interest for damages and attorney fees and costs paid from the principal's estate resulting from the violation, as well as any amount awarded to the principal or successors.
- Provide grounds under which a person could refuse to accept the authority of an agent without liability; otherwise, provide penalties for a refusal in the amount of the total of the damages from the refusal or \$1,000, whichever was greater, plus costs and reasonable attorney fees.

Article 2: Powers.

In general, an agent with general authority would have all the authority to act that the principal would have if the principal had the capacity to contract, except for an act for which the personal action of the principal was required.

Unless a power of attorney otherwise provided, a grant of general authority would include all of the powers listed in Sections 204 to 216 of the act. These would include acting with respect to real property; tangible personal property; stocks and bonds; commodities and options; banks and other financial institutions; operation of business; insurance and annuities; estates, trusts, and other beneficiary relationships; claims and litigation; personal and family maintenance; benefits from government programs or military service; retirement plans, and taxes.

However, an agent would have authority under a power of attorney for the following acts on behalf of the principal or with the principal's property only if the power of attorney expressly granted the authority:

- Create, modify, or revoke an inter vivos trust.
- Make a gift.
- Create or change rights of survivorship.
- Designate or change the designation of a beneficiary.
- Create in the agent an interest in the principal's property through gift, survivorship, or beneficiary designation.
- Delegate to another the authority granted under the power of attorney.
- Disclaim property, including a power of appointment.

If a principal granted inconsistent authority to one or more agents in two or more powers of attorney, the authority granted last would control to the extent of the inconsistency. Powers granted in a power of attorney would be exercisable with respect to interests in property that the principal had both before and after the power of attorney was executed,

for property located in or out of Michigan, for powers exercised in Michigan or another state, and for a power of attorney executed in Michigan or another state.

Article 3: Statutory Form of Power of Attorney.

The bill would create a form that could be used to create a power of attorney that would have the meaning and effect prescribed by the uniform act. The form contains important information for the principal about the types of decisions the agent could make on the principal's behalf. The form would contain the following:

- a place to designate an agent and successor agents.
- a grant of general authority (the principal can cross out any subject or subjects he or she does not want the agent to have authority over, e.g., the principal can cross out stocks and bonds and beneficiary relationships, but leave intact authority over all of the other subject areas listed in the bill such as taxes and real property).
- a grant of specific authority (e.g., the principal would have to initial those actions he or she wants to give the agent authority over, such as making a gift or changing a right of survivorship).
- special instructions.
- effective date.
- optional nomination of guardian or conservative.
- reliance on the power of attorney.
- signature and acknowledgement.
- important information for the agent (includes a list of the duties required of agents).
- the agent's acceptance.

The bill also includes an optional form that could be used by an agent to certify facts concerning a power of attorney.

Article 4: Miscellaneous Provisions.

The act would have to be applied and construed to effectuate its general purpose - which is to make the law respecting a power of attorney uniform among the states adopting the uniform act. It would modify, limit, and supersede the federal Electronic Signatures in Global and National Commerce Act., 15 USC 7001 to 7031, with the exception of 15 USC 7001(c) - which pertains to consumer disclosures and preservation of consumer protections, among other things. The bill also would not authorize electronic delivery of any of the notices described in 15 USC 7003(b).

Except as otherwise provided, on its effective date the bill would:

- Apply the act to all powers of attorney created before, on, or after the effective date.
- Apply the act to all judicial proceedings concerning powers of attorney commenced on or after the effective date.

- Apply the act to judicial proceedings concerning powers of attorney commenced before the effective date absent a court finding that a particular provision would substantially interfere with the judicial proceedings or prejudice the rights of the parties, in which case the particular provision would not apply and the superseded law would apply instead.
- Exclude actions taken before the bill's effective date from being affected by it.

FISCAL IMPACT:

Any effect on the judiciary power of attorney caseload cannot be reliably estimated; therefore, it is uncertain what kind of fiscal impact the bill might have on state and local government.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.