

PRESENTED AT

18th Annual Estate Planning, Guardianship and Elder Law Conference

August 11 – 12, 2016
Galveston, Texas

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

Nikki L. Laing
Nicole P. Wolff
Wendy Yates

Author Contact Information:

Nikki L. Laing
Capshaw Green, PLLC
Texarkana, Texas 75503

nlaing@capshawgreen.com
903.223.9544

Nicole P. Wolff
Wolff Law, PLLC
Dallas, Texas 75204

nwolff@wolfflawpllc.com
214.865.6559

Wendy Yates
Moorman Tate Haley Upchurch
& Yates, LLP
Brenham, Texas 77833
yates@moormantate.com
979.836.5664

PLEASE NOTE:

*This paper was originally prepared for and presented at the
State Bar of Texas
26th Annual Estate Planning & Probate Drafting Course,
October 8 – 9, 2015.*

*It is being reproduced here for
The University of Texas School of Law
18th Annual Estate Planning, Guardianship and Elder Law Conference
with the permission of the authors.*

NIKKI L. LAING
Capshaw Green, PLLC
5501 Plaza Drive
Texarkana, Texas 75503
Telephone: (903) 223-9544
Facsimile: (888) 371-7863
Email: nlaing@capshawgreen.com
www.linkedin.com/in/nikkilaing

EDUCATION

J.D., *magna cum laude*, Baylor University School of Law, 2012
B.B.A., *magna cum laude*, Baylor University, 2006

PROFESSIONAL AND EDUCATIONAL ACTIVITIES

Licensed to Practice Law in Texas and Arkansas
Certified Public Accountant
Technical Editor, Baylor Law Review
Top Ten Scorer out of nearly 900 candidates on Texas CPA exam

COMMUNITY ACTIVITIES

President-Elect, Texas Society of Certified Public Accountants, Texarkana Chapter
Member, Heritage Baptist Church, Texarkana
Treasurer, Friends of the Foundation of CHRISTUS St. Michael Health System
Secretary, PGISD Education Foundation

SPEAKER, AUTHOR, & MISCELLANEOUS

Author:	<i>Expect the Unexpected: Valuation, Penalty, and Liability Issues in the Context of the Federal Estate Tax</i> , Texas Tax Lawyer, Vol. 42, No. 3 (Spring 2015).
Presenter/ Author:	Tax Alliance Conference 2015, <i>Getting Your Ducks in a Row so You Don't Get Lost in the Details of Preparing Form 706</i> , June 9, 2015, Plano, Texas.
Co-Author:	<i>Lost in Translation: A Journey Through the Bewildering Realm of IRS Interpretive Guidance</i> , available at http://ssrn.com/abstract=2572496 .
Co-Presenter/ Co-Author:	2013 Austin CPA Chapter Annual Tax Conference, November 18, 2013, Austin, Texas.
Co-Author:	<i>IRS Alphabet Soup: Practical and Precedential Value of AODs, I.R.B.s, TAMs, & Other Guidance</i> , Journal of Tax Practice & Procedure, Published by CCH, a part of Wolters Kluwer, June-July 2013 Issue.
Co-Presenter/ Co-Author:	State Bar of Texas, Advanced Estate Planning and Probate 2013, Tax Breakout. <i>Have You Ever Wondered...PLR, TAM, GCM, etc.</i> , June 27, 2013, Houston, Texas.
Co-Presenter/ Co-Author:	State Bar of Texas, Tax Law 101, <i>Gift and Estate Tax Returns: Nuts, Bolts, & Some Monkey Wrenches, Too</i> , August 15, 2012, Dallas, Texas.
Amicus Curiae:	<i>In re Allcat Claims Service, L.P.</i> , 356 S.W.3d 455 (Tex. 2011).

NICOLE P. WOLFF
Wolff Law, PLLC
3400 Carlisle Street, Suite 200
Dallas, Texas 75204
214-865-6559 / 214-865-6553 - Fax
email: nwolff@wolfflawpllc.com
website: www.wolfflawpllc.com

EDUCATION

J.D., Southern Methodist University, cum laude (2008)
M.S.A., Accounting, Southern Methodist University, cum laude (2002)
B.B.A., Accounting, Southern Methodist University, magna cum laude (2001)

PROFESSIONAL LICENSES

Certified Public Accountant, Texas (2003)

LEGAL EMPLOYMENT HISTORY

Wolff Law, PLLC (September, 2013 to present)
Calloway, Norris, Burdette & Weber, PLLC (May, 2005 to September, 2013)

DESCRIPTION OF PRACTICE

Ms. Wolff specializes in representing clients in disputes and litigation involving Decedent's estates (including will contests), trusts, and guardianships, and also handles various non-contested matters of a similar nature. Ms. Wolff regularly serves as an Administrator of the Estate of a Decedent or as a Guardian of the Estate of a Ward, and represents clients serving in those capacities. Ms. Wolff also serves as an Attorney Ad Litem or Guardian Ad Litem in various types of probate, trust and guardianship matters.

