

SENATE BILL 139

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1998 Regular Session
8lr0179

By: **Senators Kelley, Blount, Lawlah, Pinsky, Stone, Colburn, Ruben, and Trotter**

Introduced and read first time: January 22, 1998

Assigned to: Judicial Proceedings

A BILL ENTITLED

1 AN ACT concerning

2 **Powers of Attorney**

3 FOR the purpose of establishing certain requirements for the execution of a durable
4 power of attorney; requiring certain durable powers of attorney to include a
5 certain notice and to specify certain duties of the agent or attorney in fact;
6 providing that an attorney in fact is not entitled to compensation unless the
7 power of attorney provides otherwise; requiring certain fees to be specified in a
8 power of attorney or a separate document signed by the principal; requiring an
9 attorney in fact to submit a written statement for services rendered to certain
10 persons within a certain time; requiring certain persons to report suspected
11 attorney in fact abuse to the State's Attorney; requiring the State's Attorney to
12 initiate an investigation within a certain time; authorizing the State's Attorney
13 to take certain actions after completing an investigation; requiring the State's
14 Attorney to send a certain notice to certain persons; requiring the State's
15 Attorney to expunge certain reports of suspected attorney in fact abuse after a
16 certain time; granting immunity to certain persons who make or participate in
17 making certain reports or make or participate in certain investigations or
18 judicial proceedings; making it a misdemeanor subject to certain penalties to fail
19 to make a certain report; making it a misdemeanor subject to certain penalties
20 to make a certain false report; making it a misdemeanor subject to certain
21 penalties to commit attorney in fact abuse; defining certain terms; providing for
22 the application of this Act; and generally relating to powers of attorney.

23 BY renumbering

24 Article - Estates and Trusts
25 Section 13-601 through 13-603, respectively
26 to be Section 13-602 through 13-604, respectively
27 Annotated Code of Maryland
28 (1991 Replacement Volume and 1997 Supplement)

29 BY adding to

30 Article - Estates and Trusts
31 Section 13-601 to be under the new part "Part I. Definitions; General

1 Provisions"; 13-605 and 13-606 to be under the new part "Part II.
2 Execution; Form"; 13-607 to be under the new part "Part III.
3 Compensation of Attorneys in Fact"; and 13-608 through 13-614,
4 inclusive, to be under the new part "Part IV. Attorney in Fact Abuse"
5 Annotated Code of Maryland
6 (1991 Replacement Volume and 1997 Supplement)

7 BY adding to
8 Article - Courts and Judicial Proceedings
9 Section 5-640
10 Annotated Code of Maryland
11 (1995 Replacement Volume and 1997 Supplement)

12 BY repealing and reenacting, with amendments,
13 Article - Estates and Trusts
14 Section 13-601
15 Annotated Code of Maryland
16 (1991 Replacement Volume and 1997 Supplement)
17 (As enacted by Chapter 619 of the Acts of the General Assembly of 1997)

18 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
19 MARYLAND, That Section(s) 13-601 through 13-603, respectively, of Article -
20 Estates and Trusts of the Annotated Code of Maryland be renumbered to be Section(s)
21 13-602 through 13-604, respectively.

22 SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland
23 read as follows:

24 **Article - Estates and Trusts**

25 Subtitle 6. Powers of Attorney.

26 PART I. DEFINITIONS; GENERAL PROVISIONS.

27 13-601.

28 IN THIS SUBTITLE, "DURABLE POWER OF ATTORNEY" MEANS A POWER OF
29 ATTORNEY BY WHICH A PRINCIPAL DESIGNATES ANOTHER AS AN ATTORNEY IN FACT
30 OR AGENT AND THE AUTHORITY IS EXERCISABLE NOTWITHSTANDING THE
31 PRINCIPAL'S SUBSEQUENT DISABILITY OR INCAPACITY.

PART II. EXECUTION; FORM.

13-605.

A DURABLE POWER OF ATTORNEY SHALL BE:

(1) SIGNED IN THE PRESENCE OF TWO ADULT WITNESSES WHO ARE NOT KNOWINGLY ENTITLED TO ANY PORTION OF THE ESTATE OF THE PRINCIPAL OR KNOWINGLY ENTITLED TO ANY FINANCIAL BENEFIT BY REASON OF THE DEATH OF THE PRINCIPAL; AND

(2) ACKNOWLEDGED BY A NOTARY PUBLIC, WHO MAY NOT SERVE AS A WITNESS UNDER ITEM (1) OF THIS SECTION.

