

POWERS OF ATTORNEY: RECENT DEVELOPMENTS

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*Certified as a Elder Law Attorney
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University of Texas School of Law Continuing Legal Education
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EDUCATION

J.D. Degree (magna cum laude), St. Mary's University School of Law, 1990
B.A. Degree (mathematics), Trinity University, 1975

PROFESSIONAL ACTIVITIES

Sole practitioner serving the State of Texas
Adjunct Professor of Law, St. Mary's University School of Law (1998 to present)
Co-Chair, Long Term Care, Medicaid and Special Needs Trusts Committee of the Real Property, Trusts & Estates Section of the American Bar Association (2010-2013)
Member, National Academy of Elder Law Attorneys (national and state chapters)(State Board of Directors, 2000 to 2006, 2009 through 2012, Texas Chapter President 2004-2005)
Member, Special Needs Alliance
Member of the College of the State Bar of Texas (1997 to present)
Member of the American Bar Association, State Bar of Texas, San Antonio Bar Association; Texas Trial Lawyers Association and San Antonio Trial Lawyers Association
Planning Committee Chair, State Bar of Texas, Elder Law and Guardianship Course (2004)
Planning Committee Member, State Bar of Texas, Elder Law Course (2000, 2001, 2003-2008, 2013-2015)
Planning Committee Member, State Bar of Texas, Advanced Estate Planning Course (2008 & 2013)
Planning Committee Member, The University of Texas School of Law Estate Planning, Guardianship and Elder Law Conference (1999 to present)
Co-Director, The University of Texas School of Law Special Needs Trust Conference (2005 to present)
Listed in the 2011 Inaugural Edition, Martindale-Hubbell Bar Register of Preeminent Women Lawyers (and in 2012-2014)
Listed in *Best Lawyers in America* in Elder Law (2007-2014)
Listed in *Texas Monthly Super Lawyers 2004-2014* in Elder Law and Top 50 Lawyers in South and West Texas (2013).
Listed in *Scene in SA San Antonio's Best Lawyers* in Trust and Estate Law (2008-2014)
Co-Author of *Save My Home! Saving Your Home, Farm or Ranch from Medicaid Estate Recovery in Texas*, Elder Law Trio Press, Houston, 2005.
Co-Author of *Elder Law, Texas Practice Series Vol. 51*, Thomson-Reuters (formerly West Publishing), 2008 to present.
Named the Outstanding Attorney in San Antonio in Elder Law and Estate Planning (2013) by the *San Antonio Business Journal*.

LAW-RELATED PUBLICATIONS AND PRESENTATIONS

Author, *Creating a SNT without Creating Malpractice*, State Bar of Texas Advanced Elder Law Conference, Houston, Texas, April 9, 2015.
Author, *Cracking the Entitlements Enigma Code: What Practitioners Need to Know about Medicaid*, Corpus Christi Estate Planners Counsel, Corpus Christi, Texas, November 20, 2014.
Author, *Auditing the MERP Claim*, Texas-NAELA Annual Fall Meeting, Fort Worth, Texas, October 1, 2014
Author, *Medicaid Do's and Don'ts*, 2014 Medico-Legal Summit, South Texas Geriatric Education Center and the VA-GRECC, San Antonio, Texas, September 18, 2014.
Author, *Elderly/Disability Issues and Medicaid, SSI and Social Security Disability*; 2012 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 21, 2014.
Author, *Winding Up the Settlement: The Government Benefit Elephant in the Room*, State Bar of Texas Soaking Up Some CLE, May 15, 2014, South Padre Island, Texas.
Co-Author, *Where Real Estate and Estate Planning Collide*, State Bar of Texas, Advanced Elder Law Conference, April 3, 2014, Dallas, Texas.
Author, *Cracking the Government Benefits Enigma Code: What Estate Planners need to know about Government Benefits*; San Antonio Estate Planner's Counsel's Docket Call in Probate Court, February 21, 2014, San

Antonio, Texas.

Author, *And How are the Children: Planning for Children with Special Needs Trusts*, University of Texas School of Law 2014, 10th Annual Changes and Trends Affecting Special Needs Trusts, February 6-7, 2014, Roundrock, Texas.

Co-Author, *Elder Law Planning and Issue Spotting*, Building Blocks of Wills, Estates & Probate, State Bar of Texas Webcast, January 24, 2014.

Author, *Special Needs Trusts*, Northeast Independent School District Continuing Education, San Antonio, Texas, October 24, 2013

Author, *The Good News/Bad News Client: Adult Protective Services issues that may arise when caring for an Elderly or Disabled individual*, University of Texas Health Science Center Medico-Legal Conference, October, 10, 2013.

