

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

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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,

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.

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 (currently \$14,000 and increasing to \$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 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 agent. *Sec. 751.101*. Acceptance can be made by

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

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 principals and those asked to rely upon the durable

powers of attorney so that principals can be more confident that their wishes will be followed while still affording numerous options for third parties to reasonably refuse acceptance without any increased liability. It is important to note that these provisions apply to all durable powers of attorney, regardless of when they were executed or whether the statutory form was used. These new provisions (which are discussed in detail in Section III of this outline) generally provide for the following:

1. Time Frames for Acceptance. A person who is requested to accept a durable power of attorney must accept or reject within a certain period of time.

2. Ability to Request and Rely on Information. A person who is requested to accept a durable power of attorney is authorized to request and rely on certification by the agent, an opinion of counsel, and an English translation.

3. Grounds for Refusal. A person who is requested to accept a durable power of attorney is authorized to refuse to accept a power of attorney for certain specified reasons and must advise the agent in writing of the reason for refusal in most cases.

4. Protection for Reliance. A person who accepts a durable power of attorney in good faith is generally protected in doing so.

5. Cause of Action for Refusal to Accept. There is a limited statutory cause of action for failure to accept a durable power of attorney.

C. Changes in Statutory Form.

Although use of the statutory form is not required, most practitioners attempt to keep the basic structure and appearance of the statutory form so that it is more easily accepted by third parties who are accustomed to the format of the statutory form. Whether you use the statutory form or not, there are changes in the Act that may result in changes to your form. Here is a summary of the changes in the statutory form in the order in which they appear.

1. Cautionary Language. The statutory form now includes cautionary language in the initial paragraph that reminds the principal that the power must be signed in the offices of an attorney, a title company, or the lender if the power is intended to be used for a home equity loan (as required under the holding in *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013)).

2. References to “Attorney in Fact.” References to “attorney in fact” have been eliminated in the statutory form, to reflect the fact that the term “attorney

in fact or agent” has been replaced with “agent” throughout the Act, and the term agent is now defined to include an attorney-in-fact. See *Sec. 751.002*.

3. Co-Agents. The statutory form now provides specifically that co-agents can be appointed. The form notes that unless the principal provides otherwise, co-agents may act independently. See *Sec. 751.021*.

4. Digital Assets Powers. New paragraph (N) has been added to incorporate the new powers with respect to digital assets and the content of an electronic communication. *Sec. 752.1145*. Note that granting an agent digital assets powers may not be a no-brainer. See IV.H below.

5. New Special Instructions. The “Special Instructions” section of the statutory form has been revised to incorporate two choices:

- Should be the agent be entitled to compensation in addition to reimbursement for expenses?
- If co-agents have been appointed, will they act independently, jointly, or by majority rule?

6. Typo Corrected. “ABOVE” has been changed to “BELOW” to correct an error that has been in the form for many years.

7. “Terminate” Replaces “Revoked.” The statutory form now recognizes that the authority of the agent may terminate other than by revocation by the principal. See *Sec. 751.131*. This is reflected in the disclosure as well as in the statement about third party reliance in the next to last paragraph of the form.

8. Texas Law Applicable. The statutory language is amended to clearly provide that Texas law applies to avoid any confusion about applicable law. See *Section 751.0024*.

9. Optional Revision of Statutory Form to Grant Specific Authority for “Hot Powers.” Although the Act specifically authorizes a principal to authorize the estate planning “hot powers,” those powers were not included in the standard statutory form. The concern is that many persons will obtain the statutory form from the internet or another source and might not consult an attorney before completing the form. Therefore, the option to grant “hot powers” might not be appropriate in the standard form to which most people will have access. However, Section 752.052 provides optional language that can be added to the statutory form if there is a desire to allow the principal to grant them using the statutory form.

Note: Section IV below contains a discussion of some of the issues estate planning attorneys may wish to consider when drafting powers of attorney for clients.

D. Miscellaneous Provisions.

1. Removal of Agent. Under new Chapter 753, an agent may be removed by a court if it finds that the agent (i) breached his or her fiduciary duties, (ii) materially violated or attempted to violate the terms of the durable power and the violation or attempted violation resulted in a material financial loss to the principal, (iii) is incapacitated or incapable of acting as agent, or (iv) fails to provide a required accounting.

a. If an agent is so removed, the court can authorize the appointment of the successor named in the power if the successor is willing to serve.

b. Any compensation under the power that the removed agent could have received can be denied by the court.

c. A successor agent named in the power can request the removal of an agent.

d. If a guardianship proceeding has been commenced for the principal, then any person interested in the guardianship can also request the removal of an agent. A “person interested” is broadly defined to include any heir, devisee, spouse, creditor, person having a property right in or claim against the principal, person interested in the welfare of the principal, attorney ad litem or guardian ad litem. *Sec. 753.001.*

e. If an agent is so removed, the successor agent must give actual notice of the order removing the agent to anyone the successor agent believes has relied on the agent’s authority under the durable power previously or may rely upon it in the future. *Sec. 753.002.*

2. Power to Request a Judicial Review of a Durable Power. To address concerns about who can review the actions of an agent, new provisions were added that allow certain persons to bring an action in court to review an agent’s conduct. An action can also be brought to construe or to determine the validity or enforceability of a durable power of attorney. The persons who can bring an action include: principal; agent; guardian, conservator or other fiduciary acting for the principal; a person who is a named beneficiary of the principal; certain governmental agencies that have authority to protect the welfare or estate of a principal; any person who demonstrates sufficient interest in the principal’s welfare to a court; and any

person asked to accept the power. If the principal is not incapacitated, then he or she can have the action dismissed. *Sec. 751.251.*

3. Copies. A copy, including a digital copy, has the same effect as the original unless the power itself or another statute provides otherwise. *Sec. 751.0023(c).* (The statutory form included a statement that a copy has the same effect as the original, but there was no provision making that applicable to all durable powers of attorney.)

4. Applicable Law. A durable power is interpreted using the law indicated in the power. If none is indicated in the power itself, then the law of the domicile of the principal applies, if the domicile of the principal is evident in the power. If the domicile of the principal is not evident in the power, then the law of the jurisdiction where the power was executed will apply. *Sec. 751.0024.* As previously noted, the new statutory durable power of attorney form includes a statement that the meaning and effect of the power will be determined under Texas law to avoid any confusion for our Texas clients.

5. Effective Dates. The new Act generally takes effect on September 1, 2017, and applies to durable powers of attorney executed *before, on and after* that date. However, the following sections apply only to durable powers of attorney *executed on or after September 1, 2017:*

a. *Sec. 751.024* (creating the default rule that agents are entitled to reasonable reimbursement and compensation if the power is silent);

b. Subchapter A-2 (relating to the “hot powers” and the additional estate planning powers that can be given to an agent);

c. Subchapter B (relating to the effect of acts of agent, but note that much of this subchapter was repealed);

d. Subchapter C (relating to the agent’s duty to inform and account, including the clarification that an agent is not a fiduciary until the agent accepts appointment as agent);

e. Subchapter D (relating to the addition of reverse mortgages and home equity liens to the list of reasons that a power may be required to be recorded); and

f. Chapter 752 (relating to the new statutory form and the construction of powers provisions).