13-606.

(A) EACH PREPRINTED DURABLE POWER OF ATTORNEY FORM SOLD OR DISTRIBUTED IN THE STATE AND EACH DURABLE POWER OF ATTORNEY PREPARED IN THE STATE SHALL INCLUDE THE FOLLOWING NOTICE IN 10-POINT BOLD FACE TYPE:

"NOTICE

BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW SEVERAL IMPORTANT FACTS. THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON WHOM YOU DESIGNATE (YOUR AGENT, ALSO KNOWN AS YOUR ATTORNEY IN FACT) BROAD POWERS TO HANDLE YOUR PROPERTY, WHICH MAY INCLUDE BANK ACCOUNTS AND REAL OR PERSONAL PROPERTY, WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU.

THESE POWERS CONTINUE TO EXIST EVEN IF YOU BECOME INCAPACITATED OR INCOMPETENT, UNLESS YOU STRIKE THAT PROVISION IN THIS DOCUMENT.

YOU MAY REVOKE THIS POWER OF ATTORNEY IN WRITING IN THE PRESENCE OF TWO ADULT WITNESSES WHO ARE NOT KNOWINGLY ENTITLED TO ANY PORTION OF YOUR ESTATE OR KNOWINGLY ENTITLED TO ANY FINANCIAL BENEFIT BY REASON OF YOUR DEATH, WITH SIGNATURES ACKNOWLEDGED BY A NOTARY PUBLIC. IF YOU BECOME UNABLE TO SIGN YOUR NAME, THE WRITTEN REVOCATION MAY BE SIGNED BY SOME OTHER PERSON FOR YOU IN YOUR PRESENCE AND AT YOUR EXPRESS DIRECTION IN THE PRESENCE OF TWO ADULT WITNESSES WHO ARE NOT KNOWINGLY ENTITLED TO ANY PORTION OF YOUR ESTATE OR KNOWINGLY ENTITLED TO ANY FINANCIAL BENEFIT BY REASON OF YOUR DEATH, WITH SIGNATURES ACKNOWLEDGED BY A NOTARY PUBLIC.

SHOULD YOU WISH TO APPOINT THE SAME PERSON WHOM YOU DESIGNATE IN THIS DOCUMENT, OR ANY OTHER PERSON AS YOUR AGENT TO MAKE FUTURE HEALTH CARE DECISIONS ON YOUR BEHALF, YOU SHOULD USE A SEPARATE DOCUMENT TO MAKE THAT APPOINTMENT.

1 IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND,
2 YOU SHOULD ASK A LAWYER TO EXPLAIN IT."

3 (B) EACH PREPRINTED DURABLE POWER OF ATTORNEY FORM SOLD OR
4 DISTRIBUTED IN THE STATE AND EACH DURABLE POWER OF ATTORNEY PREPARED
5 IN THE STATE SHALL SPECIFY THE FOLLOWING DUTIES OF THE AGENT OR
6 ATTORNEY IN FACT:

7 (1) THE DUTY TO USE THE PRINCIPAL'S INCOME AND ASSETS FOR THE
8 PRINCIPAL'S BENEFIT ONLY, UNLESS THE POWER OF ATTORNEY EXPRESSLY
9 PROVIDES FOR COMPENSATION FOR THE AGENT OR ATTORNEY IN FACT;

10 (2) THE DUTY TO USE DUE CARE IN ACTING FOR THE PRINCIPAL'S
11 BENEFIT;

12 (3) THE DUTY TO KEEP COMPLETE RECORDS OF ALL TRANSACTIONS
13 CONDUCTED ON BEHALF OF THE PRINCIPAL;

14 (4) THE DUTY TO NOTIFY THE PRINCIPAL OR A THIRD PARTY
15 DESIGNATED IN THE POWER OF ATTORNEY WITHIN 24 HOURS AFTER THE POWER OF
16 ATTORNEY IS USED BY THE ATTORNEY IN FACT FOR A TRANSACTION OVER AN
17 AMOUNT DESIGNATED IN THE POWER OF ATTORNEY; AND

18 (5) THE DUTY TO PROVIDE A FULL ACCOUNTING TO THE PRINCIPAL'S
19 GUARDIAN IF ONE IS APPOINTED BY A COURT.