Author, *Winding up the Settlement: the Government Benefit Elephant in the Room*, Corpus Christi Probate Conference, September 27, 2013

Author, *Winding up the Settlement: the Government Benefit Elephant in the Room*, Texas NAELA, Austin, Texas, September 7, 2013

Panelist, *Ask the Experts*, Estate Planning, Guardianship & Elder Law Conference, University of Texas School of Law, Galveston, Texas, August 8-9, 2013

Author, *Elderly/Disability Issues and Medicaid, SSI and Social Security Disability*; 2013 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 2013.

Panelist, Elder Law, Disability Planning and Bioethics Group: *Current Issues Affecting Special Needs Trusts*, American Bar Association Section of Real Property, Trust and Estate Law 24th Annual Spring CLE Symposia, Washington, D.C. May 2-3, 2013

Author, *Administrative Appeals: Cutting it off at the Pass*, State Bar of Texas Advanced Elder Law Course, Houston, Texas, April 11, 2013.

Author, *Special Needs Trusts*, Northeast Independent School District Continuing Education, San Antonio, Texas, March 21, 2013.

Author, *Special Needs Trust: The Moving Target*, University of Texas School of Law 2013, 9th Annual Changes and Trends Affecting Special Needs Trusts, February 7-8, 2013, Austin, Texas.

Co-Author, *Elder Law Planning and Issue Spotting*, Building Blocks of Wills, Estates & Probate, State Bar of Texas Webcast, January 25, 2013.

Co-Author, *Where Real Estate and Estate Planning Collide*, Texas Land Title Institute, December 6, 2012, San Antonio, Texas.

Co-Author, *Where Real Estate and Estate Planning Collide*, Tarrant County Probate Bar Association, November 1, 2012, Ft. Worth, Texas.

Author, *Special Needs Trusts*, Northeast Independent School District Continuing Education, San Antonio, Texas, October 25, 2012.

Author, *Requirements of Reporting Abuse & Exploitation: Understanding the Difference between Abuse & Family Dynamics*, Case Management Society of South Texas, October 12, 2012, San Antonio, Texas.

Author, *Curing a Transfer Penalty*, Texas Chapter of the National Academy of Elder Law Attorneys Conference, September 15, 2012, San Antonio, Texas.

Co-Author, *The Collision of Real Estate Law and Elder Law: Shocks and Sparks*, University of Texas School of Law Elder Law, Estate Planning and Guardianship Course, August 9-10, 2012, Galveston, Texas.

Author, *Elderly/Disability Issues and Medicaid, SSI and Social Security Disability*; 2012 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker's Association, Dallas, Texas, July 16, 2012.

Co-Author, *Where Real Estate and Estate Planning Collide*, State Bar of Texas Advanced Real Estate, July 13, 2012, San Antonio, Texas.

Author, *Special Needs Planning*, National Organization of the Disorders of the Corpus Callosum Conference, July 7, 2012, San Antonio, Texas.

Author, *Acid Rock to Acid Reflux: How Will Boomers Pay for Disability?* American Bar Association Section of Real Property, Trust, and Estate Law 23rd Annual Spring Symposia, May 3, 2012, New York, New York.

Co-Author, *Where Real Estate and Estate Planning Collide*, Advanced Elder Law Conference, April 12, 2012, Dallas, Texas.

Author, *Managing Expectations and Personal Responsibility*, University of Texas School of Law 2012 Changes and Trends Affecting Special Needs Trusts, Austin, Texas, February 10, 2012.

Author, *Managing Expectations and Personal Responsibility*, University of Texas School of Law 2012 Changes and Trends Affecting Special Needs Trusts, Austin, Texas, February 10, 2012.

Co-Author, *Elder Law Planning and Issue Spotting*, Building Blocks of Wills, Estates & Probate, State Bar of Texas Webcast, January 13, 2012.

Numerous presentations 1996 through 2011.

POWERS OF ATTORNEY: RECENT DEVELOPMENTS

Over the last two years, several cases have focused on the use and interpretation of powers of attorney. The presentation will address an overview of the basics of law as it applies to powers of attorney, an agent's potential liability even when the agent takes no action and the need to sign a power of attorney in a law office to confer authority to execute home equity loan documents.