III. ACCEPTANCE AND RELIANCE PROVISIONS.

A. Acceptance Provisions.

The Act contemplates that the person requested to accept the power of attorney does not have to accept the power of attorney immediately when it is presented, but rather has a reasonable opportunity to review the power of attorney, evaluate the information it has about the principal and agent, and consider the action that the agent is requesting to take before deciding whether to accept the power of attorney. Generally, a person requested to accept a durable power must either accept the power or refuse it with a specific cited reason within the statutory time frame. *Sec. 751.201.*

1. Time Frames for Acceptance. The person presented with the durable power of attorney must accept or refuse a power of attorney within the following time frames:

a. Initial Time Frame. Unless one or more valid grounds for refusal exist (as discussed below), a person presented with a valid durable power of attorney must accept or refuse to accept the power or request either (or both) an *agent's certificate* or an *opinion of counsel* within **10 business days** after presentment.

If the power contains language other than English, the person may request an English translation of the document. (See discussion in III.A.2.c. below.) An English translation of a power must be requested within **5 business days** from the date the power of attorney is presented, and if requested, the power is not considered presented for acceptance until that translation is provided. Only after the English translation is provided does the 10 business day period begin to run.

b. Secondary Time Frame if Agent's Certification is Requested. If an agent's certification is requested, the durable power of attorney must be accepted or rejected within **7 business days** after receipt of the requested certification. (See discussion in III.A.2.a. below.)

c. Secondary Time Frame if Opinion of Counsel is Requested. If an opinion of counsel is requested, the durable power of attorney must be accepted or rejected within **7 business days** after receipt of the requested opinion of counsel. (See discussion in III.A.2.b. below.)

2. What May Be Requested? The Act recognizes that the person requested to accept the

durable power of attorney may need assurance as to underlying factual matters or matters of law before it can safely rely on the power of attorney and the agent's authority to act under the power of attorney. Therefore, the person may request either an agent's certification or an opinion of counsel or both.

a. Agent's Certification. The person asked to accept the durable power can ask for certification by the agent of any *factual* matter relating to the principal, agent, or power of attorney. This form is signed by the agent under penalty of perjury. If the power is springing in nature, so that it becomes effective only on the incapacity of the principal, the person asked to accept the power can require a written statement from the principal's physician confirming incapacity of the principal. *Sec. 751.203.*

At the request of different stakeholders in the legislative process, a form for an agent's certificate was included in the Act. *Sec. 751.203(b).* Although it is not a mandatory form, it is expected that many financial institutions and other persons who are frequently requested to rely on powers of attorney will develop and use agent certification forms similar or identical to the statutory form. The form contains certifications that the agent may not be comfortable in making or that are not relevant to the transaction in question. If you are preparing the certificate, it would be prudent to review and edit the statutory certificate and remove any statements that are not appropriate for your client's actual situation.

The person requesting the certificate can request that the agent sign a specific form of certificate. If you are presented with a specific form from another person, it will be important to review it carefully to ensure that the agent is only certifying factual matters to the best of his or her knowledge and is not certifying as to any legal matter.

Should an attorney who prepares powers of attorney for a client prepare an agent's certification at the same time? While it may sometimes be helpful to sign an agent's certification when the power of attorney is initially signed, the agent's certification is most useful to the person requested to accept the power of attorney when it is signed contemporaneously with acceptance, so that all representations are made based on current facts.

Additional observation: You may wish to consider adding a jurat to the statutory form.

b. Opinion of Legal Counsel. When asked to accept a durable power, a person may request an

opinion of counsel regarding any ***legal*** matter relating to the durable power. Any such request must be in writing (or other record, which includes electronic mail) and must explain the reason for the request. The principal or agent, as the case may be, selects the counsel to give the opinion and the principal must pay for the opinion. *Sec. 751.204*. Although a person asked to accept a durable power may want his or her own legal counsel to review the power, the cost of this is not borne by the principal or agent.

c. **English Translation**. A person asked to accept a durable power that is not entirely in English may request an English translation of the durable power. The principal or agent, as the case may be, selects the translator to prepare the translation and the principal must pay for the translation. *Sec. 751.205*.

d. **Translation, Certification and Opinion**. In an appropriate case, the person requested to accept a durable power of attorney may request an English translation, an agent's certification, and an opinion of counsel. For example, assume that the agent presents a power of attorney part of which is in Spanish. The person asked to accept the power of attorney should request an English translation within 5 business days after the power is initially presented. Then, the person may request an agent's certification or an opinion of counsel (or both) within 10 business days after the translation is received.

e. **Extension of Time Period**. The agent and the person to whom the power of attorney is presented may agree to extend the time period for accepting the power of attorney.

3. **What May Not Be Required**. There are some requests that a person requested to accept a durable power of attorney may not make:

a. **In-House Forms**. A person requested to accept a durable power of attorney may ***not*** require the agent to provide a specific form of a power of attorney (e.g., the financial institution's own in-house form). *Sec. 751.202*. This does not, however, preclude an institution from requiring its own form of agent's certification.

b. **Recording with County Clerk**. A person asked to accept the durable power cannot require that it be filed with the county clerk unless recording is required under Section 751.151 (i.e., real property transactions) or other law. *Sec. 751.202*.

4. **Valid Grounds for Refusal**. There are several specific but broadly-defined reasons for refusing a durable power of attorney authorized under the Act.

Sec. 751.206. Note, however, that the power being "too old" or "not on our preferred form" are not valid grounds for refusal. One cannot arbitrarily adopt a policy under which all powers of attorney will be refused.

The reasons a power can be refused include the following:³

a. **Wouldn't Otherwise Have to Deal With Principal**. The person would not be required to engage in a transaction with the principal or the agent under the same circumstances, including:

- If the principal is not already a customer.

For example, while a bank can be required to allow the agent to transact on an existing account of the principal, the bank cannot be required to allow the agent to open an account in the name of the principal if the principal is not already a customer.

- If the agent is seeking to obtain a service the person does not offer.

b. **Inconsistent with Law, Regulation or Required Policy**. The person's engaging in the transaction with the agent or the principal would be inconsistent with another Texas or federal law, a request from a law enforcement agency, or a policy adopted by the person in good faith that is needed to comply with another Texas or federal law, regulation, regulatory directive, guidance or executive order.

c. **Prior Behavior of Principal or Agent**. The person would not engage in a similar transaction with the agent because:

- The person (or its affiliate) had filed a "suspicious activity report" (commonly referred to by financial institutions as a "SAR") with respect to the principal or agent;
- The person believes in good faith that the principal or agent has a prior criminal history involving financial crimes; or

³ The list of acceptable reasons for refusal does not include that the power of attorney is not a durable power of attorney. But a person is only required to reasonably accept a durable power of attorney, so if the power of attorney is not a durable power of attorney, then it may be refused. Examples of powers of attorney that are not durable under Texas law are those that do not include a statement that the power of attorney is not affected by the principal's subsequent disability or incapacity or that the power of attorney is effective in the event of incapacity and those which are not properly acknowledged.

