

POWERS OF ATTORNEY – UPDATE AND ABUSES

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Wills and Probate Institute
September 12-13, 2002**

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I. INTRODUCTION

It has been nine years since old Section 36A of the Texas Probate Code was repealed and replaced by the Durable Power of Attorney Act. *See* TEX. PROB. CODE. ANN. §§ 481-506. The old Section 36A consisted of about six paragraphs and dealt with the most basic requirements of a durable power of attorney. The "new" act includes twenty-five sections and a statutory form. The evolution of the power of attorney as an estate planning tool has been consumer driven, with clients wanting an efficient and cost effective way of arranging for the management of their financial affairs when they are unable to do so themselves. The fact that people are living longer and the potential that a greater number of them will be incapacitated for at least a short period of time before death makes the durable power of attorney a necessary consideration in any estate plan. This article reviews the issues estate planners should consider when drafting powers of attorney under the Durable Power of Attorney Act, and examines the potential abuses that may arise with the wide spread use and acceptance of powers of attorney.

II. BACKGROUND

The durable power of attorney is a relatively recent legal invention which has its roots in agency law. Under common law, an agent's authority automatically terminates upon the principal's incapacity or death. The "durable" feature which allows an agent's authority to survive the principal's incapacity or disability if the instrument so provides was incorporated into the Uniform Probate Code in 1969. According to the Prefatory Note to Part 5 of Article V of the Uniform Probate Code, the concept of a durable power of attorney was developed "to assist persons interested in establishing non-court regimes for the management of their affairs in the event of later incapacity or

disability. The purpose was to recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts [or] for persons who are unwilling or unable to transfer assets as required to establish a trust." According to the American College of Trust and Estate Counsel, by 1986 all fifty of the United States and the District of Columbia had adopted some form of durable power of attorney legislation.

Effective September 1, 1993, the Texas Legislature amended the Texas Probate Code by repealing Section 36A, previously dealing with powers of attorney, and adding Sections 481 to 506, the new Texas Durable Power of Attorney Act. The 1993 Texas Durable Power of Attorney Act differed from previous legislation in four important ways. It provided the option of a "springing power" (the power of attorney becomes effective on the principal's disability), it included a statutory form which may, but is not required to be used, it no longer required two witnesses and it dispensed with the recording requirement, except for real property transactions.

III. REQUIREMENTS OF A DURABLE POWER OF ATTORNEY

A. Governing Law.

A durable power of attorney is governed by the law in effect when the power of attorney was executed.

1. Questions concerning powers of attorney executed between 1991 and 1993.

In 1991, the Texas Legislature passed a statute requiring all durable powers of attorney to be recorded in the county of the principal's residence. This requirement was repealed in 1993. If a power of attorney is governed by the law in existence at the time a power of attorney is executed, there is an open question as to whether a power of attorney executed between 1991 and 1993 is

a **durable** power of attorney if it has not been recorded. If a power of attorney executed between 1991 and 1993 is recorded after the principal becomes incapacitated, is the power of attorney a "durable" one? Or, because at the time the power was executed, a requirement for a durable power of attorney was recordation, did the non-durable power of attorney terminate on the principal's incapacity (as is the case for a non-durable power of attorney) so that recording the power of attorney after the principal's incapacity was ineffective?

2. Springing powers recognized in power of attorney executed before 1993.

In *Comerica Bank v. Texas Commerce Bank Nat'l Ass'n*, 2 S.W. 3d 723 (Tex. App. – Texarkana 1999, pet. denied), the court was faced with the question of whether a durable power of attorney executed in 1986, which purported to grant a springing power effective on the principal's disability, was valid in light of the fact that springing powers of attorney were not specifically mentioned in the Durable Power of Attorney Act until 1993. The court determined that the power of attorney was valid and stated that the legislature, by including specific language regarding springing powers in the 1993 amendments, was merely clarifying that such powers were allowed, and not prohibiting the use of springing powers in powers of attorney executed before 1993.

B. Technical Requirements.

To be effective under Texas law, a durable power of attorney executed on or after September 1, 1993 must meet the following requirements:

1. In writing.

A durable power of attorney must be in writing; an oral designation will not be effective.

