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Financial Powers of Attorney: Do You Want Fries With That Will?

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I. A Bit of Background

Powers of attorney authorize one person (the agent) to act on behalf of another person (the principal). The agent can manage the principal's property (in the case of a financial power of attorney) or make decisions about the principal's health care (in the case of a medical power of attorney). This paper deals with financial powers of attorney.

Financial powers of attorney have been part of our legal system for hundreds of years, but the way they function has changed over time. Early powers of attorney were used primarily to carry out financial transactions when the principal was unable to be present. The principal was presumed to be competent and in control of the transaction, but was directing it from a distance because of the cost of traveling to the location of the transaction. If the principal became incapacitated, the agent's power terminated. [Restatement of Agency §122 (1941); *see also Harrington v. Bailey,* 351 SW2d 946, 948 (Tex Civ App — Waco 1961, no writ) ("Miss Brogden's agency ...terminated in 1957 when the deceased was legally declared to be of unsound mind"); *Renfro v. City of Waco*, 33 SW 766, 767 (Tex Civ App — 1896, no writ) (principal's agent did not have authority to accept payment on note after principal was declared insane).]

Even if the principal expressed an intent to grant the agent authority after the principal's incapacity, such authority was not recognized by the courts. Judges were concerned that an incapacitated principal could not monitor the agent's actions.

But modern technology has decreased the cost of travel and increased the number of elderly people living with diminished capacity. So we have less need for powers of attorney that operate only when the principal has adequate mental capacity (although they are still used), and a much greater need for powers of attorney that operate after the principal becomes incapacitated.

A power of attorney that remains effective during the principal's incapacity is called a durable power of attorney. Texas enacted its first durable power of attorney statute in 1972. [*See* former Texas Probate Code §36A, which was replaced by Texas Probate Code §§481-506 in 1993, and then again replaced by Chapters 751 and 752 of the new Estates Code in 2014.]

The agent was traditionally referred to as the "attorney-in-fact." For many years, the Texas statute used the terms "attorney-in-fact" and "agent" interchangeably. In 2017, the legislature deleted all references to "attorney-in-fact," so now the only term in the statute or the statutory form is "agent." This change was not substantive; it was made to streamline the form and remove a term that had come to be confusing to laypeople. The term "attorney-in-fact" will continue to appear in older powers of attorney, and in powers of attorney from other states, and it means the same thing that "agent" means under Texas law. [*See* Tex Estate Code § 751.002(3)(A).]

II. The Basic Statutory Form

The Texas legislature created its first statutory form of a durable power of attorney in 1993. [*See* Tex Estates Code § 752.051 *and* Jamieson, "The Power of Attorney Battle," *Advanced Estate Planning and*

Probate Course 2008, State Bar of Texas, Chapter 38, p. 2.] The statutory form is not mandatory. [Tex Estates Code § 752.003 ("...other forms of power of attorney may be used.")]

Before 1993, attorneys drafted their own powers of attorney, which resulted in a rich diversity of approaches and formats. Powers of attorney often became quite long in an effort to spell out all of the powers granted to the agent.

The statutory form allows for shorter documents, because it incorporates the statutory definitions of each power by reference. For example, simply including "Real property transactions" in the list of powers granted gives the agent all of the authority granted in Texas Estates Code §752.102, which is over 800 words long.

The statutory form also makes it easier for third parties to review powers of attorney, because they after this many years they have become familiar with the format. This has made it easier for attorneys to convince banks and other institutions to accept and rely on powers of attorney. [*But see* the Mandatory Acceptance section of this paper below.]

So I recommend using a form that is close to the statutory form, in order to get the benefits of the statutory form. You don't have to follow it exactly, so you can customize it to the client's needs. [Tex Estates Code § 752.004 (stating that a power will be legally sufficient as a statutory power if it "complies substantially" with the statutory form).] Indeed, the statute itself offers a number of optional powers and other ways to customize the statutory form.

III. Customizing the Statutory Form

The statutory form is not a one-size-fits-all form. It can be customized in a variety of ways, which means the principal has a number of choices to make before signing it. The options can get confusing. Attorneys have a role to play in guiding clients through the choices.

A. Issues with Initialing

The statutory form presents some options by listing all possibilities in the form, and then asking the principal to place his or her initials on a line to the left of each option chosen. Other options are not included in the default form, but can be added, along with a corresponding line for the principal to initial.

The initialing approach serves three purposes in the power of attorney form.

(1) For principals who are not represented by attorneys, and who are using this form in the do-it-yourself context, having all the options spelled out gives the principal some of the advice that an attorney would provide.

(2) For powers that have the ability to substantially affect the principal's property or estate plan (e.g., the power to make gifts or change beneficiary designations), requiring the principal's initials draws the principal's attention to importance of the power.

(3) When a third party may need to be convinced that the principal did in fact intend to grant a particular power, the initials provide evidence to help with the convincing. For example, in order to change the beneficiary of a life insurance policy, the agent will need the cooperation of the insurance company. But the insurance company might worry that a former beneficiary could challenge the change by arguing that the principal signed the power of attorney without realizing it contained the power to change beneficiaries.

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