PROFESSIONAL AND COMMUNITY ACTIVITIES

Member, State Bar of Texas Real Estate, Probate and Trust Law Section
Member, Dallas Bar Association, Probate, Trusts and Estates Section
Certified by the State Bar of Texas to serve as an Ad Litem
Dallas CASA, volunteer

SPEECHES AND PUBLICATIONS

State Bar of Texas, Intermediate Estate Planning and Probate Course, author and speaker, "Effective Uses of Family Settlement Agreements in Will Contests" (June, 2014).

State Bar of Texas, Intermediate Estate Planning and Probate Course, author and speaker, "Fiduciary Pitfalls of Powers of Attorney" (June, 2013).

Tarrant County Probate Bar Association, author and speaker, "Effective Uses of Family Settlement Agreements in Will Contests" (September, 2014).

Dallas Bar Association Headnotes, co-author, "Considerations When Choosing a Power of Attorney or Guardianship" (April, 2013).

Denton Bar Association, Real Estate, Probate and Trust Section, co-speaker, "Fiduciary Pitfalls Under Financial Powers of Attorney" (February, 2013).

Dallas Bar Association, Probate, Trust, and Estates Section, co-speaker, "Fiduciary Pitfalls Under Financial Powers of Attorney" (March, 2012).

WENDY YATES

MOORMAN TATE HALEY UPCHURCH & YATES, LLP
207 E. MAIN STREET
BRENHAM, TEXAS 77833
979-836-5664
YATES@MOORMANTATE.COM

Wendy practices primarily in the areas of estate planning, elder law, probate, guardianship, and real estate. She helps clients develop estate and business plans whether the estates are small or very large. She has helped clients plan for long term care, Medicaid, and family members with special needs as well as passing down family land, transitioning family businesses, protecting assets, and preserving wealth. She represents executors, administrators, guardians, and beneficiaries in probate and guardianship proceedings and trust and estate administrations, including family settlement agreements, mediations, and annual and final accountings. She also represents trustees and trust beneficiaries regarding funding, administering, modifying and terminating trusts. She prepares estate tax returns, gift tax returns, private letter rulings, and counsels clients regarding estate, gift, and generation-skipping tax matters. In addition, she assists people in buying, selling, and leasing residential, rural, and commercial properties and negotiating oil and gas leases.

DISTINCTIONS and EXPERIENCE

- Board Certified in Estate Planning and Probate by the Texas Board of Legal Specialization
- Texas Board of Legal Specialization Estate Planning and Probate Law Exam Commission Member
- Recognized in the 2009 Texas Rising Stars list in the fields of Estate Planning & Probate by Super Lawyers®, a Thomson Reuters business
- Law Review Note & Comment Editor, South Texas College of Law
- Order of the Lytae and Phi Delta Phi Honors Fraternity
- More than 10 years of working with adults and children with disabilities and their families prior to becoming a lawyer
- Speaker on estate planning, probate, special needs and elder law

EDUCATION

South Texas College of Law, J.D., *magna cum laude*

May, 2002

Rice University, B.A. & B.A.

December, 1989

LEGAL EMPLOYMENT

Moorman Tate Haley Upchurch & Yates, LLP, Brenham, TX

February, 2007 to present

Chamberlain, Hrdlicka, White, Williams & Martin, Houston, TX

August, 2002 to February 2007

South Texas College of Law, *adjunct professor*, Houston, TX

August, 2002 to February 2007

ACTIVITIES AND MEMBERSHIPS

- Brenham Rotary/District 5890
- Brenham Chamber of Commerce
- SIRE, therapeutic horse riding program
- Volunteer Services Council for Brenham State Supported Living Center
- Washington County Chamber of Commerce Leadership Program
- American, Texas, Washington County & Houston Bar Associations
- National Academy of Elder Law Attorneys
- Trail rides across Texas