2. Signed by the principal.

The principal must sign the durable power of attorney. Though the Probate Code does not define the term "signed," Section 311.005 of the Texas Government Code states that the term, signed, "includes any symbol executed or adopted by a person with the present intention to authenticate a writing." Conceivably, under this definition, the durable power of attorney could be signed by a person other than the principal as long as the principal adopted the signature with the present intention to authenticate the durable power of attorney. See Beyer, *Durable Powers of Attorney - The Texas Perspective*, ESTATE PLANNING DEVELOPMENTS (April 1990).

Section 406.0165 of the Texas Government Code allows a notary to sign the name of an individual who is physically unable to sign or make a mark on a document presented for notarization if directed to do so by that individual. The disabled individual must direct the notary to sign and the notary must sign in the presence of a witness who does not have any interest in the subject matter of the document to be notarized. The notary signs the disabled individual's name and then inserts the following or a substantially similar sentence: Signature affixed by notary in the presence of (name of witness), a disinterested witness, under Section 406.0165, Government Code.

3. Principal must be an adult.

The term "adult" is not specifically defined in the Probate Code. Section 3(t) of the Texas Probate Code provides that a "minor" is a person under eighteen years of age who has never been married or who has not had the disabilities of minority removed for general purposes. It is probably reasonable to assume that, under the Texas Probate Code, an adult is a person who is not a minor. This coincides with the language of Section 745(a)(1) of the guardianship provisions of the Texas Probate Code which recognizes that a minor becomes an adult by reaching 18 years of age.

4. Words of non-termination on subsequent disability or effective on disability.

The writing must contain the words "this power of attorney is not affected by subsequent disability or incapacity of the principal" or "this power of attorney becomes effective on the disability or incapacity of the principal" or similar words showing the intent of the principal that the power shall not terminate on the subsequent disability or incapacity of the principal.

5. Acknowledged.

The durable power of attorney must be acknowledged by the principal before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of the State of Texas or any other state. The durable power of attorney need not be witnessed.

6. Recording required for real property transaction.

Though the recording requirement added by the 1989 amendments to the power of attorney statute was repealed by the 1993 legislation, the current statute does make it clear that a durable power of attorney for a real property transaction requiring the execution and delivery of an instrument that is to be recorded also shall be recorded in the county where the real property is located.

C. Capacity at the Time of Executing the Power or Attorney.

Texas courts have recognized that the principal must be competent at the time the instrument is executed. *See e.g., Tomlinson v. Jones, 677 S.W.2d 490 (Tex. 1984).* Because the principal-agent relationship is defined under contract law, the standard of competency for executing a power of attorney is probably the same as that required for a contract, which is a higher standard than that required for a Will. *See*

Hamill v. Brashear, 513 S.W. 2d 602, 607 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).

IV. CONSIDERATIONS IN DRAFTING A DURABLE POWER OF ATTORNEY

A. Statutory Form.

The current Durable Power of Attorney Act includes a statutory form (see Appendix A), but specifically states that the statutory form is not exclusive and that other forms of power of attorney may be used. The form itself is based on the Uniform Statutory Form Power of Attorney Act and is fairly short. It lists the powers a principal may desire to grant to an agent with each area identified by a letter of the alphabet (for example, real property transactions are identified by (A), (B) is tangible personal property, (C) is stock and bond transactions, etc.). The principal is instructed that any power crossed out will be withheld. If no power is crossed out, the document shall be construed as a general power of attorney. There is also a section for the principal to describe with more specificity the limitations or extensions of the authority he is granting to the agent. The powers relating to the categories set forth in (A) through (M) of the statutory form are described in detail in the sections of the Durable Power of Attorney Act following the statutory form. If a category is not crossed out, the agent will have the powers described in the Act for that category. The principal then decides whether the power is to be effective immediately or effective only on subsequent disability by crossing out the alternative not chosen. If neither alternative is crossed out, the form states that it is assumed that the power is effective immediately. It is suggested that the principal initial any cross-outs.