- The person has had a previous unsatisfactory business relationship with the agent involving material loss to the person, financial mismanagement by the agent, litigation between the person and the agent alleging substantial damages, or multiple nuisance lawsuits by the agent.

d. Knowledge of Termination. The person has actual knowledge of the termination of the power or the agent's authority.

e. Refused Certification or Opinion. The person's request for an agent's certification or legal opinion is refused or the certification or opinion is unclear or qualified in a manner that makes it ineffective for its intended purpose.

f. Concern About Validity or Authority. The person in good faith believes the power is not valid, the agent is exceeding his or her authority or the performance of the requested act would violate the terms of a business entity's governing documents or an agreement affecting a business entity, even if a certification or opinion is provided.

For example, the agent may be requesting to act with respect to an account held by the trustee of a revocable trust, or to add a P.O.D. beneficiary when the durable power of attorney does not include the power to do so, and the financial institution does not believe that the power of attorney grants the agent the authority to do so.

g. Judicial Proceeding. The person has commenced or has actual knowledge that another person has commenced a judicial proceeding to construe the power or review the agent's conduct and that proceeding is pending.

h. Judicial Determination. The person has actual knowledge of a judicial proceeding to construe the power or review the agent's conduct in which a final determination was made that the power was invalid for the purpose being presented or the agent lacked authority to act in the manner the agent is attempting to act.

i. Elder Abuse. The person has made or is aware of a report to a law enforcement or federal or state agency that the principal is being financially or physically abused, neglected, exploited or abandoned by the agent or a person acting on behalf of the agent.

Note: Under new HB 3921 effective September 1, 2017, banks and other financial institutions have new obligations and tools to deal with elder

abuse. Generally, if an employee becomes aware of financial exploitation of a vulnerable adult, the employee must notify the institution. The institution must investigate and file a report with Family and Protective Services within 5 business days. The institution can notify a third party associated with the vulnerable adult (unless that third party is the suspected exploiter) and can place a 10-business day hold on transactions if it submits a report. The hold can be extended for up to 30 business days at the request of state or federal agency or law enforcement.

j. Conflicting Directions. The person has received conflicting directions or communications from co-agents or agents under different durable powers of attorney (but only with respect to the matter on which there is a conflict).

k. Other State Law Issues. The power is governed by the law of another state that does not have provisions that require acceptance or where the power the agent is attempting to exercise is not permitted under the other state's law.

5. Form of Refusal. In most cases, a refusal to accept a durable power must be in writing and advise the agent of the reason (or reasons) for the refusal. However, if the reason for refusal is under 4.b. or 4.c. above, no specific explanation is required for the rejection. The person refusing under those circumstances can provide an affidavit signed under penalty of perjury (referred to herein as the "Confidential Reason Affidavit") that indicates that the refusal is based on a reason described in Estates Code Section 751.206(2) or (3) (i.e., the reasons described in 4.b. and 4.c. above).

The reason for this special treatment is that under some of the terrorist financing and anti-money laundering laws and regulations, a financial institution is prohibited from advising anyone, even a judge, that it has filed a SAR. Further, financial institutions are sometimes requested by law enforcement authorities not to open accounts for or do business with certain persons for a period of time. This exception has been crafted to allow a financial institution to refuse to open an account without providing a notice which would be the equivalent to stating that "We have filed a SAR about you and our policy does not allow us to open an account for someone for whom we've filed a SAR."

Because of the requirement that the person sign an affidavit under penalty of perjury if relying on this exception, it seems unlikely to be used unless applicable.

Any refusal must be provided in writing within the appropriate time frame described above. *Sec. 751.207.*

B. Examples Applying the Acceptance Provisions.

Example 1. Isabel adds her brother Hector, who lives in Mexico, as a party to her bank account, creating a multiple party with right of survivorship account. Maria, Hector's daughter, brings in a document that appears to be written in Spanish, which Maria says is a power of attorney appointing Maria as agent. The teller submits the document to the legal department. Four business days later, the bank advises Maria that an English translation of the document is needed. Three weeks later, Maria provides an English translation of the document. The bank's 10 business day period in which to accept or refuse the power of attorney begins to run when the English translation is received.

Example 2. Mike presents a durable power of attorney ("DPOA") signed by Joe naming Mike as agent, and Mike asks to close the \$250,000 certificate of deposit held in Joe's name. The teller submits the power of attorney to her supervisor for review. Nine business days later, the bank requests that Mike provide a certification that certain facts are true, including that Joe is still alive and that Joe was mentally competent when he signed the power of attorney. Mike signs the bank's standard certification form that same day. The bank now has 7 business days to accept or refuse the power of attorney.

Example 3. James presents a DPOA signed by Pamela naming James as agent. James requests that the bank allow him to withdraw \$15,000 from Pamela's multiple party account with Fred, and then use those funds to open a TUTMA account for James' 3-year-old son Joseph. The DPOA is not in the statutory form. Three days later, the bank requests a legal opinion that the DPOA grants James the authority to conduct this transaction. Two weeks later, James' attorney provides the requested legal opinion. The bank now has 7 business days to accept or refuse the DPOA.

Example 4. Sam has become incapacitated, but Sam signed a DPOA appointing Margaret as his agent so that she could get access to his money market account at Sam's brokerage company, Darrell Finch ("DF"). All of Sam's liquid assets

are in the account. When Margaret presents the DPOA prepared by Sam's board certified estate planning attorney, the DF broker calls Margaret and tells her that DF is refusing to accept Sam's DPOA and requests that Sam drop by and sign the DF required in-house form. Margaret will not have any recourse until the 10 business day period has passed. However, it would be prudent for her to direct the DF broker to the new provisions of the Act that prohibit DF from requiring a specific form.

Example 5. Steve has signed a DPOA naming Laurel as his agent, granting her the power to "create or change rights of survivorship." Laurel presents the DPOA to the bank and requests that Steve's survivorship account with Lora be changed to a survivorship account with Laurel. During the initial 10 business day acceptance period, the bank should review the power to determine if Laurel has the authority to change beneficiary designation in favor of herself. If it is unclear, the bank should request an opinion of counsel within the 10 business day acceptance period. The bank will likely want to request a certificate from Laurel 10 business day acceptance period that confirms her relationship to Steve if the exercise of the power is silent as to her ability to create or change rights of survivorship in favor of herself. If the bank requests both the opinion of counsel and the agent's certificate, once both are received the bank will have 7 business days to accept or refuse the power of attorney.

Example 6. Don has signed a DPOA naming his wife, Patsy, and his friend, Blair as his agents to act independently for him. Blair presents the DPOA to the bank and requests that the bank move all the money from Don's joint investment account with Patsy to an account in the name of a limited partnership owned by Don and Blair. The bank determines that although it has a good relationship with Don and Patsy, it has filed a SAR on Blair. The bank provides Blair with a properly executed Confidential Reason Affidavit 10 days following Blair's presentment to the bank. Blair cannot request any further information regarding the reason the DPOA was rejected.

