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The Agent Can Do What?! Drafting Tips to Empower Agents while Protecting Principals under Powers of Attorney

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Presenter/ Author:	Tax Alliance Conference 2015, *Getting Your Ducks in a Row so You Don't Get Lost in the Details of Preparing Form 706,* June 9, 2015, Plano, Texas.
Co-Author:	*Lost in Translation: A Journey Through the Bewildering Realm of IRS Interpretive Guidance,* available at http://ssrn.com/abstract=2572496.
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- American, Texas, Washington County & Houston Bar Associations
- National Academy of Elder Law Attorneys
- Trail rides across Texas

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THE AGENT CAN DO WHAT?! DRAFTING TIPS TO EMPOWER AGENTS WHILE PROTECTING PRINCIPALS UNDER POWERS OF ATTORNEY

I. INTRODUCTION

A power of attorney is a unique document in the drafting context because the preparer must focus on two opposing goals, each being equally important to the client. The obvious purpose of the document is to appoint an agent to act on behalf of the client and provide the agent with sufficient power to do everything that is needed. The client does not benefit if the agent is given such restricted power that he cannot effectively carry out the client's wishes. On the other hand, granting too much power to the agent can potentially harm the client. If the agent's power is too broad in any particular area, it is easier for abuse of that power to occur. In addition, a power that is either too broad or too narrow can have unintended consequences to the agent and principal, even when the agent carries out the principal's wishes to the letter.

Other issues that may arise when preparing a power of attorney include the agent's willingness to serve amid liability concerns, third party acceptance of the power of attorney, and tax consequences to the agent and principal. Failure to address these issues in the drafting stage can wreak havoc on a client's estate plan. The practitioner must also keep in mind beneficiaries of the principal and other stakeholders who may be affected in the event that a power of attorney ultimately fails to function as the principal intended or triggers unintended tax consequences to the principal's estate.

With the seemingly infinite number of issues to consider when preparing a power of attorney, the drafting attorney may feel as though he is playing a game of whack-a-mole. Draft around one problem, and another one pops up. This article addresses some of those problems and offers solutions for obtaining balance between competing goals in order to accomplish the client's objectives.

II. SCOPE

This article touches on various types of financial powers of attorney, but its main focus is on drafting considerations relating to durable powers of attorney under the Texas Durable Power of Attorney Act. There are a number of other types of powers of attorney and other issues relating to powers of attorney that are not covered in this article. This article does not provide a comprehensive examination of all of the types of financial powers of attorney, and analysis is limited to certain issues relevant to the estate planning and probate practice areas. While this article highlights some issues that may arise when drafting a power of attorney and suggests solutions to those problems, the drafting suggestions included in this article in the context presented should not be used without investigating the consequences and appropriateness in other contexts. For purposes of this article, it is assumed that the principal is a United States citizen residing in the United States, with the same being true of the agent.

III. DEFINITIONS

A. Power of Attorney

A power of attorney is a document whereby an agency relationship is established between a principal and agent, and whereby a principal confers authority upon an agent to act with regard to the principal's property and financial matters as set forth in the document.

B. Principal

The principal is the person who executes the power of attorney, appoints the agent, and confers powers upon the agent with respect to the principal's property and financial matters, thereby creating an agency relationship between the principal and agent.

C. Agent

An agent is a fiduciary appointed by a principal to act on behalf of the principal with regard to the principal's property and financial affairs. As discussed further throughout this paper, an agent has both common law and statutory duties to the principal. Tex. Estates Code § 751.101; *Plummer v. Estate of Plummer*, 51 S.W.3d 840 (Tex. App.–Texarkana 2001, pet. denied).