B. Coordination With Other Estate Planning Goals.

Although a statutory form is available, an

estate planner should still draft the power of attorney so that it is tailored to the specific needs of the client. If the form does not already provide for the powers needed to implement a specific estate plan, this can be done by including provisions on the lines for "special instructions" in the form, or by attaching an exhibit which includes the additional provisions dictated by the client's needs. With the increased use of powers of attorney, an estate planner should anticipate that the power of attorney may be needed to carry out a client's estate plan in the following situations:

1. Disclaimers.

Section 499 of the Texas Probate Code (Construction of Power Relating to Estate, Trust, and other Beneficiary Transactions) allows an agent to disclaim the principal's interest in a trust, estate, or other asset to which the principal may become entitled. The IRS has indicated that it will look to state law to determine whether or not an agent acting under a power of attorney has the authority to execute a disclaimer on behalf of the principal. Priv. Ltr. Rul. 90-15-017 (January 10, 1990).

2. Gifts to be made to Crummey Trusts.

If the principal is making gifts to a Crummey Trust, the gift giving language in the statutory form should be adapted to take this into account.

3. Creation and funding of family limited partnerships and other business entities.

While Section 497 of the Durable Power of Attorney Act (Construction of Power relating to Business Operating Transactions) allows an agent to "buy" a business interest, if it is contemplated that the estate plan should include a family limited partnership, the power to create a limited partnership or other business entity should be specifically granted.

4. Creation and funding of revocable trusts.

Section 499 of the Durable Power of Attorney Act (Construction of Power Relating to Estate, Trust, and Other Beneficiary Transactions) gives an agent the authority to transfer all or part of the principal's property to the trustee of a revocable trust created by the principal as settlor. If the principal wishes to give the agent the power to create a revocable trust, this power should be added to the power of attorney. The authority to create a revocable trust may be helpful in a situation where the principal is incapacitated and no successor agents are named or able to act under the power of attorney in the event the current agent resigns, dies, or becomes incapacitated. The agent currently acting under the power of attorney would be able to create a revocable trust appointing successor fiduciaries to manage the incapacitated principal's financial affairs, if the agent named in the power of attorney becomes unable to act before the principal's death.

The power to create a trust may also be helpful in allowing the agent to implement tax planning in the event the principal neglected to do so, or the tax laws have changed. Because an agent does not have the power to make a Will for the principal, there is a question as to whether the revocable trust is merely a Will substitute and, if this is the case, such a power may be impermissible. This issue may be resolved by stating in the power of attorney that the revocable trust is distributed to the principal's personal representative on the principal's death. If the goal is to avoid probate, another option may be for the revocable trust provisions to mirror the terms of the principal's Will. On the other hand, it may be argued that the gift giving authority in the power of attorney extends to the agent's power to create such a trust. The power to create a trust should include the power to appoint the trustees. It may be prudent also to allow the agent to appoint a

corporate fiduciary if that appears to be in the principal's best interests.

5. Medicaid planning.

The estate planner may wish to specifically include authority to allow the agent to create a Miller Trust or to engage in other planning for medicaid eligibility.

6. Principal's ownership of life insurance on another.

Care should be taken to avoid adverse estate tax consequences to the agent named in a power of attorney in the event the principal owns a life insurance policy on the agent. In a situation such as, for example, an agent who is a child and a principal who is a parent, if the parent owns a life insurance policy on the child and the child dies before the parent, the proceeds from the policy may be included in the child's estate, if the power of attorney includes a provision allowing the child, as agent, to make gifts under the power of attorney to himself. IRC § 2042. The agent's power to make gifts to himself could be viewed as granting the agent incidents of ownership in the policy. To avoid this outcome, the power of attorney should specifically state that the agent is not permitted to exercise any of the principal's ownership rights in any life insurance policy owned by the principal on the life of the agent.

7. Gifts.

The statutory form includes a provision allowing the principal to indicate whether or not the principal grants the agent the authority to make gifts. The language in the statutory form states: "I grant my agent (attorney in fact) the power to apply my property to make gifts, 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."

This option may be adapted to reflect the

principal's specific desires. For example, the gifts may be restricted to certain individuals or a class of individuals (spouse and issue) or may be limited in terms of who may make the gifts (the agent initially appointed, but not successor agents). Several issues arise in connection with an agent's gift giving authority under a power of attorney.

a. If the power of attorney is silent on the right of the agent to make gifts.