C. Reliance Provisions.

1. Good Faith Reliance in General. If a person accepts a power in good faith without knowledge that the signature is invalid, he or she can rely on a presumption that it is genuine. In addition, a person who accepts a power in good

faith without knowledge of its invalidity or termination, or that the agent is exceeding his or her scope of authority, may rely on that power. *Sec. 751.209.*

2. Translations, Certifications, and Opinions. A person who accepts an agent's certification, an opinion of counsel, or an English translation can rely on it without further investigation. *Sec. 751.210.*

3. Cause of Action for Refusal to Accept a Durable Power of Attorney. Although rather limited in nature, there is now a statutorily-provided cause of action to force the acceptance of a valid durable power.

a. An agent (or principal) may bring an action against a person who does not accept a valid power within the requisite time frame.

b. If the court finds the person improperly refused the power, then the person shall be ordered to accept the power and the court may award the agent (or principal) court costs and attorney's fees.

Note that if the person provides the Confidential Reason Affidavit at any time during the proceeding, then the court can only award costs and fees and cannot order acceptance of the power. *Sec. 751.212.*

c. The Act includes a "loser pays" rule, so that if the person asked to accept the power is sued and the court finds the person had a valid reason to reject the power, then the person can recover costs and fees from the principal. *Sec. 751.213.*

d. Even though the recourse of a principal and agent is limited under the Act, there may be other avenues for recourse, including equitable claims. Those claims will not be abrogated by the Act. *Sec. 751.006.*

IV. DRAFTING POWERS OF ATTORNEY UNDER THE NEW ACT

The revised Act makes it clear that an agent can take certain estate planning actions on behalf of the principal, and also clarifies that the principal can grant the agent other authority. While the changes create opportunities for estate planning by an agent on behalf of a principal (or reduce uncertainties about ability to grant those powers), the so-called "hot powers" have implications that must be carefully considered by the

estate planning attorney and the client. The authority that a principal may clearly grant an agent under the Act is also now specifically limited in some respects unless otherwise provided. While principals may more confidently grant certain powers to agents, drafting appropriate powers of attorney for clients can now be more complicated than it was before September 1, 2017.

While attorneys will likely want to include some of the "hot powers" in powers of attorney prepared for their clients, many attorneys will soon conclude that the minimalist language approved to be added to the statutory form is inadequate, and that special provisions may be necessary to set out the breadth and limitations of the powers granted.

A. Gifts.

1. Authority to Make Gifts. The language in the statutory form under both present and prior law allows a principal to authorize an agent to make gifts:

"outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by [the principal], except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift."

Sec. 752.051.

Although there was no statute under prior law that specifically authorized an agent to make gifts other than the language in the statutory form, most estate planning lawyers assumed that a principal could give an agent authority to make gifts if expressly granted in the power of attorney. Under the revised Act, the principal's power to expressly grant the agent authority "to make a gift" is specifically recognized. *Sec. 751.031(b)(2).* Therefore, if the power of attorney expressly authorizes the agent to do so, the agent can make gifts on behalf of the principal. And, it is now clear that a gift "for the benefit of a person" includes a gift (i) to a trust, (ii) under the Texas Uniform Transfers to Minors Act, and (iii) to a Section 529 plan. *Sec. 751.032(a).*

2. Default Limitations on Power to Make Gifts. Although gifting is specifically authorized, the Act includes several default limitations on the power to make gifts:

a. Unless the power of attorney otherwise provides, an agent who is not an ancestor, spouse, or descendant of the principal may not make a gift of the principal's property to the agent or an individual to

whom the agent owes a legal obligation of support. *Sec. 751.031(c)*.

b. Unless the power of attorney otherwise provides, an agent cannot make a gift to a person in excess of the annual federal gift tax exclusion (regardless of whether the gift tax exclusion applies to the gift). If the principal's spouse consents to a "split gift," then a gift to a person may not exceed twice the annual federal gift tax exclusion. *Sec. 751.032(c)(1)*.

If a power of attorney grants the agent the general authority "to make a gift," without elaboration, the amount of the gift to any person cannot exceed the amount of the federal gift tax exclusion, or twice that amount, in the case of gift-splitting.

c. Unless the power of attorney otherwise provides, gifts must be consistent with the principal's objectives known to the agent. If the agent doesn't know the principal's objectives, then gifts must be consistent with the principal's best interests based on all relevant factors, including the agent's duty to preserve the principal's estate plan (see II.A.2. above) and the principal's personal gifting history. *Secs. 751.032(b) and (d); 751.122*.

If the principal initials the optional gifting provision that is authorized to be added to the statutory form, then all of these limitations on the authority of the agent will automatically apply. If broader authority is desired, then specific provisions granting the authority must be added to the statutory form.

3. Expanded Gifting Powers. If the principal desires to make gifts in amounts in excess of the annual exclusion amount (or twice that amount in the case of gift-splitting), then the power of attorney must specifically authorize those gifts, and special language must be drafted to authorize those gifts.

Before jumping in with both feet by including expanded gifting powers in your forms, you should carefully consider the implication of allowing agents to make these decisions on behalf of the principal. Does the principal feel comfortable giving such broad powers to the agent? Should the power only be given to the spouse of the principal and not to other agents? Should the agent be restricted from making gifts to himself or herself? Will inclusion of these powers result in adverse estate tax issues for the agent? The issues that surround these powers should be discussed in detail with a client and careful consideration should be given to these issues prior to adding gifting powers to the durable power of attorney.

For example, the mere possession of the gifting authority could have tax implications for the agent if exercisable for his or her own benefit (or for his or her creditors, estate or creditors of his or her estate). The broad powers given to the agent may be deemed to be a general power of appointment under Internal Revenue Code § 2041. If a general power is held at the agent's death, the property over which the agent has a general power will be includible in his or her estate for estate tax purposes. Likewise, an agent could be deemed to have released the purported general power of appointment under Internal Revenue Code § 2514 if he or she permits the gifting discretion to lapse in part or entirely. Arguments can be made in support and in defense of both conclusions.

One could argue that the agent is never acting without implicit consent of the principal. An agent with the ability to make gifts to himself or herself arguably should not be deemed to have a general power of appointment under Internal Revenue Code § 2041(b)(1)(C)(i), which provides that a power that is exercisable only in conjunction with the power's creator is not a general power of appointment. Clearly, the principal can revoke the agent's authority at any time, as can a court via the appointment of a guardian for the principal. In effect, the agent can only exercise the gifting discretion as long the principal continues to provide the agent with that discretion, which pursuant to Internal Revenue Code § 2041(b)(1)(C)(i) arguably means the agent and principal must exercise the discretion together. As such, the agent should not be deemed to hold a general power of appointment.

Alternatively, one could argue that by granting the gifting authority to the agent, the principal has prospectively consented to any exercise of that discretion by the agent prior to its revocation. Under this reasoning, the agent can exercise the gifting discretion unilaterally without the need to seek the principal's consent, which arguably could negate the applicability of the Internal Revenue Code § 2041(b)(1)(C)(i) exception. If so, even if the principal ultimately revokes the agent's authority, the revocation would inherently take place after the agent was arguably deemed to have a general power of appointment.