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SCOPE	1
III.	DEFINITIONS.....	1
	A. Power of Attorney	1
	B. Principal	1
	C. Agent	1
	D. Special/Limited Power vs. General Power.....	1
	E. Durable Power of Attorney	2
	F. Use of Limited/Special Powers of Attorney.....	2
	1. Business Transactions	2
	2. Federal Tax Matters.....	3
	3. State Tax Matters.....	3
	4. Sale of Automobile.....	3
	5. Real Property Transactions	3
IV.	RECENT LEGISLATION	3
	A. Guardianship and Related Procedures.....	3
	B. Texas Uniform Disclaimer of Property Interests Act.....	4
	C. Texas Real Property Transfer on Death Act	4
	D. Irrevocable Power of Attorney for Partnerships and LLCs.....	4
	E. Divorce of Principal	4
	F. Time for Recording a Durable Power of Attorney for Certain Real Property Transactions	4
	G. P.O.D. Account Payee.....	5
V.	H.B. 3095	5
VI.	FIDUCIARY DUTIES OF THE AGENT	5
	A. Common Law Duties	5
	B. Statutory Duties.....	6
	C. Duty to Account	6
	D. Duty to Not Engage in Self-Dealing	7
VII.	PRINCIPAL’S RIGHTS AND POWERS	7
	A. Right to Revoke.....	7
	B. Right to Terminate Agent’s Powers	8
	C. Extend Principal’s Rights to Designated Persons	9
	D. Determine When Fiduciary Duties Start and Attach.....	9
	E. Limit Liability of Agent.....	10
	F. Limit Liability of Third Parties	10
	G. Demand Accounting by Agent.....	11
	H. Expand or Limit Powers of Agent.....	11
VIII.	POWERS UNDER THE TEXAS DURABLE POWER OF ATTORNEY ACT	11
	A. General Construction	11
	1. Tex. Estates Code § 752.101	11
	2. Tex. Estates Code § 752.115	12
	3. Construction of Agent’s Statutory Authority	12
	4. Risk vs. Reward of Broad Powers.....	12
	B. Real Property Transactions	12
	1. Tex. Estates Code § 752.102.....	12
	2. Agent’s Authority Under § 752.102.....	13
	C. Tangible Personal Property Transactions.....	16
	1. Tex. Estates Code § 752.103	16

2.	Agent's Authority Under § 752.103	16
D.	Stock and Bond Transactions	17
1.	Tex. Estates Code § 752.104	17
2.	Agent's Authority Under 752.104	17
E.	Commodity and Option Transactions	17
1.	Tex. Estates Code § 752.105	17
2.	Agent's Authority Under 752.105	17
F.	Banking and Other Financial Institution Transactions	18
1.	Tex. Estates Code § 752.106	18
2.	Agent's Authority Under § 752.106	18
G.	Business Operation Transactions	19
1.	Tex. Estates Code § 752.107	19
2.	Agent's Authority Under § 752.107	20
H.	Insurance and Annuity Transactions	21
1.	Tex. Estates Code § 752.108	21
2.	Agent's Authority Under § 752.108	21
I.	Estate, Trust and Other Beneficiary Transactions	22
1.	Tex. Estates Code § 752.109	22
2.	Agent's Authority Under § 752.109	22
J.	Claims and Litigation	23
1.	Tex. Estates Code § 752.110	23
2.	Agent's Authority Under § 752.110	24
K.	Personal and Family Maintenance	24
1.	Tex. Estates Code § 752.111	24
2.	Agent's Authority Under § 752.111	25
L.	Benefits from Certain Governmental Programs or Civil or Military Service	27
1.	Tex. Estates Code § 752.112	27
2.	Agent's Authority Under § 752.112	27
M.	Retirement Plan Transactions	28
1.	Tex. Estates Code § 752.113	28
2.	Agent's Authority Under § 752.113	28
N.	Tax Matters	28
1.	Tex. Estates Code § 752.114	28
2.	Agent's Authority Under § 752.114	29
3.	Acceptance of Statutory Durable Power of Attorney by the IRS	29
4.	Form 2848: Appointment of Attorney-in-Fact to Represent Taxpayer in Federal Tax Matters	29
5.	Signing Federal Individual Income Tax Return	30
IX.	EXTENDED POWERS	31
A.	No Power to Modify the Principal's Will	31
B.	Powers Relating to Trusts	31
1.	Amend or Revoke a Trust	31
2.	Create a Trust	32
C.	Power to Modify the Principal's Estate Plan	32
D.	Powers Relating to Digital Assets	33
1.	Definition of Digital Assets	33
2.	Agent's Authorization to Access	33
3.	Crafting a Principal's Consent	33
E.	Power to Gift the Principal's Assets	34
1.	Reasons for Gifting	34
2.	The Risk of Including a Broad Power of Gifting	35
3.	The Risk of Not Including Specific Gifting Authority	35
X.	EXECUTION	38
A.	Capacity	38
B.	Signature and Acknowledgment	38
C.	Recording	38

XI.

CONCLUSION.....

38

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

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.

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.,

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

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

Also available as part of the eCourse

[Drafting Revocable and Irrevocable Trusts; and Gifting Provisions in Powers of Attorney](#)

First appeared as part of the conference materials for the
18th Annual Estate Planning, Guardianship and Elder Law Conference session
"Provisions in Powers of Attorney for Different Levels of Gifting"