If the agent is to be authorized to make gifts, this should be specifically addressed in the power of attorney. The current statutory form for the durable power of attorney does this. If the power to make gifts is not specifically included in the power of attorney, the Internal Revenue Service may take the position that gifts made by an agent or attorney-in-fact who had no authority to make such gifts on behalf of the principal will be included in the principal's estate for estate tax purposes under I.R.C. § 2038 as a revocable transfer. Generally the IRS looks to state law to determine whether this authority is granted when the power of attorney is silent on the matter. Tech. Adv. Mem. 86-35-007 (May 19, 1986). (*But see, Estate of Bronston v. Commissioner*, 56 T.C.M. (CCH) 550 (1988) where it was held that an agent could make gifts under a broad general durable power of attorney that did not mention gifts because the principal had a history of making gifts; *see also*, Tech. Adv. Mem. 99-44-005 (July 16, 1999), in which the IRS concluded that gifts made by a decedent's daughter as attorney-in-fact under a general power of attorney were not prohibited under Texas law because, despite the absence of specific language in the power of attorney granting gift-giving authority, the ambiguity in Texas law concerning an agent's power to make gifts under a power of attorney, the small size of the gifts, the decedent's intent as expressed in the decedent's will, and the decedent's prior history of making gifts led to the conclusion that this particular general power of attorney authorized the attorney-in-fact to make gifts.)

b. Power to elect gift-splitting.

If a situation may occur where the principal's spouse may be making gifts of separate property, language allowing the agent to elect gift-splitting treatment may be included.

c. Avoid adverse tax consequences for agent.

If an agent has the authority to make gifts of any amount and the agent is included as a permissible recipient of a gift, the agent holds a taxable general power of appointment. See I.R.C. §§ 2041 and 2514. If the agent predeceases the principal, the agent will be considered a holder of a general power of appointment at his death, thus causing the inclusion of the principal's property in the agent's estate for estate tax purposes. If the agent survives the principal, the agent may be viewed as releasing the general power of appointment by not exercising it before the principal's death. The amount in excess of the greater of \$5,000 or 5% of the value of the principal's property would be included in the agent's estate for estate tax purposes.

There are several options for avoiding the adverse tax treatment that may result for the agent. The power to make gifts could exclude the agent as a recipient. But this may not be acceptable to the principal because the agent is often a family member whom the principal wishes to benefit. Another option may be to limit the amount of gifts to the annual exclusion amount. This option, which is the default provision in the statutory form, may be desirable if there is little chance that larger gifts will have to be made to implement medicaid or other tax planning strategies. Another possibility is to provide that the agent must obtain the consent of "adverse parties" when making a gift. The IRS regulations relating to general powers of appointment state that "[a] power is not considered a general power of appointment if it is not exercisable by the

decedent except with the consent or joinder of a person having a substantial interest in the property subject to the power which is adverse to the exercise of the power in favor of the decedent." Regs. 20.2041-3(c)(1) and 20.2041-3(c)(2). The power of attorney could provide that the agent's gift-giving powers are conditioned on obtaining the consent of all adult persons who would participate in the residuary estate of the principal if the principal had died immediately before the gifts were made. If this were not practical, another option would be to select an independent third party as agent solely for the purpose of making gifts.

d. Charitable gifts.

If the client has a pattern of making charitable gifts, or wishes to allow the agent to continue to make payments on a charitable pledge, or desires to allow the agent the authority to make charitable contributions in the future, this should be addressed in the power of attorney.

C. Compensation.

Powers of attorney rarely deal with compensation of the agent. But often the agent's duties under a power of attorney are more time consuming, complicated, and of longer duration than those of an executor. Estate planning attorneys should bring this fact to their client's attention so that the client may decide whether or not it would be fair to compensate the agent. The compensation may be hourly or based on a percentage of the value of the assets being managed by the agent. Consideration should also be given to as to how to divide compensation between or among joint agents.