If the potential general power of appointment issue is a concern, it may be prudent to consider limiting the powers granted to an agent. Following are a few suggestions to consider.

If the agent's authority to make gifts to himself or herself is limited to the gift tax annual exclusion amount, then there would be in any year only an equivalent amount of estate inclusion exposure under Internal Revenue Code § 2041 if the agent were to die prior to exercising the discretion. Obviously, if the agent

exercises the discretion in any year to make an outright gift to himself or herself, then the gifted amount would be includible in his or her estate if still held at death. There would likely be no taxable gift exposure under Internal Revenue Code § 2514 if the agent failed to exercise that limited gifting discretion in any year (whether due to the agent's conscious decision to forgo exercising the discretion or due to a failure to exercise it before the death of either the principal or the agent) if the annual exclusion amount represents less than 5% of the principal's wealth out of which the exercise of the lapsed power could have been satisfied. This is due to Internal Revenue Code § 2514(e), which provides an exception for property that could have been appointed via the lapsed power to the extent it does not exceed the greater of \$5,000 or 5% of the aggregate value of the property out of which the exercise of the lapsed power could have been satisfied (commonly referred to as the "5 and 5" amount).

In addition, the possible estate inclusion risk could be mitigated by providing the agent with the gifting discretion only during a limited period of time each year (e.g., during a specified month) or by limiting any gift amount to an ascertainable standard (e.g., health, education, maintenance, and support). Any gifting powers limited to an ascertainable standard should also prohibit the agent from making a gift that would discharge the agent's legal obligation of support to another to avoid treatment as a general power of appointment. *See* Treas. Reg. § 20.2036-1(b)(2).

Alternatively, the agent could be permitted to make gifts only if the gifting power is exercised in conjunction with another person who has a substantial interest in the property, subject to the power of appointment, which is adverse to the exercise of the power. *See* Internal Revenue Code § 2041(b)(1)(C)(ii). Unfortunately, utilizing this exception may be complicated as a practical matter. The principal could change his or her estate plan in a way that would affect who would have an interest in the appointable property sufficiently substantial to fulfill this role. Multiple successor individuals may need to be included in this role to take into account the possibility of the death of the designated person whose interest would be adverse. In addition, determining the proper person to fulfill this role will be highly fact-intensive and would require an analysis of whose interest is "substantial" and of the effect of multiple initial and successor beneficiaries. Use of this exception will require a high degree of maintenance and review, which will likely eliminate it from being a practical solution. A close review of the regulations under Internal Revenue Code § 2041 is recommended before attempting the use of this exception.

If the principal prefers not to limit the agent's gifting authority among the principal's family members, then the safest course to take would be to name an agent who is not a family member and prohibit the agent from making gifts to himself or herself (or to anyone he or she owes an obligation of support) in any amount. This approach will permit the unrelated agent to pursue more aggressive estate planning on the principal's behalf without causing an estate tax problem for the agent. Another option would be to parse out the delegated powers, so that the unrelated agent's powers are limited to only the gifting powers and all of the other powers under the durable power of attorney are given to the principal's designated family member agent.

Note that similar gift and estate tax concerns apply if a principal authorizes an agent to change beneficiary designations and enter into or change pay on death, rights of survivorship or trust accounts in favor of the agent. *Sec. 751.033*. It will be important to consider adding any limitations imposed on an agent's gifting powers to these powers as well.

B. Trusts.

If the durable power of attorney authorizes the agent to do so, the agent may now create, amend, revoke or terminate an inter vivos trust on behalf of the principal. *Sec. 751.031(b)(1)*. This provision now effectively overrules prior Texas cases calling into question an agent's authority to do so. The authority to do so is not included in the statutory form, but optional language can be added to the statutory form to allow the agent to create, amend, revoke, or terminate an inter vivos trust. *Sec. 752.052*.

Note that an agent under the statutory form who has been granted authority for "Estate, trust, and other beneficiary transactions" already has the authority to transfer all or part of the principal's interest in property to the trustee of a revocable trust created by the principal as settlor. *Sec. 752.109(5)*. However, this power has not been interpreted to include the power to create the trust for the principal.

As with to the power to make gifts, authority to create, amend, revoke, or terminate a trust is subject to certain limitations. Unless the power of attorney otherwise provides, an agent who is not an ancestor, spouse, or descendant of the principal may not create a property interest in the agent or an individual to whom the agent owes a legal obligation of support. *Sec. 751.031(c)*. The agent also has a duty to preserve the principal's estate plan as discussed in II.A.2 above. *Sec. 751.122*.

C. Rights of Survivorship.

If the durable power of attorney authorizes the agent to do so, the agent may now create or change rights of survivorship. *Sec. 751.031(b)(3)*. The addition of this provisions removes the uncertainty arising under the holding in the *Armstrong* case.

However, this power is not unlimited. Unless the power of attorney otherwise provides, an agent who is not an ancestor, spouse, or descendant of the principal may not create a property interest in the agent or an individual to whom the agent owes a legal obligation of support. *Sec. 751.031(c)*. If the “hot power” to create or change rights of survivorship is included in the statutory form without change, then granting the agent the power will be subject to these limitations. And, the agent has a duty to preserve the principal’s estate plan as discussed in II.A.2 above. *Sec. 751.122*.

Including the “hot power” language “as is” will likely result in significant confusion on the part of the principal, the agent, and third parties. Reading the power of attorney alone will not provide any indication that the agent’s authority to create survivorship rights is anything other than unlimited.

If the attorney includes the authority to create or change rights of survivorship in a power of attorney, the attorney should include language making clear the limits of the agent’s authority.

- Are there any limitations on the identity of the persons in whom survivorship rights may be created?
- Can the agent create survivorship rights in favor of the agent?
- Does the agent’s duty to preserve the principal’s estate plan include existing rights of survivorship? If so, creating or changing rights of survivorship may well change the principal’s estate plan.

Creating rights of survivorship may be useful in eliminating the possible need to probate the principal’s Will. However, creating rights of survivorship in all of the principal’s property may eliminate the funds from which debts and expenses of administration would have been paid. Careful consideration should be given to the inclusion of these powers into a durable power, keeping each client’s specific circumstances in mind.

D. Beneficiary Designations.

If the principal signed the statutory form and granted the agent authority with respect to “insurance and annuity transactions” (which confers the powers listed in Section 752.108), the agent has the authority to designate or change the beneficiary of an insurance contract. Previously the agent could name himself or herself as a beneficiary only to the extent the agent was named as a beneficiary by the principal *before* executing the durable power of attorney. This provision has been changed to provide that the agent may be named to the extent he or she was named as a beneficiary by the principal, whether before or after the durable power was executed. *Sec. 752.108*.

