

A close-up photograph of a person's hands in a dark suit jacket writing on a white document with a silver pen. The document is on a wooden desk, and there are stacks of papers and binders in the background.

# FINANCIAL POWERS OF ATTORNEY

## Drafting Tips

By Nancy L. Little and Molly P. Petitjean

A financial power of attorney in Michigan,<sup>1</sup> often referred to as a general power of attorney, is an agency relationship in which the client designates another individual to act on the principal's behalf. The client in a power of attorney is referred to as the *principal* and the designee as the *agent* or *attorney-in-fact*.<sup>2</sup>

A power of attorney may be durable, meaning it survives the incapacity of the principal, or may not be durable, depending on its wording.<sup>3</sup> Further, it may be drafted for immediate effect or to take effect on some future triggering event (a *springing* power of attorney).<sup>4</sup>

A power of attorney lasts until revocation, expiration by its terms, or until the principal's death. A principal's incapacity revokes a nondurable power of attorney except as to an agent or other person who, without knowledge of the principal's incapacity, acts in good faith under the power.<sup>5</sup> However, if an agent acting in good-faith reliance on a power of attorney does not have actual knowledge of a principal's

death, disability, or revocation of a power of attorney, the agent may execute a sworn statement to that effect which, in the absence of fraud, is conclusive proof of the power's non-termination or nonrevocation.<sup>6</sup>


A well-drafted estate plan should include a durable power of attorney. Otherwise, if the client becomes incapacitated, it may be necessary for the probate court to appoint a conservator to manage the client's finances.

### Discussion

MCL 700.5501 through MCL 700.5505 set forth the provisions that control powers of attorney.

### Scope

A power of attorney typically relates to management of property. It may include such broad authority as management



of real and personal property, disclaimers, gifting, initiating legal action, creating a trust, and so forth.<sup>7</sup> Most clients execute general powers of attorney specifically to guard against the need for court appointment of a conservator, and when this is the goal, the power of attorney should be drafted to be durable. However, in addition to financial management, a principal may also use a power of attorney to nominate a guardian or conservator for himself or herself and, if appointment of either becomes necessary, the court must make the appointment in accordance with the principal's most recent nomination "except for good cause or disqualification."<sup>8</sup>

### Execution

There are no specific provisions stating how to appoint an agent or a successor, but it is commonly accepted to either name sequential agents or concurrent agents. In the former case, the principal would state, "I designate as my agent: First, John Doe. Second, Jane Doe." In the latter case, the principal would state, "I designate John Doe and Jane Doe, or either one of them, acting alone, as my agents."

A durable power of attorney must be dated and signed in the presence of two witnesses or notarized.<sup>9</sup> The agent cannot act as a witness. Although notarization is not required if the document is witnessed, it is good practice to do so because without notarization the instrument may be challenged outside of Michigan, and financial institutions may question its validity. The agent must sign an acknowledgment substantially complying with MCL 700.5501(4) before acting as agent. Although there are no statutory requirements for the execution of a nondurable power of attorney, it is advisable to execute the document in the presence of two disinterested witnesses and a notary.

### Strict construction

The terms of a power of attorney are strictly construed; general powers are limited to those necessary to effectuate the specific purposes set forth in the document.<sup>10</sup> General terms do not add new powers. Consequently, powers granted to an agent should be carefully drafted so that the powers the principal intends to include are specifically enumerated or can be implied as necessary to effectuate the enumerated powers.<sup>11</sup>

For example, in *Long v City of Monroe*, a question arose as to whether a general power of attorney granted the agent authority to sign a petition requesting a special assessment. The power of attorney granted authority to the agent to "sell and convey any lands owned by us or either of us in the county of Monroe and State of Michigan and to make, execute and deliver in our names all necessary and incident deeds of conveyances or assignments, bills of sale, or other instruments that may be in the premises required."<sup>12</sup> The Michigan Supreme Court held that the language of the power of attorney did not grant the agent authority to concur in the request for a special assessment of the land in question.<sup>13</sup>

The rule of strict construction is particularly crucial if the principal intends to authorize the agent to make gifts on the principal's behalf. Michigan prohibits an agent from making gifts unless specifically authorized to do so in the document or approved by court order.<sup>14</sup> Further, the IRS has consistently invalidated gifts made under powers of attorney that do not contain specific gifting language, pulling back the value of such gifts into a deceased principal's estate.<sup>15</sup> While some states have subsequently amended their power of attorney statutes to imply gift-making authority, Michigan has not.

The rule of strict construction is also significant if the principal intends the agent to have the authority to create a trust or take steps to qualify the principal for Medicaid or other government services. Disability planning may necessarily involve divestment of assets or other steps that could be considered a gift to the agent or others. A standard durable power of attorney may not contain terms that are broad enough to enable the agent to take steps necessary to create trusts, remove assets from existing trusts, file gift tax returns, contract for services with a third party, or take other steps necessary to effectuate disability planning. These powers should be expressly defined.

An exception to the rule of strict construction is the authority of the agent to disclaim. A general provision in a power of attorney granting the agent the authority to do "whatever the principal could do," or words of similar effect, includes the power to disclaim, unless the authority to disclaim is specifically excluded or limited.<sup>16</sup> Unless the power of attorney "denies the agent the authority to disclaim, the right to disclaim exists notwithstanding the existence of" a spendthrift clause or similar restriction or a restriction or limitation on the right to disclaim.<sup>17</sup>

### AT A GLANCE

- A financial power of attorney is an important and powerful estate planning tool that requires precise drafting. This article addresses essential drafting tips to ensure the power of attorney you prepare will effectuate your clients' intentions.