D. Definition of Incapacity for Springing Powers.

When an agent's authority is triggered by the onset of the principal's disability, it will be necessary to arrive at a definition of disability. This, of course, should be

addressed in the instrument. The drafter should keep in mind that incapacity need not be limited to the principal's mental incapacity. For example, the New Jersey springing power of attorney statute provides that a principal will be considered under a disability if the principal is unable to manage his or her property and affairs effectively for reasons such as "mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance." N.J. Stat. Ann. §46:2(b)8(a).

After disability has been defined, the instrument should then outline a procedure or mechanism for objectively certifying the onset of the disability. The method widely used for establishing the incapacity of the principal is by written certification of one or more doctors who have examined the principal.

The default definition of disability, as provided in the statutory form, states that the principal shall be considered disabled or incapacitated if a physician certifies in writing at a date later than the date of the power of attorney, that the principal is mentally incapable of managing his or her financial affairs.

E. Appointment of Substitute Agents.

The power of attorney may include language allowing the agent to appoint in writing a substitute agent to act for the agent during those times the agent may not be available. This provision may be used by the agent, for example, when the agent goes on vacation or is otherwise unavailable to handle the principal's affairs. This provision may read, "To appoint a substitute agent hereunder and to grant such substitute agent any or all of the powers granted to my agent hereunder."

F. Appointment of Successor Agents.

Just as it is important to name successor executors in a Will, it is important to consider who will act as agent under a power of attorney in the event the agent initially named is unable to act as agent. The power of attorney may also be tailored so that successor agents do not necessarily have the same powers as the original agent. For example, the power of attorney may be effective immediately if a spouse is agent, but be effective on disability if the spouse is unable to act and the successor agent is appointed. Different standards may also apply to gift giving. Since it is important to encourage third parties to accept the powers of attorney, third parties may find it comforting if the document sets forth the proof acceptable to show that the original appointees are unable to act. For example, the successor may act if the successor presents a death certificate for the originally acting agent, a letter of resignation from the originally acting agent, or a letter from a physician stating that the originally acting agent is incapacitated.

G. Multiple Agents.

Many of the same concerns attend the appointment of multiple agents as are involved in the naming of co-executors. It is by far easier for one person, rather than two or more people, to act in a fiduciary capacity, but clients often desire to appoint joint agents, and in some cases, joint agents may provide the oversight to help avoid possible abuses of the power of attorney. The clients must decide and the document must state, whether the agents should act jointly (so that both would have to sign off on any acts taken on behalf of the principal) or if the agents may act independently of each other. Even if a power of attorney states that one agent may act without the joinder of the other agent, a third party wishing to avoid controversy may require the participation of both agents in a transaction. The client should also weigh the risk that a situation could arise where quick action is required, but only one agent is

available.

H. Power to Bring Suit to Compel Acceptance of Power of Attorney.

Sometimes the fact that a power of attorney includes a provision allowing the agent to bring suit to compel acceptance of the power of attorney puts more pressure on a third party to accept a power of attorney. Such a provision may include the following language, "To institute any legal, administrative or other proceeding deemed necessary or desirable by my attorney (i) to enforce the acceptance of this power of attorney by a third party, or (ii) for damages and all expenses and costs (including reasonable attorneys' fees) resulting from a third party's failure to timely accept this power of attorney."

I. Powers Granted in Statute That Client May Not Want.

A client executing the statutory form of power of attorney is at a disadvantage because, unless the client is educated by the attorney, the client is usually unaware of what powers the categories on the first page of the statutory form actually include. It is suggested that at some point in the estate planning process, before the documents are executed, the attorney give the client a copy of Sections 491 through 504 of the Durable Power of Attorney Act so that the client is informed as to what powers the client is authorizing the agent to possess. A client may be surprised at some of the powers granted to an agent, such as, for example, the power to change the beneficiary on the principal's life insurance policy or IRA (as long as the agent may be designated a beneficiary only to the extent that the agent was named as a beneficiary by the principal before the execution of the power of attorney).

V. REVOCATION.

A durable power of attorney may expressly state that it will terminate on a certain date

or upon the happening of a certain event. Otherwise, the validity of a durable power of attorney will not be affected by the lapse of time. The revocation of a durable power of attorney will not revoke the agent's authority with respect to the agent or any other person who acts in good faith reliance on the durable power of attorney without actual notice of its revocation.