Similarly, if the principal signed the statutory form and granted the agent authority with respect to “retirement plan transactions” (which confers the powers listed in Section 752.113), the agent has the authority to designate or change the beneficiary. As with the insurance beneficiary designations discussed above, the agent could name himself or herself as a beneficiary only to the extent the agent was named as a beneficiary by the principal under the retirement plan *before* the durable power of attorney was executed. This provision has been changed to provide that the agent may be named to the extent he or she was named as a beneficiary by the principal, whether before or after the durable power was executed. *Sec. 752.113*.

If the principal grants the agent the “hot power” to create or change a beneficiary designation,” then the limitations in *Sec. 752.108* and *752.113* do not apply. However, even if those limitations are removed, the agent is still subject to the duty to preserve the principal’s estate plan discussed above.

Careful consideration should be given to the powers granted to the agent in this regard. It would be helpful to specify in the power of attorney guidelines and limits, such as disclosing the requirement that beneficiary designations be consistent with the principal’s estate plan.

E. Delegating Authority.

If the durable power of attorney authorizes the agent to do so, the agent may now delegate authority granted under the durable power of attorney. *Sec. 751.031(b)(5)*. The power of delegation appears to be comparable to a “power of substitution” which may exist under the common law of agency. It is not clear whether this is a new power, or whether this is just specific confirmation that a principal may grant that power in a durable power of attorney.

A power of delegation or substitution can be very important in a durable power of attorney that is intended as a planning instrument to avoid the need for a guardian. For example, suppose the principal signed a durable power of attorney naming her son as the agent under the power of attorney with no successor agent named. Son is handling the affairs for his mother who is now unable to sign a new power of attorney. The agent-son is then transferred overseas, takes a lengthy vacation, has health problems, or moves to another state, any of which might cause him to be temporarily unable and make it difficult to perform his duties as agent. Having the ability to designate a person or institution to act on his behalf from time to time might be a good alternative to resignation, particularly if resignation will result in the need for a guardian because no successor agent was named in the durable power.

There are several possible advanced planning solutions for this type of situation, including naming co-agents, successor agents, and signing multiple powers of attorney in favor of several persons. If a successor is named, the currently acting agent can resign, allowing a successor to become agent. However, this must all be considered and accomplished while the principal still has capacity to sign a durable power. If that does not occur and no provision to delegate authority is granted, a temporary or permanent guardianship proceeding may be necessary.

Below is a sample provision granting a delegation power:

“Substitution of Agent or Delegation of Powers. My Agent shall have the power, exercised by acknowledged written instrument, to substitution as agent hereunder, or delegate any one or more of the Agent’s powers under this power of attorney to, one or more persons selected by the Agent, for such period of time as the Agent shall determine, and the Agent shall have the power to terminate such substitution or revoke such delegation. Any substituted agent or person to whom the Agent delegates such powers shall enjoy the protections granted to my Agent under this instrument. My Agent may provide for compensation for such substitute agents, whether or not compensation is provided for my Agent hereunder.”

If a substituted agent or person to whom the agent has delegated powers requests a person to accept the power of attorney, it will be necessary to demonstrate that the substitution or delegation has actually occurred. It is also important to keep in mind

that the named agent may still be held liable for the acts of the person to whom he or she delegated his or her authority. The delegation of authority is not the same in this regard as the appointment of a successor agent.

F. Appointing Successors.

Another significant addition to the Act is the provision that allows the agent to name his or her own successor agent. The new statutory form does not include sample language for this purpose, so you will need to craft your own language in this regard.

Careful drafting will be required when giving these powers to one or more agents so that there will be no confusion as to who is next in line to serve when the current agent fails or ceases to serve. Keep in mind that the default provisions under Act provide that any successors appointed by an agent will step in only if all of the agents originally named in the power fail or cease to serve. If that is not the desired result, then the provisions added should clearly state that the successor agents appointed by an agent will serve before the successor agents named in the power.

Any successor appointment provision should specify how the appointment will be made. At a minimum the power of attorney should provide that a successor appointment must be in a written, acknowledged document which refers to the original power of attorney, and that the last dated appointment will control. When a successor appointed by the agent begins to serve, he or she will need to be able to establish the appointment to a person asked to accept the power of attorney. The durable power should include a provision that specifically permits a third party to rely on a successor agent’s certification as to the fact of his or her appointment when appropriate.

G. Co-Agents

Some attorneys routinely prepare powers of attorney appointing co-agents. Other attorneys, usually based on unfortunate past experiences with co-executors, co-trustees, or co-agents, are loathe to ever appoint co-fiduciaries of any kind.

When co-agents are appointed, the key question is whether they must act jointly or may act severally. As noted above, a default provision regarding co-agents now provides that unless the power states otherwise, co-agents can act independently of each other. *Sec. 751.021*. If it is desired that co-agents act either by unanimous consent or majority rule, then that must be clearly set out in the power of attorney.

H. Digital Assets Powers.

As noted above, the new Act includes new Section 752.1145, Digital Asset Transactions, which is referenced in item (N) of the revised statutory form. Under the statutory form, the agent can now be granted the authority “to access digital assets as provided in Chapter 2001.” Chapter 2001 is in new Estates Code Title 4, Digital Assets.

A comprehensive discussion of digital assets is beyond the scope of this paper.⁴ However, it will be important to consider whether or not the principal would like to grant immediate access to these types of accounts under a durable power. If inclusion is determined to be appropriate, to provide the most access to the agent an additional clause should be added to item (N) of the durable power as follows: “, including the content of electronic communications.” This will assure access not only to the catalogue of electronic communications but also to the content.

If it is likely that clients will frequently not want to grant access to these types of assets to agents, then it may be less confusing to either customize the durable power to exclude this provision altogether or to use a power of attorney form in which the principal strikes out unwanted powers rather than initialing desired powers.

V. CONCLUSION

The Act is new and improved, but it is also imperfect and does not include all of the provisions that REPTL had hoped would be enacted. As with all legislative efforts, there were many compromises along the way. There will inevitably be ambiguity in the application of some of the new provisions and clarifications that will need to be made in future legislative sessions.

However, having laws in place that require financial institutions and others who are asked to accept durable powers of attorney to make a determination as to whether the power will be accepted or not within a reasonable time frame and under reasonable guidelines is of enormous benefit to our clients, who may now more easily be able to rely on their validly-executed durable powers to avoid costly and time consuming guardianship proceedings.

⁴ For an excellent article on Planning for Digital Assets, see the most recent article published by Gerry W. Beyer and Kerri Nipp at https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=461383.

If you have any ideas for improvement to the Act, please share those with one or both of us:

Lora Davis (lora@davisstephenson.com)

Don Totusek (don.totusek@ftllplaw.com)

EXHIBITS

- Exhibit A - Revised Statutory Durable Power of Attorney Form (showing changes)
- Exhibit B - Agent's Certification under TEC § 751.203(b) (Optional Statutory Form)
- Exhibit C - SAMPLE Bank Form: Request for Additional Information
- Exhibit D - SAMPLE Bank Form: Refusal to Accept Durable Power of Attorney
- Exhibit E - SAMPLE Bank Form: Refusal to Accept Durable Power of Attorney (Confidential Reason)

EXHIBIT A - Revised Statutory Durable Power of Attorney Form (showing changes)

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO. IF YOU WANT YOUR AGENT TO HAVE THE AUTHORITY TO SIGN HOME EQUITY LOAN DOCUMENTS ON YOUR BEHALF, THIS POWER OF ATTORNEY MUST BE SIGNED BY YOU AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A TITLE COMPANY.

