

**To: The Chair and Members of the House Judiciary Committee**

**From: MSBA Elder Law Section by Morris Klein, Esq.**

**Date: February 22, 2021**

**Re: HB 870 - Maryland General and Limited Power of Attorney Act**

**Position: Support with Amendments**

The Elder and Disability Law Section of the Maryland State Bar Association is an attorney organization whose members represent senior clients. I submit this report only in my capacity of serving as a spokesperson to express the position of this group.

A significant part of many of our members' practices involves drafting financial powers of attorney (and health care powers of attorney, which is not the subject today). A POA is a legal document in which an individual (the principal) appoints another person (the agent) with the legal authority to act on the principal's behalf. This document gives the principal the confidence that a chosen and trusted agent would make sound financial decisions choices if he or she can no longer make decisions. A POA avoids the need for a costly guardianship which results in a stranger making such decisions. An agent's typical actions may include accessing the principal's financial accounts to pay various bills, manage property, file income tax returns, protect assets for their benefit and the benefit of family members, and apply for public benefits such as veterans' benefits and Medicaid.

Eleven years ago, the Maryland General Assembly enacted a power of attorney law (Acts of 2010, Chs. 689 and 690, Md. Estates and Trusts Code Ann. § 17-101 et seq.) intended to make it easier for individuals to sign powers of attorney. The legislature developed some standardized forms that became part of the legislation. These forms are not perfect, and while enough time has passed to justify a more general review of this law, HB 870 focuses on one particular flaw that requires attention.

Some persons who become disabled and require long term care need to protect assets to protect their spouses and other family members from becoming impoverished or to set aside funds for disabled family members in a special needs trust. HB 870 clarifies that such actions are possible. This bill will improve the power of attorney document by offering additional options to better serve the wishes of the principal.

Our section offers amendments to add further clarification. Specifically, the proposed amendments add special needs trusts to the types of programs that the agent may establish and fund on behalf of the principal (amendments to lines 4 - 7 on page 25 of HB 870). It removes the potentially double negative explaining which items require a specific check-off

(lines 33 and 34 on page 25). It allows the agent to specifically initial authorization for unlimited gifting to these programs (on lines 8 - 14 of page 26 of the bill), permit gifts to the agent (line 14 of p. 26), and to fund trusts (line 15 of p. 26).

We assume that the agent is trustworthy and does not abuse his or her authority. Indeed, the agent is legally obligated to serve as a fiduciary of the principal. It is beyond the scope of this legislation to address problems with agents who abuse their authority. We understand that other legislation now on the books or under consideration addresses this issue.

Respectfully submitted,

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Attachment: proposed amendments

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4 N. ~~Gifts~~ GIFTS AND TRANSFERS - With respect to this subject, I authorize  
my agent to:

( ) MAKE A GIFT OR TRANSFER TO A PERSON, AND TO ESTABLISH AND  
FUND FOR THE BENEFIT OF A PERSON, INCLUDING MYSELF, ~~(including gifts to~~  
a trust, an account under the Uniform Transfers to

5 Minors Act, a tuition savings account or prepaid tuition plan as defined under  
Internal

6 Revenue Code Section 529, 26 U.S.C. § 529, ~~and~~ an ABLE account as defined under  
Internal

7 Revenue Code Section 529A, 26 U.S.C. § 529A AND A  
SPECIAL NEEDS TRUST OR ANY TRUST PURSUANT TO § 1917 OF THE SOCIAL  
SECURITY ACT, 42 USC § 1396p,

~~) - With respect to this subject, I authorize~~

~~8 my agent to:~~

9 ~~( ) Make outright to, or for the benefit of, a person INCLUDING MYSELF,~~  
~~a gift~~ OF part or all of MY

10 ~~the principal's~~ property, including by the exercise of a presently exercisable general  
power

11 of appointment held by the principal, in an amount for each donee not to exceed the  
annual

12 dollar limits of the federal gift tax exclusion under Internal Revenue Code Section  
2503(b),

13 26 U.S.C. § 2503(b), without regard to whether the federal gift tax exclusion applies  
to the

14 gift, or if the principal's spouse agrees to consent to a split gift pursuant to Internal  
Revenue