A. Revocation by the principal.

There is no statutorily mandated method for revocation of a power of attorney by the principal. The Durable Power of Attorney Act states that, unless otherwise provided by the durable power of attorney, a revocation is not effective as to a third party relying on the power of attorney until the third party receives **actual notice** of the revocation. The drafters of the legislation felt that the principal is in the best position to know the makeup of his property and the best way to notify those third parties with whom an agent may be dealing that the power of attorney has been revoked. The one thing to remember is, the more work a revocation mechanism requires a third party to do, the less likely the third party will be inclined to accept the power of attorney.

B. Termination on the death of the principal.

In accordance with agency law, the durable power of attorney automatically terminates on the death of the principal.

C. Termination by appointment of guardian.

The Durable Power of Attorney Act provides that, if a permanent guardian of the estate is appointed for the principal, the powers of the attorney-in-fact or agent shall terminate upon the qualification of the guardian, and the attorney-in-fact or agent

shall deliver to the guardian all assets of the estate of the ward in his possession and shall account to the guardian as he would to his principal, had the principal himself terminated the power of attorney. If a temporary guardian is appointed, the court may suspend the powers of an agent until the expiration of the temporary guardianship.

D. Power of attorney is not revoked by bankruptcy of the principal.

Section 487A of the Durable Power of Attorney Act states that the filing of a voluntary or involuntary petition in bankruptcy in connection with the principal's debts does not revoke or terminate a power of attorney, but the agent's authority to act for the principal is subject to the limitations and requirements of the United States Bankruptcy Code.

VI. COORDINATING POWERS OF ATTORNEY WITH OTHER ESTATE PLANNING DOCUMENTS

A. Using Power of Attorney With Unfunded Revocable Trust.

An alternative for clients who are reluctant to name an agent with immediate authority to deal with their property because they don't know anyone they trust to have this power may be the use of a durable power of attorney in conjunction with an unfunded revocable trust. The only authority granted to the agent under the durable power of attorney would be to fund, upon the principal's disability, a revocable trust previously established by the principal. The present exercise of the durable power of attorney poses no threat to the principal and yet the mechanism for handling the principal's property in the event of disability is in place.

B. Avoiding Guardianship's Termination of Power of Attorney by Naming Agent in Declaration of Guardian.

Section 679 of the Texas Probate Code allows a competent adult to name an individual to act as guardian of his or her person and/or estate in the event of later incapacity. A declarant may also in the declaration disqualify certain individuals from ever serving as the declarant's guardian. The disqualified persons may not be appointed as declarant's guardian under any circumstance.

Because the qualification of a guardian terminates all powers of the agent under a durable power, for the purposes of continuity of administration of the principal's assets, the principal may wish to appoint the same individuals in a durable power of attorney and in a declaration of guardian under Section 679 of the Texas Probate Code. This would remove the incentive for another individual to open a guardianship for the principal so as to terminate the power of attorney. On the other hand, naming the same individuals in both documents removes a possible safeguard (someone who can demand an accounting) in the event the agent under the power of attorney is not acting in the principal's best interests.

C. Referencing Will as Guideline in Making Gifts.

If the principal wishes to grant the agent the authority to make gifts, the principal may wish in the power of attorney to reference the principal's will as identifying those beneficiaries who may receive gifts during the principal's lifetime.

D. Coordinating Power of Attorney With Trust Provisions If Gifts Are To Be Made from Revocable Trust.

If a power of attorney authorizes the agent to make gifts, but the bulk of the principal's

assets are in a revocable trust, it is important to coordinate the power of attorney and the trust instrument to make it clear that an agent under the power of attorney is authorized to withdraw property from the trust in order to make the gifts.

In Tech. Adv. Mem. 96-01-002 (January 5, 1996), the decedent had transferred the majority of his property to a revocable trust. The decedent had also given his daughter a power of attorney which authorized annual exclusion gifts to the decedent's children, grandchildren, great-grandchildren, and step-grandchildren. The trust did not reference the power of attorney nor did the power of attorney reference the trust. The agent under the power of attorney withdrew funds in the amount of \$170,000 from the revocable trust's bank account to make seventeen annual exclusion gifts. The IRS determined that the \$170,000 of gifts was included in the decedent's estate because the trust agreement provided that the right to withdraw principal from the trust "must be exercised solely by [the decedent] and may not be exercised by any other person, including any agent or conservator." The IRS recognized that the agent had a right to make gifts under the power of attorney, but argued that the property used by the agent to make gifts was not owned by the decedent, individually, but by the decedent as trustee of the revocable trust. Under the terms of the revocable trust, the agent did not have the authority to withdraw the principal to make the gifts.

