

H1911, S1138
An Act Clarifying a Right of a Durable Power of Attorney
Representative Murray, Senator Keenan

Intent of the Bill:

This Bill makes minor changes to parts of the Massachusetts Uniform Trust Code (MUTC) to confirm that an attorney-in-fact (“agent”) under Durable Power of Attorney (POA) may create a Trust on behalf of the person who executed the POA (principal) so long as the POA expressly authorizes the attorney-in-fact to create a trust on the principal’s behalf.

Background:

The Massachusetts Supreme Judicial Court (SJC) ruled in *Barbetti v. Stempniewicz (2022)* that a trust created by an attorney-in-fact under POA was void because the POA in that case failed to explicitly grant trust-making authority. The SJC opined “...we conclude that, at this time, the more prudent path is to allow the Legislature the opportunity to decide whether and how to allow delegation of the power to create a trust.” This decision has since created significant ambiguity for practitioners and individuals engaging in estate planning, especially disabled individuals and those living with chronic illnesses.

What this Bill Does:

It was long-understood that the creation of trusts was a delegable power, so long as a principal explicitly chose to include this power in his or her power of attorney. But because of *Barbetti*, this assumption has become uncertain. This bill would resolve this question left open by the SJC by explicitly granting, in the MUTC statute, the attorney-in-fact the authority to create a trust.

Why this Legislation is Needed:

- Allows individuals to control and plan for their incapacity, including the growing number of those living with impaired capacity due to Alzheimer’s disease and dementia.
- Allows individuals with progressive disabilities to plan for their own future consistent with equal access to legal planning as guaranteed under the ADA and applicable case law.
- Assists older adults and persons with progressive disabilities who are being negatively impacted as a result of the uncertainty identified in *Barbetti*.
- Establishes the validity of existing trusts created by attorneys-in-fact, when the principal explicitly authorized the creation of such trusts by his or her POA.
- Makes Massachusetts law consistent with many other states that authorize a POA to create a trust.
- Resolves real estate transactions involving trusts already created by attorneys-in-fact that are potentially unsettled today due to the *Barbetti* decision.
- Eliminates the need for an attorney-in-fact to go through the time-consuming, costly and stressful procedure of petitioning the Probate Court for a Conservatorship to seek authority to create a trust.