

DURABLE POWERS OF ATTORNEY: DISCUSSING THEIR ROSY FUTURE AND ANSWERING YOUR THORNIEST QUESTIONS

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HIGHLIGHTS OF THE NEW AND IMPROVED TEXAS DURABLE POWER OF ATTORNEY ACT

I. INTRODUCTION

After many years of work by many, many people, Texas has finally come into the modern era with the new Texas Durable Power of Attorney Act (the “Act”). Numerous attorneys volunteering their time through REPTL, in conjunction with attorneys from the Business Law Foundation and other various stakeholders, spent countless hours working through issues important to each stakeholder to arrive at our current Act. Although the recent additions to the Act were originally based on the Uniform Power of Attorney Act of 2006, which has been enacted in 22 states to date, it bears only a slight resemblance to it following its makeover in the legislative process.

This outline provides an introductory overview of the most significant changes to the Act, including (1) the provisions affecting an agent’s powers and duties; (2) the new acceptance and reliance provisions, and (3) the changes in the statutory form. Then the outline examines more closely the details of the acceptance and reliance provisions, especially as they relate to banks and other financial institutions. Finally, the outline discusses some of the issues raised by the changes that should be considered by attorneys who are drafting powers of attorney for clients.

A careful reading of the new Act is strongly recommended, as there have been numerous changes, and this outline is not intended to be a summary of every change that may affect your clients.¹

II. OVERVIEW OF KEY CHANGES

A. Powers and Duties of Agents.

1. Estate Planning Powers. The Act now expressly authorizes a principal to grant an agent certain estate planning powers (sometimes referred to as “hot powers”), including the power to (a) create, amend, revoke or terminate an inter vivos trust, (b) make gifts, (c) create or change rights of survivorship, (d) create or change a beneficiary designation (including a pay on death designation), or (e) delegate authority granted under the durable power of attorney. *Sec. 751.031*. This removes the uncertainty resulting from Texas cases calling into question an agent’s ability to exercise certain powers,

including the power to create a trust on behalf of the principal or name a pay on death beneficiary. *Filipp v. Till*, 230 S.W.3d 197, 203 (Tex. App.--Houston [14th Dist.] 2006, no pet.); *Armstrong v. Roberts*, 211 S.W.3d 867 (Tex. App. - El Paso 2006, pet. den.). However, unless the power provides otherwise, an agent who is not an ancestor, spouse or descendant of the principal cannot exercise these powers in favor of himself, herself or anyone he or she has a legal obligation to support. *Sec. 751.031(c)*.²

General authority granted to “make gifts” will be limited to the annual exclusion amount (\$15,000 in 2018, or twice that amount if the principal’s spouse agrees to split a gift), unless the durable power specifically grants broader gifting power. *Sec. 751.032*. Any gifts made by the agent must be consistent with the principal’s objectives, if known to the agent, and if not known, then as the agent determines is in the principal’s best interest based on all relevant factors, including the general duty to preserve the principal’s estate plan (discussed below) and the principal’s personal gift-making history. *Sec. 751.032(d)*.

If the agent is given the power to create or change beneficiary designations (in addition to the general powers to enter into insurance, annuity and retirement plan transactions in the statutory form), then the agent is not limited in his or her ability to name himself or herself as a beneficiary of such accounts and can also increase the amounts passing to himself or herself over the amounts originally designated by the principal unless the power provides otherwise. *Secs. 751.031, 751.033, 752.108 and 752.113*.

2. Duty to Preserve Estate Plan. An agent has a an affirmative duty to preserve the principal’s estate plan, to the extent he or she has actual knowledge of the plan, as long as doing so is in the principal’s best interest based upon all relevant factors, including (a) the principal’s property, (b) the principal’s foreseeable obligations and maintenance needs, (c) tax minimization, and (d) eligibility for benefits. *Sec. 751.122*. An agent who has been granted any of the “hot powers” should be especially aware of this duty. However, this duty also applies to any agent who is acting under the durable power of attorney.

3. Agent’s Status as Fiduciary. The Act now provides that an agent is not a fiduciary until he or she accepts appointment and then only when acting as an

¹ For an excellent summary of all of the 2017 legislative changes affecting the estate planning and probate areas, the 2017 Texas Estate and Trust Legislative Update, written by William D. Pargaman, can be found on the Resources page of his firm

website at www.snpalaw.com.

