
A Guide To: Challenging a Financial Durable Power of Attorney in Michigan

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An estate plan is often conceived as a plan drawn up during one's lifetime with the stated intention of transferring one's property upon death. The most common forms of estate planning documents include Last Wills and Testaments or Trust agreements, but also include transfers on death, by incorporation of joint account arrangements, beneficiary designations, assignments, transfer on death arrangements, and deeds. However, estate planning also encompasses planning for incapacity through the use of documents such as Durable Powers of Attorney for financial affairs and Designations of Patient Advocates for healthcare decisions. These documents allow an individual, the "Principal," to plan for his or her incapacity by delegating certain decision making authority to a trusted family member, friend or advisor who agrees to serve as the Principal's "Agent." With regard to financial matters, a properly drafted and executed Durable Power of Attorney allows an Agent to act on behalf of the Principal without the involvement of the probate court.

Despite being an effective way to plan for incapacity, a Durable Power of Attorney can render the Principal particularly vulnerable to financial abuse. Although the appointed Agent is required to act in the Principal's best interest and solely for the Principal's benefit, it is too often the case that an Agent acting under a Durable Power of Attorney takes advantage of the broad authority granted under the document and acts for the Agent's own benefit. For example, if used improperly, an Agent can disregard the Principal's best interest and withdraw funds from the Principal's bank accounts for unauthorized purposes, or make transfers or gifts of the Principal's assets to the Agent, the Agent's family members, or others. When such abuse occurs, the Principal, the Principal's presumptive heirs, and others interested in the Principal's welfare are not without legal recourse. In order to determine if legal action is necessary, one must first understand what a Durable Power of Attorney is, to what extent an Agent may act on the Principal's behalf, and what limitations are placed on the Agent's authority.

What is a Durable Power of Attorney for Finances? A Durable Power of Attorney for finances (for simplicity, referred to as a "Durable Power of Attorney") is an instrument by which a Principal appoints another person, the "Agent," to act on the Principal's behalf with regard to the Principal's financial affairs. The execution of a Durable Power of Attorney and subsequent Acknowledgment by the Agent of his or her responsibilities creates an agency relationship between the Principal and the Agent. A consequence of the resulting agency relationship is the Agent is a fiduciary and must act solely for the Principal's benefit.^[1]

A Durable Power of Attorney must be executed by a mentally competent Principal; meaning, the Principal has sufficient capacity to understand in a reasonable manner the nature and effect of the act in which he or she is engaged, and the ability to consent to, render a degree of control over, and appreciate the significance and consequences of the resulting agency relationship. If the document is properly drafted, the Principal's subsequent incapacity will not disturb or revoke the Durable Power of Attorney. In fact, a power of attorney is only "durable" if it remains effective during the Principal's incapacity.

The Agent's authority may either be effective immediately upon the Principal's execution of the document or may be "springing"-meaning the Agent may only begin to act upon a finding of the Principal's incapacity. If the Durable Power of Attorney is effective immediately, the Agent may act on the Principal's behalf without the need to present evidence of the Principal's incapacity to third parties. A non-springing Durable Power of Attorney is typically used for the convenience of the Principal, as it allows the Agent to act when the Principal has capacity but is otherwise unable to attend to his or her own financial matters-for example, when the Principal is physically immobile or out of town for an extended period of time. Regardless of whether the Durable Power of Attorney is effectively immediately or is springing, the Agent's authority extinguishes upon the death of the Principal.

What is the extent of the Agent's authority? Durable Powers of Attorney are strictly construed by Michigan courts, and an Agent may only perform those acts specifically delegated by the Principal. Nevertheless, a Principal can delegate to the Agent powers that are quite general and broad enough to cover all of the Principal's financial and property matters. The following are common examples of the powers the Principal may grant to the Agent:

- Power to deposit into and withdraw from all bank accounts,
- Power to sell, mortgage, lease or convey the Principal's real or personal property,
- Power to exercise authority over the Principal's retirement accounts,
- Authority to collect the Principal's Social Security and other benefits,
- Power to prepare and file the Principal's tax returns, and collect any tax refunds,
- Authority to gain entry to the Principal's safe deposit box,
- Authority to make gifts of the Principal's property, and
- Ability to create a joint tenancy in the Principal's assets between the Principal and the Agent.

Although the Agent may have broad authority over the Principal's assets, the Agent cannot act for his or her own account. Unless the Durable Power of Attorney provides otherwise, the Agent is subject to the standards of care applicable to fiduciaries, including the prohibition against self-dealing.^[2] The Agent is held to the highest standards of good faith and fair dealing, and owes the Principal a duty of loyalty with respect to any action taken by the Agent. In essence, the Agent must act primarily for the benefit of the Principal when dealing with the Principal's property.