15 Code Section 2513, 26 U.S.C. § 2513, in an amount for each donee not to exceed twice  
the

16 annual federal gift tax exclusion limit

17 ( ) Consent, pursuant to Internal Revenue Code Section 2513, 26 U.S.C. §

18 2513, to the splitting of a gift made by the principal's spouse in an amount for each  
donee

19 not to exceed the aggregate annual gift tax exclusions for both spouses

20 (NOTE: An agent may only make a gift of the principal's property as the agent  
21 determines is consistent with the principal's objectives if actually known by the  
agent and,

22 if unknown, as the agent determines is consistent with the principal's best interest  
based

23 on all relevant factors, including:

24 (1) The value and nature of the principal's property;

25 (2) The principal's foreseeable obligations and need for maintenance;

26 (3) Minimization of taxes, including income, estate, inheritance,

27 generation–skipping transfer, and gift taxes;

28 (4) Eligibility for a benefit, a program, or assistance under a statute or  
29 regulation; and

30 (5) The principal’s personal history of making or joining in making gifts.)

31  All of the above

32 GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

33 IN ADDITION my agent MAY ~~NOT~~ do any of the following specific acts for me  
UNLESS ONLY IF I have

34 INITIALED the specific authority listed below:

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1(Caution: Granting any of the following will give your agent the authority to take actions

2 that could significantly reduce your property or change how your property is distributed at

3 your death. In addition, granting your agent the authority to make gifts to, or to designate

4 as the beneficiary of any retirement plan, the agent, the agent's spouse, or a dependent of

5 the agent may constitute a taxable gift by you and may make the property subject to that

6 authority taxable as part of the agent's estate. INITIAL ONLY the specific authority you

7 WANT to give your agent.)

8 ( ) TAKE ANY OF THE ACTIONS I HAVE AUTHORIZED IN THIS SECTION N WITHOUT RESTRICTION TO THE AMOUNT OF THE GIFT OR TRANSFER.

Create an inter vivos trust, [or amend, revoke, or terminate an existing inter-  
9 vivos trust if the trust expressly authorizes that action by the agent] INCLUDING A  
10 SPECIAL NEEDS TRUST OR A POOLED TRUST ACCOUNT, OR ESTABLISH AND FUND AN

11 ABLE ACCOUNT AS DEFINED UNDER § 529A OF THE INTERNAL REVENUE CODE FOR

12 THE BENEFIT OF THE PRINCIPAL OR THE PRINCIPAL'S FAMILY, HEIRS AT LAW, OR

13 DESCENDANTS, OR ANY OTHER PERSON DESIGNATED BY THE PRINCIPAL AS A  
14 BENEFICIARY UNDER AN EXISTING WILL, TRUST, OR OTHER INSTRUMENT

( ) TAKE ANY OF THE ACTIONS I HAVE AUTHORIZED IN THIS SECTION N IN FAVOR OF MY AGENT

15 ( ) AMEND, REVOKE, OR TERMINATE AN EXISTING INTER VIVOS TRUST IF 16 THE TRUST EXPRESSLY AUTHORIZES THAT ACTION BY THE AGENT

17 ( ) Make a gift, subject to any special instructions in this power of attorney,  
18 INCLUDING A GIFT OF THE PRINCIPAL'S ASSETS TO ASSIST THE PRINCIPAL IN 19 MEETING THE ELIGIBILITY REQUIREMENTS AND QUALIFYING FOR A BENEFIT OR  
20 PROGRAM AT THE EARLIEST POSSIBLE TIME

21 ( ) Create or change rights of survivorship

22 ( ) Create or change a beneficiary designation, subject to any special instructions  
23 in this power of attorney; and, if I wish to authorize my agent to designate the agent, the

24 agent's spouse, or a dependent of the agent as a beneficiary, I will explicitly state this

25 authority within the special instructions of this power of attorney or in a separate  
power of

26 attorney

27  Authorize another person to exercise the authority granted under this power 28  
of attorney

29  Waive the principal's right to be a beneficiary of a joint and survivor annuity,  
30 including a survivor benefit under a retirement plan

31  Exercise fiduciary powers that the principal has authority to delegate

32  Disclaim or refuse an interest in property, including a power of appointment

33  In accordance with the Maryland Fiduciary Access to Digital Assets Act,

34 access and take control of (1) the content of any of my electronic communications, (2)  
any