20 PART III. COMPENSATION OF ATTORNEYS IN FACT.

21 13-607.

22 (A) UNLESS THE POWER OF ATTORNEY PROVIDES OTHERWISE, AN ATTORNEY
23 IN FACT IS NOT ENTITLED TO COMPENSATION.

24 (B) A PERSON WHO CHARGES A FEE FOR ACTING AS AN ATTORNEY IN FACT,
25 INCLUDING A LAWYER, ACCOUNTANT, OR TRUST OFFICER, SHALL SPECIFY THE
26 PERSON'S FEE STRUCTURE IN THE POWER OF ATTORNEY OR IN A SEPARATE
27 DOCUMENT SIGNED BY THE PRINCIPAL.

28 (C) AN ATTORNEY IN FACT MAY NOT BE PAID FOR SERVICES RENDERED
29 UNLESS THE ATTORNEY IN FACT SUBMITS A WRITTEN STATEMENT TO THE
30 PRINCIPAL OR A THIRD PARTY DESIGNATED IN THE POWER OF ATTORNEY BY THE
31 PRINCIPAL WITHIN 1 YEAR AFTER RENDERING THE SERVICE.

32 PART IV. ATTORNEY IN FACT ABUSE.

33 13-608.

34 IN THIS SUBTITLE, "ATTORNEY IN FACT ABUSE" MEANS THE IMPROPER OR
35 ILLEGAL USE OR MANAGEMENT OF A POWER OF ATTORNEY FOR THE PROFIT OR
36 ADVANTAGE OF THE ATTORNEY IN FACT OR ANOTHER PERSON.

1 13-609.

2 NOTWITHSTANDING ANY OTHER PROVISION OF LAW, INCLUDING ANY LAW ON
3 PRIVILEGED COMMUNICATIONS, A LAWYER, ACCOUNTANT, TRUSTEE, GUARDIAN,
4 CONSERVATOR, OR ANY OTHER PERSON RESPONSIBLE FOR PREPARING THE
5 PRINCIPAL'S TAX RECORDS OR RETURNS OR FOR ANY OTHER ACTION CONCERNING
6 THE USE OR PRESERVATION OF A PRINCIPAL'S PROPERTY, WHO HAS REASON TO
7 SUSPECT THAT ATTORNEY IN FACT ABUSE HAS OCCURRED, SHALL MAKE A REPORT
8 IN WRITING TO THE STATE'S ATTORNEY FOR THE COUNTY IN WHICH THE PRINCIPAL
9 RESIDES WITHIN 3 BUSINESS DAYS AFTER RECEIVING THE EVIDENCE OR
10 INFORMATION THAT CAUSED THE INDIVIDUAL TO SUSPECT THAT ATTORNEY IN
11 FACT ABUSE HAS OCCURRED.

12 13-610.

13 (A) WITHIN 10 BUSINESS DAYS AFTER RECEIVING A REPORT OF SUSPECTED
14 ATTORNEY IN FACT ABUSE UNDER § 13-609 OF THIS SUBTITLE, THE STATE'S
15 ATTORNEY SHALL INITIATE AN INVESTIGATION.

16 (B) AFTER THE COMPLETION OF THE INVESTIGATION, THE STATE'S
17 ATTORNEY MAY:

18 (1) DETERMINE THAT THE ATTORNEY IN FACT SHOULD BE CHARGED
19 WITH A CRIMINAL OFFENSE; OR

20 (2) IF THE STATE'S ATTORNEY FINDS THAT ATTORNEY IN FACT ABUSE
21 DID NOT OCCUR, CLASSIFY THE REPORT AS UNFOUNDED.

22 (C) (1) IF THE STATE'S ATTORNEY CLASSIFIES THE REPORT AS
23 UNFOUNDED, THE STATE'S ATTORNEY SHALL SEND NOTICE OF THE CLASSIFICATION
24 BY FIRST-CLASS MAIL TO:

25 (I) THE ALLEGED VICTIM;

26 (II) THE ALLEGED VICTIM'S GUARDIAN OR CAREGIVER; AND

27 (III) THE ATTORNEY IN FACT.

28 (2) THE NOTICE SHALL ADVISE THE RECIPIENT THAT THE REPORT WILL
29 BE EXPUNGED 1 YEAR AFTER THE DATE OF THE REPORT, IF NO FURTHER REPORTS
30 OF ATTORNEY IN FACT ABUSE ARE RECEIVED DURING THE 1-YEAR PERIOD.