When the Durable Power of Attorney arrangement doesn't seem right-what can I do? Although a common and effective estate planning tool, a

Durable Power of Attorney can cause the Principal and the Principal's loved ones significant financial harm if the Agent abuses his or her authority. In these instances, a Principal with capacity may simply revoke the Durable Power of Attorney and notify all institutions with which he or she deals of such revocation. However, if the Principal is incapacitated, or being unduly influenced, legal action may be necessary to prevent the Agent from continuing to abuse his or her authority and cause further harm. Depending on the facts and circumstances, the options for legal recourse may include (i) a challenge to the validity of the Durable Power of Attorney, (ii) a petition to appoint a conservator for the Principal, and (iii) a petition to surcharge the Agent for mismanagement of assets and for breach of fiduciary duties. If there is any question as to the validity of a Durable Power of Attorney, the document may be challenged under the following theories:

- The Durable Power of Attorney document was not executed in conformance with Michigan law or was not properly witnessed or notarized;
- The Principal lacked the requisite mental capacity to execute the document;
- The Durable Power of Attorney was forged;
- The Principal executed the Durable Power of Attorney under duress or by coercion;
- The Principal was induced to execute the document by fraud or misrepresentation; or
- The Principal executed the Durable Power of Attorney because of undue influence.

What if the Durable Power of Attorney was validly executed? The Principal of a validly executed Durable Power of Attorney may still be subject to financial harm if the Agent abuses his or her authority. When such abuse is suspected, it may be necessary to petition the probate court of jurisdiction to appoint a conservator for the Principal.^[3] Such a petition may be brought by any person interested in the individual's estate, affairs, or welfare, which includes a person who would be adversely affected by lack of effective management of the individual's property and business affairs. Upon filing such a petition, the probate court may appoint a conservator if the court is satisfied, upon the presentation of clear and convincing evidence, that the individual is unable to manage his or her property and business affairs, and has property that will be wasted or dissipated unless proper management is provided.^[4]

While the appointment of a conservator can revoke the Agent's authority under the Durable Power of Attorney and instead allow the conservator to manage the Principal's assets, further legal action may be necessary to surcharge the Agent or recover assets diverted from the Principal during the period in which the Agent had authority over the Principal's assets. A petition may be brought in probate court to compel the Agent to produce an accounting to disclose and report all transactions he or she entered into as Agent. The Principal, his or her conservator or other fiduciary, and the Principal's presumptive heirs are all interested persons in such proceedings. The petitioner may also, in the same petition, include information sufficient to support a surcharge against the Agent. By way of example, to support a surcharge, the petitioner should demonstrate that the Agent (i) did not act solely for the Principal's benefit, (ii) used the Principal's assets for his or her own benefit, or (iii) failed to prudently manage and administer the Principal's financial affairs.

Due to the significant level of authority granted to the Agent under a Durable Power of Attorney, the Principal and his or her loved ones should prudently monitor any actions taken by the Agent on behalf of the Principal. It may be necessary to take legal action against the Agent for misappropriating funds or otherwise causing the Principal financial harm. The legal process to contest a Durable Power of Attorney and hold an Agent liable for wrong-doing can be rather complex. The assistance of an experienced attorney is essential in order to provide the guidance, advice and expertise necessary to navigate probate court proceedings. For a consultation with a Clark Hill attorney regarding any probate litigation matter, please call Thomas E.F. Fabbri at (248) 988-5856 | tfabbri@clarkhill.com, Mallory A. Kallabat at (248) 530-6342 | mkallabat@clarkhill.com, Jonathan M. Martone at (248) 988-1823 | jmartone@clarkhill.com, Nicholas E. Papisifakis at (248) 530-9132 | npapisifakis@clarkhill.com or another member of Clark Hill's Estate Planning & Probate Litigation practice group. For more information on probate related litigation matters, please visit our website at www.clarkhill.com.

^[1] While Michigan courts generally accept without question that an Attorney-in-Fact is a fiduciary who must solely act for the benefit of the Principal, a Principal may, within the terms of the Durable Power of Attorney, exonerate the Attorney-in-Fact of any liability to the Principal for breach of fiduciary duty except for actions committed in bad faith or with reckless indifference. Additionally, an Attorney-in-Fact may act for his or her own benefit if so instructed by the Principal acting with capacity and under no coercion, duress, or undue influence.

^[2] Although not specifically defined as a "fiduciary" under Michigan's Estate and Protected Individual's Code, Michigan case law holds that an Agent under Durable Power of Attorney has a fiduciary duty to the principal and cannot engage in self-dealing transactions. For example, an Agent cannot personally engage in a transaction with the property of the Principal, invest the Principal's assets in a manner which would benefit the Agent, or profit or otherwise benefit from the purchase, sale, or transfer of the Principal's property.

^[3] Generally, the appropriate venue for conservatorship proceedings is in the county in which the person to be protected resides, if he or she resides in Michigan; otherwise, in the county in which the property of the individual is located.

^[4] Issues may arise with regard to the appointment of a conservator for the Principal. Michigan law provides that certain individuals have priority for such appointment. If, in the Durable Power of Attorney document, the Principal nominates the Agent to serve as his or her conservator, the probate court will appoint the Agent as conservator except for "good cause or disqualification." Michigan Compiled Laws §§700.7409; 700.5503. The burden lies on the petitioner to show that the appointment of the Agent as conservator is not in the Principal's best interest.