

Department of Legislative Services

Maryland General Assembly

2023 Session

FISCAL AND POLICY NOTE

Third Reader - Revised

House Bill 18

(Delegates Hill and Kaufman)

Judiciary

Judicial Proceedings

Maryland General and Limited Power of Attorney Act - Alterations

This bill amends the Maryland Statutory Form Personal Financial Power of Attorney by, among other things, (1) granting an agent additional authority to take action on the principal's behalf; (2) adding a warning to the principal about the potential effects of authority granted to the agent; and (3) adding information for the agent about the agent's duties to the principal. The bill amends both the Maryland Statutory Form Personal Financial Power of Attorney and the Maryland Statutory Form Limited Power of Attorney to include specified authorization for an agent to perform the acts necessary to enable the principal to qualify for a governmental benefit or program. The bill also makes related changes to a specified grant of authority and optional grants of specific authority in the Maryland Statutory Form Limited Power of Attorney regarding gifts and transfers and the creation and funding of specified trusts or accounts.

Fiscal Summary

State Effect: The bill does not directly affect State operations or finances.

Local Effect: The bill does not directly affect local government operations or finances.

Small Business Effect: None.

Analysis

Bill Summary:

Maryland Statutory Form Personal Financial Power of Attorney

Additional Authority of Agent

The bill amends the Maryland Statutory Form Personal Financial Power of Attorney by authorizing the agent to take specified actions regarding:

- tangible personal property, including motor vehicles, boats, planes, and other titled and untitled tangible personal property;
- trust and estate matters, including a trust, probate estate, escrow, custodianship, or other fund to which the principal is, claims to be, or later becomes entitled as a beneficiary, to a share or payment; and
- disclaimers, for the purposes of tax planning or effectuating stated intentions of the principal regarding the principal's estate.

The bill also authorizes the agent to perform the acts necessary to enable the principal to qualify for a governmental benefit or program, including obtaining personal and financial records and, to the extent specifically authorized, making gifts. The authorization is primarily included under provisions regarding benefits from governmental programs or civil or military service, "including any benefit, program, or assistance provided under a statute or regulation including Social Security, Medicare, and Medicaid."

The bill adds optional specific authority that the principal may grant the agent (by initialing the specific statements of authority in the statutory form) to take the following actions:

- make gifts or transfer ownership of the principal's assets (in specified amounts) outright or in trust to or for the benefit of the principal's agent (as specified), spouse, parents, grandparents, children and their descendants, a nonprofit or charitable organization, and other organizations and persons, as specified;
- (1) open a joint account with the principal and one or more other persons as account owners and/or (2) create or change rights of survivorship in accounts or other assets in which the principal has an interest, change a beneficiary designation for any accounts or financial instruments, and waive the principal's right to be a beneficiary of a joint and survivor annuity, as specified; and
- appoint a successor agent, effective only when no other agent or successor agent designated by the principal is willing or able to act.

The bill also allows for the principal to initial a statement that the agent is entitled to reasonable compensation or to compensation specified by the principal.

Warning to Principal and Information for Agent

The bill adds warning language that the principal should understand that granting an agent the authority to take actions under the power of attorney may affect the principal's property by significantly reducing and limiting access to it or changing how it is distributed under the principal's existing estate plans and that actions taken by an agent may result in tax consequences to the principal or others.

The bill adds important information for the agent to the statutory form, stating that the agent is not required to exercise the power of attorney, and that the agent (1) may not act in the agent's self-interest; (2) is bound by an utmost duty of loyalty to the interests of the principal; and (3) is further limited by legal duties to the principal that govern the agent's actions. The information for the agent further establishes that when exercising the authority granted in the power of attorney, the agent must consider the stated intentions of the principal regarding the principal's self-interest, family, estate, and taxes.

Additional Changes

Among other changes to the statutory form, the bill adds statements that:

- a copy of the power of attorney document has the same force and effect as the original unless provided otherwise in special instructions; and
- (1) anyone relying or acting upon the power of attorney is entitled to presume conclusively that it is in full force and effect unless the principal has given written notice to the person or entity that the power has been revoked; (2) no one relying or acting upon the power of attorney is required to see to the application and disposition of any funds or other property paid to or delivered to the agent or any person appointed by the agent; and (3) the principal authorizes the agent to seek damages against anyone who refuses to honor the power of attorney without having received notice that it has been revoked.

Maryland Statutory Form Limited Power of Attorney

Similar to the change the bill makes to the Maryland Statutory Form Personal Financial Power of Attorney, the bill amends the Maryland Statutory Form Limited Power of Attorney (which requires the principal to initial specific statements or areas of authority, which the principal grants to the agent) to include an authorization for the agent to perform the acts necessary to enable the principal to qualify for a governmental benefit or program, including obtaining personal and financial records and, to the extent specifically

authorized, to transfer or gift the principal's property. The authorization is included under provisions regarding benefits from governmental programs or civil or military service, "including any benefit, program, or assistance provided under a statute or regulation including Social Security, Medicare, and Medicaid."