In *Estate of Frank*, T.C. Memo. 1995-132 [1995 RIA TC Memo ¶95,132], the IRS lost its argument to include in the decedent's estate gifts made by an agent under a power of attorney after the agent withdrew funds from the revocable trust. The gifts were made two days before the decedent's death. The IRS claimed that the gifts were included in the decedent's estate under Section 2035 of the Internal Revenue Code because the decedent had relinquished a power of revocation over the withdrawn amounts within three years of the decedent's date of

death. The Tax Court rejected the IRS' claim and reasoned that the decedent, through the agent, had exercised his power to withdraw assets from the trust, and then made the gifts (through the agent) in his individual capacity. The difference between the *Estate of Frank* and Tech. Adv. Mem. 96-01-002 is that power of attorney in the *Estate of Frank* expressly authorized the agent to make withdrawals from the decedent's revocable trust.

E. Need For Power of Attorney Even If All Assets Are In A Revocable Trust.

Even if a client decides to use a funded revocable trust to manage his or her assets, the client should be encouraged to consider also executing a durable power of attorney granting an agent the powers a trustee will not normally possess because the trustee's powers are limited to the assets actually transferred to the trust. Such powers not usually possessed by a trustee include the authority to gain access to the principal's safe deposit box, to sign the principal's tax return, to participate in tax proceedings involving the principal, and to handle matters affecting the principal's personal business such as redirecting the principal's mail and canceling or continuing credit cards. See Collin, Planning and Drafting Durable Powers of Attorney (American College of Probate Counsel Annual Meeting, March 1989).

VII. DEALING WITH THIRD PARTIES

As with any agency arrangement, the durable power of attorney will be strictly construed. *Gittings, Neiman-Marcus, Inc. v. Estes*, 440 S.W.2d 90 (Tex. Civ. App. - Eastland 1969, no writ); *Montgomery v. Nevins*, 270 S.W.2d 427 (Tex. Civ. App. - Austin 1954, writ ref'd n.r.e.). The powers granted should be described with specificity; it should not be assumed that powers not expressly described will be implied. See

RESTATEMENT (SECOND) OF AGENCY §37 (1958). Generally speaking, an agent acting under a general durable power of attorney is authorized to act on behalf of the principal within the ordinary and usual scope of business entrusted to the agent. *Von Wedel v. McGrath*, 180 F.2d 716 (3rd Cir.), *cert denied*, 340 U.S. 816 (1950). Section 487 of the Durable Power of Attorney Act provides that, “[w]hen a power of attorney is used, a third party who relies in good faith on the acts of an attorney in fact or agent within the scope of the power of attorney is not liable to the principal.” For this reason, it is important to anticipate with whom the agent will be dealing so as to make sure that the power to deal with such third party can be considered to be “within the scope of the power of attorney.”

A. Specific Concerns of Certain Third Parties.

1. Brokerage Firms.

Most brokerage firms have their own forms for powers of attorney. But it is often impractical to expect the client to remember to ask for and execute a new power of attorney form whenever a new brokerage account is opened. Also, the principal may not have capacity to execute a new power of attorney form when an account is opened. Many brokerage firms will accept an affidavit or certificate executed by the agent stating that the power of attorney is in effect, has not been revoked, and the principal had capacity when the power of attorney was signed. Many brokerage firms have their own form for this variation on the Affidavit referenced in Section 487 of the Texas Probate Code.

2. Title Companies.

Title companies often are comforted by the sight in a power of attorney of a specific legal description of the real property the agent wishes to sell on behalf of the principal. The drafter may want to consider including such legal descriptions in the

power of attorney’s special instructions or in an exhibit attached to the power of attorney.