You should select someone you trust to serve as your agent [~~(attorney in fact)~~]. Unless you specify otherwise, generally the agent's [~~(attorney in fact's)~~] authority will continue until:

- (1) you die or revoke the power of attorney;
- (2) your agent [~~(attorney in fact)~~] resigns, is removed by court order, or is unable to act for you; or
- (3) a guardian is appointed for your estate.

I, _____ (insert your name and address), appoint _____ (insert the name and address of the person appointed) as my agent [~~(attorney in fact)~~] to act for me in any lawful way with respect to all of the following powers that I have initialed below. (YOU MAY APPOINT CO-AGENTS. UNLESS YOU PROVIDE OTHERWISE, CO-AGENTS MAY ACT INDEPENDENTLY.)

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (O) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (N).

TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE POWER.

YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD

____ (A) Real property transactions;

____ (B) Tangible personal property transactions;

____ (C) Stock and bond transactions;

____ (D) Commodity and option transactions;

____ (E) Banking and other financial institution transactions;

____ (F) Business operating transactions;

____ (G) Insurance and annuity transactions;

____ (H) Estate, trust, and other beneficiary transactions;

____ (I) Claims and litigation;

____ (J) Personal and family maintenance;

____ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;

____ (L) Retirement plan transactions;

_____ (M) Tax matters.

_____ (N) Digital assets and the content of an electronic communication;

_____ (O) ALL OF THE POWERS LISTED IN (A) THROUGH (N) ~~[(M)]~~. YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (O) ~~[(N)]~~.

SPECIAL
INSTRUCTIONS:

Special instructions applicable to agent compensation (initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to compensation that is reasonable under the circumstances):

_____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf and to compensation that is reasonable under the circumstances.

_____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf but shall receive no compensation for serving as my agent.

Special instructions applicable to co-agents (if you have appointed co-agents to act, initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to act independently):

_____ Each of my co-agents may act independently for me.

_____ My co-agents may act for me only if the co-agents act jointly.

_____ My co-agents may act for me only if a majority of the co-agents act jointly.

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

___ I grant my agent [~~attorney in fact~~] the power to apply my property to make gifts outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

UNLESS YOU DIRECT OTHERWISE BELOW ~~[(ABOVE)]~~, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT TERMINATES [IS REVOKED].

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.

(B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Termination [Revocation] of this [the] durable power of attorney is not effective as to a third party until the third party has actual knowledge [receives actual notice] of the termination [revocation]. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney. The meaning and effect of this durable power of attorney is determined by Texas law.

If any agent named by me dies, becomes incapacitated [legally disabled], resigns, [of] refuses to act, or is removed by court order, or if my marriage to an agent named by me is dissolved by a court decree of divorce or annulment or is declared void by a court (unless I provided in this document that the dissolution or declaration does not terminate the agent's authority to act under this power of attorney), I name the following (each to act alone and successively, in the order named) as successor(s) to that agent: _____.

Signed this _____ day of _____, _____

(your signature)

State of _____

County of _____

This document was acknowledged before me on _____ (date) by _____

(name of principal).

(signature of notarial officer)

(Seal, if any, of notary)

(printed name)

My commission expires: _____

IMPORTANT INFORMATION FOR AGENT [~~(ATTORNEY IN FACT)~~]

Agent's Duties

When you accept the authority granted under this power of attorney, you establish a "fiduciary" relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated, suspended, or revoked by the principal or by operation of law. A fiduciary duty generally includes the duty to:

- (1) act in good faith;
- (2) do nothing beyond the authority granted in this power of attorney;
- (3) act loyally for the principal's benefit;
- (4) avoid conflicts that would impair your ability to act in the principal's best interest; and

(5) disclose your identity as an agent or attorney in fact when you act for the principal by writing or printing the name of the principal and signing your own name as “agent” [~~or “attorney in fact”~~] in the following manner:

(Principal’s Name) by (Your Signature) as Agent [~~or as Attorney in Fact~~]

In addition, the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code) requires you to:

- (1) maintain records of each action taken or decision made on behalf of the principal;
- (2) maintain all records until delivered to the principal, released by the principal, or discharged by a court; and
- (3) if requested by the principal, provide an accounting to the principal that, unless otherwise directed by the principal or otherwise provided in the Special Instructions, must include:
 - (A) the property belonging to the principal that has come to your knowledge or into your possession;
 - (B) each action taken or decision made by you as agent [~~or attorney in fact~~];
 - (C) a complete account of receipts, disbursements, and other actions of you as agent [~~or attorney in fact~~] that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately;
 - (D) a listing of all property over which you have exercised control that includes an adequate description of each asset and the asset’s current value, if known to you;
 - (E) the cash balance on hand and the name and location of the depository at which the cash balance is kept;
 - (F) each known liability;
 - (G) any other information and facts known to you as necessary for a full and definite understanding of the exact condition of the property belonging to the principal; and
 - (H) all documentation regarding the principal’s property.

Termination of Agent’s Authority

You must stop acting on behalf of the principal if you learn of any event that terminates or suspends this power of attorney or your authority under this power of attorney. An event that terminates this power of attorney or your authority to act under this power of attorney includes:

- (1) the principal’s death;
- (2) the principal’s revocation of this power of attorney or your authority;
- (3) the occurrence of a termination event stated in this power of attorney;
- (4) if you are married to the principal, the dissolution of your marriage by court decree of divorce or annulment or declaration that your marriage is void, unless otherwise provided in this power of attorney;
- (5) the appointment and qualification of a permanent guardian of the principal’s estate unless a court order provides otherwise; or
- (6) if ordered by a court, [the suspension of this power of attorney on the appointment and qualification of a temporary guardian until the date the term of the temporary guardian expires] your removal as agent (attorney in fact) under this power of attorney. An event that suspends this power of attorney or your authority to act under this power of attorney is the appointment and qualification of a temporary guardian unless a court order provides otherwise.

Liability of Agent

The authority granted to you under this power of attorney is specified in the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under Chapter 32 of the Texas Penal Code.

THE ~~[ATTORNEY IN FACT OR]~~ AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

EXHIBIT B - Statutory Form of Agent's Certification under TEC § 751.203(b)

Note: This form is optional. The person to whom the DPOA is presented can request certification of any factual matter concerning the principal, agent, or power of attorney; the person may request certifications not included in the statutory form.

CERTIFICATION OF DURABLE POWER OF ATTORNEY BY AGENT

I, _____ (insert name of agent) (“Agent”), under oath, swear or affirm and certify under penalty of perjury that the following statements are true:

1. I am the duly appointed agent named in a power of attorney validly executed by _____ (“Principal”), as principal, on _____, _____ (insert date power of attorney executed), and the power of attorney is now in full force and effect (“Power of Attorney”).