Additionally, the bill modifies a grant of authority to the agent to make specified gifts, including gifts to specified trusts or accounts (or a prepaid tuition plan), in an amount for each donee up to the annual dollar limits of the federal gift tax exclusion under the Internal Revenue Code, or twice that amount if the principal's spouse agrees to consent to a split gift. The grant of authority is modified by the bill so that it applies to a gift or transfer to a person, or the creation and funding for the benefit of a person, including the principal, of specified trusts or accounts (or a prepaid tuition plan), including a special needs trust or any trust authorized under § 1917 of the federal Social Security Act, subject to the same federal gift tax exclusion limits on the amount for each donee.

The bill also includes options to grant the same gift/transfer authority (and/or separate authority to consent to the splitting of a gift made by the principal's spouse), in the section of the limited statutory form containing optional grants of specific authority, but (1) without restriction on the amount of the gift or transfer and/or (2) with the ability to take an action in favor of the agent. In the same section, the bill modifies an optional grant of specific authority to create an *inter vivos* trust, by (1) specifying that it includes the authority to fund the trust and to create and fund a special needs trust, any trust authorized under § 1917 of the federal Social Security Act, or a third-party special needs trust; (2) adding the authority to establish and fund an Achieving a Better Life Experience account as defined under the Internal Revenue Code; and (3) requiring that the creation/establishment and funding of the trusts or accounts be for the benefit of the principal or the principal's family, heirs at law, descendants, or any other person designated by the principal as a beneficiary under an existing will, trust, or other instrument.

Finally, the bill also modifies another optional grant of specific authority, to make a gift subject to any special instructions in the power of attorney, by specifying that it includes the authority to make a gift of the principal's assets to assist the principal in meeting the eligibility requirements and qualifying for a governmental benefit or program, including gifts to or in favor of an agent who is the principal's spouse or descendant.

Current Law: Chapter 690 of 2010 enacted the Maryland General and Limited Power of Attorney Act and established two statutory form powers of attorney and a form for use by an agent to certify facts concerning a power of attorney. One of the statutory forms (the Maryland Statutory Form Personal Financial Power of Attorney) provides an agent with broad authority as specified on the form, while the other statutory form (the Maryland Statutory Form Limited Power of Attorney) allows a principal to specifically indicate which of various powers are given to an agent.

Both forms are located under Title 17, Subtitle 2 of the Estates and Trusts Article. A person may not require an additional or different form of power of attorney for any authority granted in a statutory form power of attorney. A principal may delegate to one or more agents the authority to do any act specified in the statutory forms. However, the acts specified in the statutory forms may not be deemed to invalidate or limit the validity of other authorized acts that a principal may delegate to an agent. A power of attorney document that is substantially in the form of one of the two statutory forms when the document is executed continues to have the meaning and effect prescribed by Title 17 regardless of the enactment of legislation altering the statutory forms after the document is executed.

The statutory forms include a number of authorizations relating to benefits from governmental programs, including the authority to (1) enroll in, apply for, select, reject, change, amend, or discontinue, on the principal's behalf, a benefit or program and (2) prepare, file, and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation.

Maryland Statutory Form Personal Financial Power of Attorney

The Maryland Statutory Form Personal Financial Power of Attorney includes grants of specified authority to act with respect to (1) real property; (2) stocks and bonds; (3) banks and other financial institutions; (4) insurance and annuities; (5) claims and litigation; (6) benefits from governmental programs or civil or military service; (7) retirement plans; (8) taxes; and (9) digital assets. The principal may grant additional powers to the agent by using special instructions. The statutory form includes certain information and warning statements regarding the effect of signing the document and the importance of selecting an agent the principal trusts.

Maryland Statutory Form Limited Power of Attorney

In relation to the changes the bill makes to authority in the Maryland Statutory Form Limited Power of Attorney regarding gifts and transfers and the creation and funding of specified trusts or accounts, the Maryland Statutory Form Limited Power of Attorney includes a grant of authority to make outright to, or for the benefit of, a person, a gift of part or all of the principal's property, in an amount for each donee of up to the annual dollar limits of the federal gift tax exclusion under the Internal Revenue Code, or twice that amount if the principal's spouse agrees to consent to a split gift. There is also a grant of authority to consent to the splitting of a gift made by the principal's spouse, pursuant to the Internal Revenue Code, in an amount for each donee up to the aggregate annual gift tax exclusions for both spouses. The limited statutory form specifies that an agent may only make a gift of the principal's property as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent

determines is consistent with the principal's best interest based on all relevant factors, including, among other factors, eligibility for a benefit, a program, or assistance under a statute or regulation.

The limited statutory form also includes optional grants of specific authority that a principal may choose to grant to their agent, including the authority to create an *inter vivos* trust and to make a gift (without any specified limit on the amount of the gift, but subject to any special instructions in the power of attorney).

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years; however, legislation with similar provisions has been proposed. For example, see HB 92 of 2022 and HB 870 of 2021.

Designated Cross File: SB 851 (Senator Carter) - Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts); Register of Wills; Maryland Department of Health; Department of Legislative Services

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