² Unless otherwise indicated, all section references are to the Texas Estates Code.

agent. *Sec. 751.101*. Acceptance can be made by exercising authority, performing duties as an agent or by any assertion or conduct indicating acceptance. *Sec. 751.022*. These provisions are intended to negate the finding in *Vogt v. Warnock*, 107 S.W.3d 778 (Tex. App. – El Paso 2003, pet. denied) (finding that the agent named under the durable power of attorney was a fiduciary as a matter of law even though she never acted under the power). This new provision only applies to agents acting under durable powers executed on or after September 1, 2017.

4. Authority of Co-Agents. While there has been no statutory limitation on appointing two or more co-agents, there also has been no guidance on how they should make decisions if the power is silent on that issue. A default provision regarding co-agents has been added that provides that unless the power states otherwise, co-agents can act independently of each other. *Sec. 751.021*. Note that the new statutory durable power of attorney form includes a section in the special instructions to select how co-agents will act (i.e., independently, jointly, or by majority).

5. Duty to Notify. An agent with actual knowledge of a breach or imminent breach of fiduciary duty by another agent (whether a co-agent under the same durable power of attorney or another durable power of attorney) has the duty to notify the principal of the breach. If the principal is incapacitated, the agent must take reasonably appropriate action to act in the best interest of the principal. If the agent does not do so, he or she may be liable for any reasonably foreseeable damages. However, if an agent is unaware of another agent's breach, then he or she is not liable. *Sec. 751.121*.

6. Power to Appoint Successors. The Act now specifically provides that an agent may be given the ability to name one or more successor agents either in lieu of or to follow the named successor agents. If the power does not specify, any successors named by an agent will act only after those listed in the power by the principal. *Sec. 751.023*.

Note that the power to appoint successors is in addition to the "hot power" to delegate authority under the power of attorney that may be granted by the principal. *Sec. 751.031(b)(5)*. The principal may now authorize the agent to both delegate authority to a substitute while the agent is serving and also prevent a vacancy in the position by naming a successor if the agent is unable to serve.

7. Compensation. With respect to durable powers executed on or after September 1, 2017, a

default rule has been added providing that an agent is entitled to reasonable compensation and reimbursement of reasonable expenses. Of course, the power can always provide otherwise. *Sec. 751.024*. (Note that some attorneys believe that an agent under a power of attorney signed before September 1, 2017, had a right to compensation and reimbursement under the common law of agency.)

8. Termination or Suspension of Agent's Power on Appointment of Guardian. Due to some reorganization by the legislative council, Section 751.052 dealing with an agent's powers if a temporary or permanent guardian is appointed was renumbered to Section 751.133. A separate bill passed in connection with guardianship legislation (S.B. 39) made changes to Section 751.052 that were not conformed in the new Section 751.133 prior to the deletion of Section 751.052. It is unclear under the Code Construction Act if the guardianship revisions will remain. As a general rule under the existing statute as relocated, the appointment of a permanent guardian terminates the powers of any agent under a durable power. The powers of any agent may but are not required to be suspended during the term of the temporary guardianship. Taking the optimistic approach that the new provisions from S.B. 39 are effective, if a temporary guardian is appointed for a principal, the agent's powers are immediately suspended unless the court affirms the effectiveness of the durable power of attorney and the validity of the appointment of the agent named. In addition, if the powers are revoked under the temporary guardianship, the new provisions of S.B. 39 make it clear that the agent is required to account for and deliver the assets to the guardian (similar to the requirements imposed when a permanent guardianship is ordered). *Secs. 751.052 and 751.133*.

9. Additional Scope of Statutory Powers. Agents who are granted the statutory powers in durable powers executed on or after September 1, 2017 now have automatically included expanded powers relating to entering into mineral transactions, consenting to homestead liens, handling mail, providing for pets, and accessing digital assets. *Secs. 752.102, 752.111, and 752.1145*.

B. Acceptance and Reliance Provisions.

Subchapter E of the Act is dedicated to new provisions that require reasonable acceptance of valid durable powers of attorney. As estate planning and probate attorneys have discovered over the years, many clients have been unable to effectively use durable powers of attorney due to rejection of those powers for arbitrary and often unexplained reasons. These new provisions are intended to balance the rights of

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