THE BASICS:

It is always good to revisit the basics of agency law. The 12th Court of Appeals (Tyler) set out a clear outline of an agent's powers in a 2014 case styled *In re Estate of Miller*. The following are excerpts from the case:

“A power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law. Vogt v. Warnock, 107 S.W.3d 778, 782 (Tex.App.-El Paso 2003, pet. denied); Plummer v. Estate of Plummer, 51 S.W.3d 840, 842 (Tex.App.-Texarkana 2001, pet. denied). ‘When persons enter into fiduciary relations[,] each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity.’ Tex. Bank & Trust, 595 S.W.2d at 508. Consequently, a fiduciary owes his principal a high duty of good faith, fair dealing, honest performance, and strict accountability. Sassen v. Tanglegrove Townhouse Condo. Ass'n, 877 S.W.2d 489, 492 (Tex.App.-Texarkana 1994, writ denied).”

“‘[A]n agent's duties of performance to the principal are subject to the terms of any contract between them.’ Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co., 235 S.W.3d 695, 702 (Tex.2007) (quoting Restatement (Third) of Agency § 8.07 cmt. a (2006)). Thus, the language of a power of attorney determines the extent of an agent's authority. First Nat'l Bank in Dallas v. Kinabrew, 589 S.W.2d 137, 145 (Tex.Civ.App.-Tyler 1979, writ ref'd n.r.e.). Unless otherwise provided by statute or law, duties owed by an agent to his principal may be altered by agreement. Nat'l Plan Adm'rs, Inc., 235 S.W.3d at 700.”

“When we [the Court] interpret a power of attorney, we construe the document as a whole in order to ascertain the parties' intentions and rights. Kinabrew, 589 S.W.2d at 145. In determining the limits of an agent's authority, we apply two well established rules of construction set forth by the Texas Supreme Court. First, the meaning of the general words in the document will be restricted by the context and construed accordingly. Gouldy v. Metcalf, 75 Tex. 455, 12 S.W. 830, 831 (1889). Second, the authority will be construed strictly so as to exclude the exercise of any power that is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect. *Id.*”

“Under these rules of construction, powers of attorney, unlike deeds and wills, are to be strictly construed, and authority delegated is limited to the meaning of the terms in which it is expressed. Avis v. First Nat'l Bank of Wichita Falls, 141 Tex. 489, 174 S.W.2d 255, 259 (1943); Frost v. Erath Cattle Co., 81 Tex. 505, 17 S.W. 52, 54 (1891). And where there is a ‘very comprehensive’ grant of general power and an enumeration of specific powers, the established rules of construction limit the authority derived from the general grant of power to the acts authorized by the language employed in granting the special powers. Gouldy, 12 S.W. at 831.”

“‘Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.’ Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex.2002) (quoting Restatement (Second) of Agency § 387 (1958)). Or as more recently formulated, an agent's duty is ‘to act loyally for the principal's benefit in all matters connected with the agency relationship.’ Restatement (Third) of Agency § 8.01 (2006). Thus, absent the principal's consent, an agent must refrain from using his position or the principal's property to gain a benefit for himself at the principal's expense. See Tex. Bank & Trust Co. v. Moore, 595 S.W.2d 502, 508–09 (Tex.1980); Mims–Brown v. Brown, 428 S.W.3d 366, 374 (Tex.App.-Dallas 2014, no pet.); see also Restatement (Third) of Agency § 8.01 cmt. b (2006). A ‘benefit’ can be an advantage, a privilege, profit, or gain. Black's Law Dictionary 166 (8th ed. 2004). If the agent gains a benefit from the unauthorized use of his position or the principal's property, he engages in self-dealing. See Tex. Bank & Trust, 595 S.W.2d at 508–09; see also Cohen v. Hawkins, No. 14–07–00043–CV, 2008 WL 1723234, at *6 (Tex.App.-Houston [14th Dist.] Apr. 15, 2008, pet. denied) (mem. op.).”

“When an agent engages in self-dealing in a transaction with his principal, the transaction is presumptively unfair and invalid. See Tex. Bank & Trust, 595 S.W.2d at 507; see also Chien v. Chen, 759 S.W.2d 484, 495 (Tex.App.-Austin 1988, no writ) (holding that all transactions between fiduciary and principal are presumptively fraudulent and void). This places the burden on the fiduciary to rebut the presumption by establishing the fairness of the transaction with his principal. Tex. Bank & Trust, 595 S.W.2d at 509; Lesikar v. Rappeport, 33 S.W.3d 282, 298 (Tex.App.-Texarkana 2000, pet. denied); see also Lee v. Hasson, 286 S.W.3d 1, 21 (Tex.App.-Houston [14th Dist.] 2007, pet. denied) (holding that benefiting fiduciary must show he acted in good faith and that transactions were fair and equitable).”

Thus, if a principal intends to allow an agent to self deal, such authority should be clear in the power of attorney. For example, when an ill spouse becomes eligible for Medicaid nursing home benefits (referred to as the “institutionalized spouse”), the institutionalized spouse must transfer all countable assets in his name to the spouse living at home (referred

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