31 (D) IF THE STATE'S ATTORNEY FINDS THAT ATTORNEY IN FACT ABUSE
32 OCCURRED, THE STATE'S ATTORNEY MAY IMMEDIATELY PETITION A COURT OF
33 COMPETENT JURISDICTION TO REVOKE THE POWER OF ATTORNEY AND APPOINT A
34 GUARDIAN OF THE PROPERTY FOR THE PRINCIPAL.

35 (E) THE STATE'S ATTORNEY SHALL EXPUNGE A REPORT OF SUSPECTED
36 ATTORNEY IN FACT ABUSE AND ALL INVESTIGATIVE FINDINGS 1 YEAR AFTER THE
37 DATE OF THE REPORT, IF THE REPORT IS CLASSIFIED AS UNFOUNDED AND NO

1 FURTHER REPORTS OF ATTORNEY IN FACT ABUSE ARE RECEIVED DURING THE
2 1-YEAR PERIOD.

3 13-611.

4 A PERSON WHO MAKES OR PARTICIPATES IN MAKING A REPORT OF SUSPECTED
5 ATTORNEY IN FACT ABUSE UNDER § 13-609 OF THIS SUBTITLE OR PARTICIPATES IN
6 AN INVESTIGATION OR A RESULTING JUDICIAL PROCEEDING SHALL HAVE THE
7 IMMUNITY DESCRIBED UNDER § 5-640 OF THE COURTS ARTICLE.

8 13-612.

9 ANY PERSON WHO IS REQUIRED TO REPORT A REASONABLE SUSPICION OF
10 ATTORNEY IN FACT ABUSE UNDER § 13-609 OF THIS SUBTITLE AND WHO KNOWINGLY
11 FAILS TO MAKE THE REQUIRED REPORT IS GUILTY OF A MISDEMEANOR AND ON
12 CONVICTION IS SUBJECT TO A FINE NOT EXCEEDING \$1,000 FOR A FIRST OFFENSE
13 AND \$2,500 FOR A SUBSEQUENT OFFENSE.

14 13-613.

15 (A) (1) IN THIS SECTION, "FALSE REPORT" MEANS AN UNFOUNDED AND
16 MALICIOUS REPORT OF ATTORNEY IN FACT ABUSE THAT IS MADE FOR THE PURPOSE
17 OF:

18 (I) HARASSING, EMBARRASSING, OR HARMING ANOTHER PERSON;

19 (II) PERSONAL FINANCIAL GAIN FOR THE PERSON MAKING THE
20 REPORT;

21 (III) ACQUIRING CUSTODY OF A DISABLED OR ELDERLY PERSON; OR

22 (IV) PERSONAL BENEFIT FOR THE PERSON MAKING THE REPORT IN
23 ANY OTHER PRIVATE DISPUTE INVOLVING A DISABLED ADULT OR ELDERLY PERSON.

24 (2) "FALSE REPORT" DOES NOT INCLUDE A REPORT THAT IS MADE IN
25 GOOD FAITH AND THAT IS CLASSIFIED AS UNFOUNDED UNDER § 13-610(B) OF THIS
26 SUBTITLE.

27 (B) A PERSON WHO MAKES A FALSE REPORT IS GUILTY OF A MISDEMEANOR
28 AND ON CONVICTION IS SUBJECT TO THE FOLLOWING PENALTIES:

29 (1) FOR A FIRST OFFENSE, IMPRISONMENT FOR NOT MORE THAN 30
30 DAYS OR A FINE OF NOT MORE THAN \$1,000 OR BOTH; AND

31 (2) FOR A SUBSEQUENT OFFENSE, IMPRISONMENT FOR NOT MORE
32 THAN 90 DAYS OR A FINE OF NOT MORE THAN \$2,500 OR BOTH.

1 13-614.

2 A PERSON WHO COMMITS ATTORNEY IN FACT ABUSE IS GUILTY OF A
3 MISDEMEANOR AND ON CONVICTION IS SUBJECT TO IMPRISONMENT FOR NOT MORE
4 THAN 5 YEARS OR A FINE OF NOT MORE THAN \$5,000 OR BOTH.

5 **Article - Courts and Judicial Proceedings**

6 5-640.

