

**To:** Members of House Judiciary Committee

**From:** Joint Task Force of the Estate and Trust and Elder and Disability Rights Law Sections of the Maryland State Bar Association

**Date:** January 17, 2022

**Subject:** **HB 18** – Estates & Trusts – Maryland General and Limited Power of Attorney Act – Assistance With Governmental Benefits and Programs

**Position:** **Support with Amendment**

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The Joint Task Force of the Estate and Trust and Elder and Disability Rights Law Sections of the Maryland State Bar Association **supports with amendment** House Bill 18 – Estates and Trusts – Maryland General and Limited Power of Attorney Act – Assistance With Governmental Benefits and Programs.

In 2010 The Maryland General and Limited Power of Attorney Act (the “Act”) was enacted. As a result Maryland has two statutory forms available for use, a general power of attorney form, often referred to as the “short form,” and a longer, limited power of attorney, in which the principal selects the specific subject matters over which the principal wishes to authorize the agent to act. Since its enactment the forms have been revised on occasion to address, for example, changes in the law such as the use of digital assets and Maryland’s elective share law.

In 2020 and 2021 members of the Estate and Trust and Elder and Disability Law Sections of the Maryland State Bar Association participated as a member of the Life & Health Planning Committee to the Maryland Attorney General’s COVID-19 Recovery Task Force (“Covid-19 Task Force”). Recognizing the importance for individuals and family members to be able to gain access to governmental benefits during a pandemic or other crisis, the COVID-19 Recovery Task Force, acting on the recommendations of the Life & Health Planning Committee, proposed that Maryland’s statutory form powers of attorney be amended to improve the accessibility to governmental benefits.

Recognizing that other parts of the statutory forms should also be reviewed, the Joint Task Force of the Estate and Trust and Elder and Disability Rights Law Sections circulated a survey among members of the Maryland Bar to elicit their feedback about the usefulness of the Maryland statutory form powers of attorney and whether there were areas in which the forms could be improved. Including a power to make gifts and to create and fund trusts were cited by estate planning and elder law attorneys as two areas of need. Powers of Attorney often play a significant role in one’s estate plan, when a person’s cognitive or physical challenges prevent them from being able to gift or create trusts that would otherwise help to reduce tax, allow for the continuity of a family business, take care of loved ones, or preserve their assets.

Most practitioners use the “Special Instructions” area of the statutory forms to include custom written powers to address perceived areas of deficiencies in the current forms, for example, the lack of gifting power in the general form, the appointment of successor agents when all prior agents are no longer able to serve, compensation for the agent, disclaimers, etc. The concern, however, is that the addition of the custom language will cause the document to no longer be considered as “substantially

similar in form” which is a requirement under Section 17-201 of the Act for the document to have the force of law behind the Act.

While HB 18 clarifies the authority of the agent to act in assisting the principal with applying for and obtaining governmental benefits, the language in the statutory forms should be revised to address the power to gift and transfer assets of the principal not only in the context of access to governmental benefits, but in the context of estate planning in general. Now would also be the time to improve the form to address other areas of need and concern. The Joint Task Force of the Estate and Trust and Elder and Disability Rights Law Sections has drafted a revised statutory form General Power of Attorney, the language of which may be used to amend HB 18, to accomplish improvement of that statutory form not only with assistance with governmental benefits and programs, but estate planning in general. Review and study of the statutory form limited power of attorney, however, is still needed.

For the reasons stated above, the MSBA **supports with amendment HB 18 and urges a favorable committee report.**

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