2. The Principal is not deceased and is presently domiciled in _____ (insert name of city and state, territory, or foreign country).

3. To the best of my knowledge after diligent search and inquiry:

a. The Power of Attorney has not been revoked by the Principal or suspended or terminated by the occurrence of any event, whether or not referenced in the Power of Attorney.

b. At the time the Power of Attorney was executed, the Principal was mentally competent to transact legal matters and was not acting under the undue influence of any other person.

c. A permanent guardian of the estate of the Principal has not qualified to serve in that capacity.

d. My powers under the Power of Attorney have not been suspended by a court in a temporary guardianship or other proceeding.

e. If I am (or was) the Principal's spouse, my marriage to the Principal has not been dissolved by court decree of divorce or annulment or declared void by a court, or the Power of Attorney provides specifically that my appointment as the Agent for the Principal does not terminate if my marriage to the Principal has been dissolved by court decree of divorce or annulment or declared void by a court.

f. No proceeding has been commenced for a temporary or permanent guardianship of the person or estate, or both of the Principal.

g. The exercise of my authority is not prohibited by another agreement or instrument.

4. If under its terms the Power of Attorney becomes effective on the disability or incapacity of the Principal or at a future time or on the occurrence of a contingency, the Principal now has a disability or is incapacitated or the specified future time or contingency has occurred.

5. I am acting within the scope of my authority under the Power of Attorney, and my authority has not been altered or terminated.

6. If applicable, I am the substitute or successor to _____ (predecessor agent), who has resigned, died, or become incapacitated, is not qualified to serve, or has decline to serve as agent, or is otherwise unable to act. There are no unsatisfied conditions remaining under the Power of Attorney that preclude my acting as substitute or successor agent.

7. I agree not to exercise any power granted by the Power of Attorney if I attain knowledge or receive notice that the Power of Attorney has been revoked, suspended, or terminated, and I agree not to exercise any specific powers that have been revoked, suspended, or terminated.

8. A true and correct copy of the Power of Attorney is attached to this document.

9. If used in connection with an extension of credit under Section 50(a)(6), Article XVI, Texas Constitution, the power of attorney was executed in the office of the lender, the office of a title company, or the law office of_____.

Dated_____, 20__.

(signature of agent)

EXHIBIT C - Sample Bank Form
Request for English Translation, Agent’s Certification, or Opinion of Counsel
REQUEST FOR ADDITIONAL INFORMATION NEEDED TO REVIEW
DURABLE POWER OF ATTORNEY

To: _____

Date: _____

From: _____ Bank (“Bank”)

Description of Power of Attorney:

Principal: _____ (“Principal”)

Agent: _____ (“Agent”)

Date of Power of Attorney: _____

Date Power of Attorney Presented: _____

You presented the Bank with the power of attorney described above and requested the Bank to accept it. After reviewing the power of attorney, the Bank has determined that it needs the following additional information before determining whether it will accept the durable power of attorney:

1. Request for English Translation. The power of attorney contains, wholly or partly, language other than English. The Bank requests that you provide an English translation of the power of attorney at the Principal’s expense.
2. Agent’s Certification. The Bank requests that you provide the following item(s):
 - A. The Bank’s standard Certification of Durable Power of Attorney by Agent.
 - B. Certification of the following factual matter(s) concerning the Principal, Agent, or power of attorney:

C. Because the power of attorney is only effective on the disability or incapacity of the Principal, please provide a written statement from a physician attending the Principal that states that the Principal is presently mentally incapable of managing his or her financial affairs.

3. Opinion of Legal Counsel. The Bank requests that you provide at the Principal’s expense an opinion of legal counsel regarding the following matter of law, for the following reason:

_____.

4. The following additional information: _____
_____.

_____ Bank

By: _____

Authorized Signature

EXHIBIT D - Sample Bank Form - Refusal to Accept Power of Attorney

NOTICE OF REFUSAL TO ACCEPT DURABLE POWER OF ATTORNEY

To: _____

Date: _____

From: _____ Bank (“Bank”)

Description of Power of Attorney:

Principal: _____ (“Principal”)

Agent: _____ (“Agent”)

Date of Power of Attorney: _____

Date Power of Attorney Presented: _____

The Agent presented the Bank with the power of attorney described above and requested the Bank to accept it. After careful consideration, the Bank refuses to accept the power of attorney for the following reason(s):

1. The Principal is not already a Bank customer, and the Bank is not required to engage in the proposed transaction, or the Bank is unwilling to expand an existing customer relationship with the Principal under the power of attorney.
2. The Bank does not offer the product or service requested by the Agent.
3. The Bank has actual knowledge of termination of the Agent’s authority or the power of attorney.
4. The Bank requested (a) an agent’s certification, (b) an opinion of legal counsel, and/or (c) an English translation **AND** (i) the Agent refused to comply with the request, **OR** (ii) the document received was incorrect, incomplete, unclear, limited, qualified or deficient in a manner that makes it ineffective.
5. The Bank believes in good faith that (a) the power of attorney is not valid and/or (b) the Agent does not have the authority to act on behalf of the Principal as requested.
6. The Bank has actual knowledge that a judicial proceeding has been commenced to construe the power of attorney or review the Agent’s conduct and that proceeding is pending.
7. The Bank has actual knowledge that a final judicial order is in place that found that the power of attorney is invalid with respect to the purpose of the requested banking activity or the Agent lacked the authority to act in the same manner in which the agent is attempting to act under the power of attorney.
8. The Bank has made or has actual knowledge that another person has made a report to a law enforcement agency or other state or federal agency, including the Department of Family and Protective Services, stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the Agent or a person acting with or on behalf of the Agent.
9. The Bank has received conflicting instructions or communications regarding the matter from co-agents under the same power of attorney or from agents acting under different powers of attorney signed by the principal.

10. Other Reasons:

- a. The Power of Attorney is not a durable power of attorney.
- b. The account in question is not held by the principal but is held in a trust.
- c. _____

_____ BANK
By: _____

Authorized Signer

EXHIBIT E - Sample Bank Form

Refusal to Accept Power of Attorney for Reason Bank not Required to Disclose

NOTICE OF REFUSAL TO ACCEPT DURABLE POWER OF ATTORNEY (CONFIDENTIAL REASON)

To: [Name of Agent]

Date: [Date of Notice]

From: _____ BANK ("Bank")

Description of Power of Attorney:

Principal: _____

Agent: _____

Date: _____

Date Power of Attorney Presented: _____

You presented the Bank with the durable power of attorney described above and requested that the Bank accept it. After careful consideration, the Bank refuses to accept the power of attorney, and provides the following statement:

The Bank's reason for refusing to accept the power of attorney is a valid reason under either Section 751.206(2) or (3), Texas Estates Code. The Bank is not required to provide you with any additional explanation for its refusal. The undersigned is making this statement under penalties of perjury.

Name: _____

Title: _____

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, this ___ day of _____, 20_ , by _____.

Notary Public - State of Texas