7 (A) A PERSON WHO ACTS IN GOOD FAITH IS IMMUNE FROM ANY CIVIL
8 LIABILITY OR CRIMINAL PENALTY FOR:

9 (1) MAKING A REPORT UNDER § 13-609 OF THE ESTATES AND TRUSTS
10 ARTICLE;

11 (2) PARTICIPATING IN AN INVESTIGATION ARISING OUT OF A REPORT
12 UNDER § 13-609 OF THE ESTATES AND TRUSTS ARTICLE; OR

13 (3) PARTICIPATING IN A JUDICIAL PROCEEDING ARISING OUT OF A
14 REPORT UNDER § 13-609 OF THE ESTATES AND TRUSTS ARTICLE.

15 (B) A PERSON WHO MAKES A REPORT UNDER § 13-609 OF THE ESTATES AND
16 TRUSTS ARTICLE SHALL BE PRESUMED TO BE ACTING IN GOOD FAITH UNLESS LACK
17 OF GOOD FAITH IS SHOWN BY CLEAR AND CONVINCING EVIDENCE.

18 (C) THIS SECTION DOES NOT GRANT ANY IMMUNITY FOR A PERSON WHO
19 COMMITS ATTORNEY IN FACT ABUSE AND WHO MAKES A REPORT OR PARTICIPATES
20 IN THE INVESTIGATION OR PROCEEDING.

21 SECTION 3. AND BE IT FURTHER ENACTED, That the Laws of Maryland
22 read as follows:

23 **Article - Estates and Trusts**

24 [13-601.]13-602.

25 (a) [In this section, "durable power of attorney" means a power of attorney by
26 which a principal designates another as an attorney in fact or agent and the authority
27 is exercisable notwithstanding the principal's subsequent disability or incapacity.

28 (b)] Except as provided in subsection [(e)] (D) of this section, when a principal
29 designates another as an attorney in fact or agent by a power of attorney in writing,
30 it is a durable power of attorney unless otherwise provided by its terms.

31 [(c)] (B) Any act done by the attorney in fact or agent pursuant to the power
32 during any period of disability or incompetence or uncertainty as to whether the
33 principal is dead or alive has the same effect and inures to the benefit of and binds the
34 principal as if the principal were alive, competent, and not disabled.

1 [(d)] (C) If a guardian is appointed for the principal, the attorney in fact or
2 agent shall account to the guardian rather than the principal. The guardian has the
3 same power the principal would have but for his disability or incompetence to revoke,
4 suspend, or terminate all or any part of the power of attorney or agency.

5 [(e)] (D) (1) This section does not apply to an instrument or portion of an
6 instrument that is an advance directive appointing a health care agent under Title 5,
7 Subtitle 6 of the Health - General Article.

8 (2) An instrument or portion of an instrument that is an advance
9 directive appointing a health care agent is subject to the provisions of Title 5, Subtitle
10 6 of the Health - General Article.

11 SECTION 4. AND BE IT FURTHER ENACTED, That Sections 13-605 and
12 13-607(b) of the Estates and Trusts Article as enacted by this Act shall apply to any
13 durable power of attorney executed in the State on or after October 1, 1998.

14 SECTION 5. AND BE IT FURTHER ENACTED, That Section 13-606 of the
15 Estates and Trusts Article as enacted by this Act shall apply to any preprinted
16 durable power of attorney form sold in the State and any durable power of attorney
17 prepared in the State on or after October 1, 1998.

18 SECTION 6. AND BE IT FURTHER ENACTED, That Section 13-607(a) of the
19 Estates and Trusts Article as enacted by this Act shall apply to any durable power of
20 attorney in effect on or after October 1, 1998.

21 SECTION 7. AND BE IT FURTHER ENACTED, That Section 13-607(c) of the
22 Estates and Trusts Article as enacted by this Act shall apply to any services rendered
23 by an attorney in fact on or after October 1, 1998.

24 SECTION 8. AND BE IT FURTHER ENACTED, That Sections 13-608 through
25 13-611 of the Estates and Trusts Article as enacted by this Act shall apply to any acts
26 of suspected attorney in fact abuse occurring on or after October 1, 1998.

27 SECTION 9. AND BE IT FURTHER ENACTED, That Sections 1, 2, 4, 5, 6, 7,
28 and 8 of this Act shall take effect October 1, 1998.

29 SECTION 10. AND BE IT FURTHER ENACTED, That Section 3 of this Act
30 shall take effect January 1, 2000.