AGENTS, PRINCIPALS, (ATTORNEYS) AND DURABLE POWERS OF ATTORNEY A LOVE/HATE RELATIONSHIP

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I. INTRODUCTION

Traditional estate planning primarily involved drafting the dispositive plan directing where the person's assets would pass upon death. However, as life spans have increased and the nuclear family has disintegrated, it is becoming increasingly necessary for the estate planner to address not only the testamentary plan, but also to put in place a plan for the client if he or she should become disabled during lifetime. While death and taxes are still a certainty, there is a significant statistical probability that a client will require assistance with the management of his or her affairs during lifetime (the probability one will be disabled for three months or longer is 58% at age 25, 45% at age 40, and 23% at age 55). Portfolio 859-3rd T.M. 1, DURABLE POWERS OF ATTORNEY (Estate, Gifts and Trust Portfolios, BNA 2015); see also Portfolio 816-2nd T.M. 1, PLANNING FOR DISABILITY (Estate, Gifts and Trusts Portfolios, BNA 2015).

If a person does no planning for incapacity, then just as happens when a person fails to plan for the testamentary disposition of assets the statutes of the State of Texas will dictate how a person's affairs are handled upon disability. In the more extreme cases, this will mean a guardianship proceeding. As is well known, guardianships in Texas can be cumbersome, expensive to administer, exposes the incapacitated person's affairs to public scrutiny, and generally strips the ward of his or her civil rights.

Consequently, in addition to a testamentary dispositive plan, a well drafted estate plan will use a combination or all the following lifetime estate planning instruments - the durable power of attorney for financial affairs, the power of attorney for medical affairs and the related disclosure statement, the declaration of guardian, the directive to physicians and family or surrogates, and a HIPAA authorization statement. Depending on the situation, the documents may also include a declaration regarding disposition of remains. Of these documents, the financial power of attorney may be the most important if the goal is to avoid a guardianship. While Texas law allows surrogate decision making for medical decisions without having to resort to a guardianship, there is no such surrogate decision making process for financial affairs.[1]

This article will concentrate on the legal development and history of the financial power of attorney, on issues surrounding the use of the durable power of attorney for financial affairs in Texas, and legislative and judicial trends in Texas on such documents. This article will not cover in depth the requirements in Texas for the durable power of attorney.

II. OVERALL HISTORY AND BACK-GROUND OF DURABLE POWERS OF ATTORNEY FOR FINANCIAL AFFAIRS.

Despite the prevalence of the durable power of attorney in today's estate planning arena, the durable power of attorney is a relatively recent legal invention. Virginia was the first state to adopt a statute in 1954 authorizing the use of a durable power of attorney. Under common law agency rules, an agent's authority under a power of attorney terminated upon the incapacity of the principal. The Virginia statute extended common law agency law to provide that a document could provide that the agent's power could continue after the principal became incapacitated.

However, it was not until much later that the concept of a durable power of attorney gained acceptance. In the late 1950's and early 1960's studies conducted by the American Bar Foundation, the National Council on the Aging, and the National

[1] Another alternative people use is to add another person to an account. This is typically done to allow the added person to pay for bills and other items. The danger is that these accounts are typically set up as rights of survivorship accounts rather than as convenience accounts.

Conference of Commissioners on Uniform State Laws found that state laws gave few viable options for management of the financial affairs of mentally incapacitated adults. BOXX, THE DURABLE POWER OF ATTORNEY: WHY YOU SHOULD GIVE MORE ATTENTION TO ESTATE PLANNING'S STEPCHILD, U. OF MIAMI EST. PLAN. INST. CHAPTER 15 (2003). Relatively wealthy persons used funded management trusts to handle their financial affairs if they became incapacitated. The option of management trusts was not available to those persons who either did not know of such trusts or whose estates were too small to warrant the cost.

The different studies led to the enactment in 1964 of the model Special Power of Attorney for Small Interests Act. The prefatory notes to the act specifically stated that the power of attorney was to be used to provide a simple and inexpensive legal procedure for incapacitated persons with relative small property interests. The power of attorney was not meant to wholly replace guardianships and conservatorships, but to provide a less expensive alternative.

The concept of the durable power of attorney did not gain acceptance until the adoption of the Uniform Probate Code in 1969. In addition to addressing many other issues, the 1969 U.P.C. included a one section provision allowing powers of attorney to continue after the incapacity of the principal. The U.P.C. provision also altered the common law rule that the death of the principal automatically voids any acts of the agent taken after death regardless of the circumstances. The term "durable" power of attorney was coined to differentiate these powers from common law power of attorney that terminated upon the disability of the principal. The U.P.C. version allowed the principal a choice between using a power that became effective upon signature and a power that "sprung" into existence upon the incapacity of the principal. In 1971, Texas adopted a one paragraph variation of the U.P.C. which was codified at Section 36A of the Texas Probate Code. Acts 1971, 62nd Leg, Chapter 183, Section 3 (the Texas version omitted the choice of springing powers).

Signifying the growing importance of durable powers of attorney, by 1984 all of the states had enacted durable power of attorney provisions. In 1979, the U.P.C. provisions on durable powers of attorney were basically transferred into a stand-alone act known as the Uniform Durable Power of Attorney Act.

By the 1980's, even though the use of powers of attorney had become widespread, the problem became getting third parties to recognize the authority of the agent. Since the standards were still evolving and there was no universally recognized form, the actual forms of durable powers of attorney were as varied as the person drafting the form. This variation and lack of consistency of powers from agent to agent made third parties reluctant to accept any power of attorney other than those already developed by the third party. Seeing the need to promulgate a form that would become familiar and readily accepted by third parties across the country, in 1988 the National Conference of Commissioners on Uniform State Laws adopted the Uniform Statutory Form Power of Attorney Act. The uniform form reduced the power of attorney to two pages with the details of the power set forth in other sections of the Uniform Act. The statutory form was adopted by Texas in 1993.

In 2002, a Durable Power of Attorney Survey sponsored by the Joint Editorial Board for the Uniform Trusts and Estates Act was sent out to practitioners throughout the nation. The purpose of the survey was to identify potential problem areas in the use of durable powers of attorney that were not contemplated in the original Uniform Durable Power of Attorney Act. The survey consisted of 45 questions to gather data on the overall use of powers of attorney in practice, use of statutory

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