### Agent as fiduciary

Under common law, an agent in a power of attorney is a fiduciary<sup>18</sup> and, by statute, must act according to the standards of care applicable to fiduciaries except as otherwise provided in the document.<sup>19</sup> Therefore, particular care should be taken when drafting a power of attorney in which the principal plans to authorize gifts to the intended agent or permit the agent to create joint tenancies between the principal and agent. MCL 700.1214 specifically prohibits self-dealing on the part of a fiduciary absent an express authorization in the governing instrument.

Nevertheless, a competent principal may consent to an action by the agent that would otherwise be self-dealing or other breach of duty,<sup>20</sup> such as the creation of joint tenancies between the principal and the agent. However, the burden is on the agent, if challenged, to prove that the principal's consent was given after full disclosure of the facts.<sup>21</sup>

An agent in a general power of attorney is accountable to the principal and any conservator or other fiduciary charged with management of the principal's property.<sup>22</sup> On behalf of a disabled principal, a court-appointed fiduciary may exercise the principal's power to amend or revoke a general power of attorney.<sup>23</sup>

### Termination

A durable power of attorney is not affected by lapse of time; for example, the durable power of attorney drafted for a client in 1990 remains valid today unless the instrument states a termination time.<sup>24</sup>

A power of attorney that contains the words, "This power of attorney is not affected by the principal's subsequent disability or incapacity of the principal" or similar words remains in effect even after the principal's subsequent incapacity.<sup>25</sup> If the document does *not* include words to this effect, the agent's authority will terminate upon the principal's disability<sup>26</sup> except to the extent the agent, acting in good faith, has no actual knowledge of the principal's disability.<sup>27</sup>

By law, the death of the principal terminates the agency relationship.<sup>28</sup> However, if the agent or other person, without actual knowledge of the principal's death, acts in good faith under the power of attorney, the principal's successors in interest will be bound by those actions.<sup>29</sup> For example, in *In re Capuzzi Estate*, the agent directed the transfer of certain limited partnership shares before the principal's death but the transfer was not completed.<sup>30</sup> In upholding the transfer, the Michigan Supreme Court noted that "when an agent has completed all necessary actions and all that is left is for a third party to complete the transaction . . . the principal's death has no effect on the validity of the transaction and does not relieve the requirements on the third party to act."<sup>31</sup> Note that this holding would not apply if an agent performed some, but not all, of the acts necessary; it is narrowly limited to the situation in which the agent has completed all necessary actions.<sup>32</sup> ■



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### ENDNOTES

1. The scope of this article is limited to financial powers of attorney and does not address the following: (1) a designation of a patient advocate, also known as a durable power of attorney for healthcare, pursuant to MCL 700.5506 through MCL 700.5515; (2) the appointment of an "authorized representative" (power of attorney) through the Michigan Department of Treasury, Form 151; (3) the appointment of a power of attorney for federal tax purposes, Form 2848; or (4) the appointment of a "representative payee" for Social Security Administration purposes, Form SSA-1696U4.
2. MCL 700.5501(1).
3. *Id.*
4. *Id.*
5. MCL 700.5504(2).
6. MCL 700.5505(1).
7. MCL 700.5501 and MCL 700.5502.
8. MCL 700.5503(2).
9. MCL 700.5501(2).
10. *Kuite v Lage*, 152 Mich 638, 640; 116 NW 467 (1908); *Park v Appeal Bd of Mich Employment Sec Comm*, 355 Mich 103, 135; 94 NW2d 407 (1959); *Bergman v Dykhouse*, 316 Mich 315, 319; 25 NW2d 210 (1946); *Long v Monroe*, 265 Mich 425, 427; 251 NW 582 (1933).
11. 1 Restatement Agency, 2d, § 12, p 57.
12. *Long*, 265 Mich at 427.
13. *Id.* at 429-430.
14. MCL 700.5501(3)(d).
15. See, e.g., IRS PLR 8635007 (May 19, 1986), in which the IRS treated gifts made by an agent under a Michigan durable power of attorney as a revocable transfer and thus includable in the deceased principal's estate. See also *Casey v Comm'r of Internal Revenue*, 948 F2d 895 (CA 4, 1991) and IRS PLR 9231003 (April 9, 1992).
16. MCL 700.2902(2).
17. *Id.*
18. *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983) and *In re Susser Estate*, 254 Mich App 232, 234-235; 657 NW2d 147 (2002).
19. MCL 700.5501(3)(a).
20. *In re King Estate*, unpublished per curiam opinion of the Court of Appeals, issued January 31, 2006 (Docket No. 263497).
21. *In re Cummin Estate*, 258 Mich App 402, 408; 671 NW2d 165 (2003).
22. MCL 700.5503.
23. *Id.*
24. MCL 700.5502.
25. MCL 700.5501.
26. MCL 700.5501(1).
27. MCL 700.5504(2). See also *Persinger v Holst*, 248 Mich App 499, 505 (2001).
28. MCL 700.5504(1). See also *Cooper v Edgewater Bank*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 2011 (Docket No. 296189).
29. MCL 700.5504(1).
30. *In re Capuzzi Estate*, 470 Mich 399; 684 NW2d 677 (2004).
31. *Id.* at 403.
32. *Id.* at 402-405.