D. Special/Limited Power vs. General Power

> "[T]here are two types of authority an agent may possess: general authority and special authority. A general agent is one empowered to transact all the business of his principal of a particular kind or in a particular place, and such general agent has the apparent authority to do anything that the company could do in the premises . . . A special agent has authority only to do those things entrusted to him and such as are apparently necessary to accomplish [same]."[1]

[1] *Elliot Valve Repair Co. v. B.J. Valve & Fitting Co.*, 675 S.W.2d 555, 561 (Tex. App.—Houston [1st Dist.] 1984), *rev'd on other grounds sub nom. B.J. Valve & Fitting Co. v. Elliott Valve Repair Co.*, 679 S.W.2d 1 (Tex. 1984) (citing *Great Am Cas. Co. v. Eichelberger,* 37 S.W.2d 1050, 1052 (Tex.Civ.App.—Waco 1931, writ ref'd)).

In a special (or limited) power of attorney, the principal grants the agent authority to perform a particular thing or a particular class of work. In a general power of attorney, the principal grants the agent broad authority to transact all business that the principal can transact.

It is well established that powers of attorney "are to be strictly construed, and authority delegated is limited to the meaning of the terms in which it is expressed. . . . [W]here 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." *In re Estate of Miller*, 446 S.W.3d 445, 455 (Tex. App.–Tyler 2014) (internal citations omitted).[2] *See also 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).

The version of the Texas statutory durable power of attorney form under the Estates Code that became effective January 1, 2014 is considered a special power of attorney for two reasons. First, the form no longer has a comprehensive grant of a general power. Second, even if there were a general grant of power, the form includes an enumeration of specific powers and the principal has to specify, by initialing a line, what powers the agent has. Therefore, the statutory form found in Section 752.101 of the Estates Code will be strictly construed, but will exclude only those powers "not warranted either by the actual terms used, or as a necessary means of executing the authority with effect." *Gouldy v. Metcalf,* 75 Tex. 455, 12 S.W. 830, 831 (1889).

E. Durable Power of Attorney

Regardless of whether a power of attorney is general or special, a conventional power of attorney that is executed without consideration generally terminates when the principal becomes incapacitated. However, a durable power of attorney survives the principal's incapacity.[3]

Both a general and special power of attorney can be made durable. Texas law defines a "durable power of attorney" as a document that:

> (1) designates another person as attorney in fact or agent;
> (2) is signed by an adult principal;
> (3) contains:
>
> (A) the words:
>
> (i) "This power of attorney is not affected by subsequent disability or incapacity of the principal"; or
> (ii) "This power of attorney becomes effective on the disability or incapacity of the principal"; or
>
> (B) words similar to those of Paragraph (A) that show the principal's intent that the authority conferred on the attorney in fact or agent shall be exercised notwithstanding the principal's subsequent disability or incapacity; and
>
> (4) is acknowledged by the principal before an officer authorized under the laws of this state or another state to:
>
> (A) take acknowledgments to deeds of conveyance; and
> (B) administer oaths. Tex. Estates Code § 751.002.

The form for a statutory durable power of attorney is located in Section 752.051 of the Estates Code. The statutory form is certainly not exclusive, and other forms of durable powers of attorney may be used. *See* Tex. Estates Code § 752.003.

F. Use of Limited/Special Powers of Attorney

As set forth above, special or limited powers of attorney restrict an agent's authority to a specified matter or matters. Often limited powers of attorney are made durable by including language required in Section 751.002 of the Estates Code, but sometimes they are not. The following are some examples of situations in which limited powers of attorney (whether durable or not) might be preferred.

1. Business Transactions

A limited power of attorney may be desirable for the purpose of signing entity documents on behalf of a partner or limited liability company member. *See, e.g.,*

[2] The court in this case held that a general statement in a power of attorney authorizing an agent to act in the principal's "name, place, and stead, to act in, manage, and as [her] act and deed, to do and execute . . . every act, deed or thing [she] could do or execute" was limited by language of specific powers granted in power of attorney. *See* 446 S.W.3d at 455–56.

[3] Texas did not have an express statutory provision for a power of attorney to be durable until January 1, 1973 when then Section 36A of the Texas Probate Code became effective. Section 36A was replaced by the Texas Durable Power of Attorney Act in 1993, which is also when the first Texas statutory durable power of attorney form was adopted.

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