3. Post Office.

Several practitioners have reported that the U.S. Post Office has required a power of attorney to specifically authorize the agent to change the address of the principal, or otherwise deal with the principal’s mail, before allowing the agent to do so.

B. Section 487 Affidavit.

1. Section 486 of the Durable Power of Attorney Act protects third parties from liability for relying on a revoked or terminated power of attorney if the third party had no actual knowledge that the power of attorney had been revoked or terminated and acts in good faith reliance on the power of attorney.

2. Section 487 of the Durable Power of Attorney Act authorizes an agent acting under a power of attorney to furnish a third party with an affidavit stating that the agent does not have knowledge of the termination or revocation of the power of attorney. The affidavit is “conclusive proof” as between the agent and the third party that the power of attorney has not been terminated or revoked. The agent may also give a third party a similar affidavit stating that the principal is incapacitated, as defined in the power of attorney, so that the springing power is triggered. While the third party may not be held liable for relying on the power of attorney, the principal may still bring a cause of action against the agent, if the agent has breached a fiduciary duty to the principal.

C. “Stale” Powers of Attorney.

Section 483 of the Durable Power of Attorney Act states that a durable power of attorney does not lapse because of the passage of time unless a time limitation is specifically stated in the instrument creating the durable power of attorney. The purpose

of this language is to combat the policies of some banks, insurance companies, title companies, brokerage firms and other third parties not to honor a power of attorney more than a certain number of years after its execution. This practice may make sense with a non-durable power of attorney, but the essence of a durable power of attorney is that the principal intends for the agent's authority to extend indefinitely into the future.

D. Validity in Other States.

Generally, the laws of the state where a durable power of attorney is executed will control the validity of the power. However, there is some authority to the effect that the validity of a durable power of attorney affecting real property will be governed by the state where the real property is located. If multi-state transactions involving real property are contemplated, the drafter of a durable power of attorney should prepare the power of attorney so that it complies with the laws of the various states where the principal's real property is located. Another option is to prepare a different power of attorney for each state containing real property belonging to the principal. See Schlesinger, *Planning for the Elderly or Incapacitated Client*, AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL NOTES (1991).

Section 505 of the Durable Power of Attorney Act states that the powers set forth in the Durable Power of Attorney Act may be exercised with respect to the principal's property "whether or not the property is located in this state and whether or not the powers are exercised or the durable power of attorney is executed in this state."

VIII. ANTICIPATING ABUSES

A. Potential For Abuse.

1. Lack of Oversight.

The very characteristics that make powers of attorney attractive to clients may give rise to opportunities for abuse. The ease with which powers of attorney may be used is appealing to the client who wants few complications, but this ease also allows for an unscrupulous agent to take advantage of an unsuspecting principal. Durable Powers of Attorney are typically used in situations involving incapacitated principals, so the potential for abuse without detection is great.

The lack of oversight of one using a power of attorney can be very real. If a principal trusts an individual enough to make him or her agent under a power of attorney, the principal has probably also named the individual as guardian under a Designation of Guardian Before the Need Arises, and as executor under the principal's will. If one suspects the agent is abusing the power of attorney, who has standing to complain? It is true that an agent must account to a permanent court appointed guardian of the estate, but is this an effective remedy if the agent is also the guardian? And if the principal dies and the agent becomes the executor of the principal's estate, it is unlikely that the executor would pursue any claims that the agent had abused his or her powers during the principal's lifetime.

2. Acts of agent can affect principal's other beneficiaries – estate planning by ademption.

The principal is not the only one who can be hurt by the abuse of a power of attorney by the agent. An agent may also be in the position to alter the principal's overall estate plan.

Imagine that a principal has executed a will that leaves the principal's residence to one person and the principal's residuary estate to another person. The principal has named the beneficiary of the principal's residuary estate as the agent under the principal's power of attorney. After the principal becomes incapacitated and is moved to a health care facility, the agent sells the

principal's house. When the principal dies, the specific bequest of the principal's residence cannot take effect because the residence was not owned by the principal at the principal's death. But the cash resulting from the sale of the residence passes to the agent as part of the principal's residuary estate.

The Texas Supreme Court has indicated that such a situation may be an exception to the ademption rule. See *Shriner's Hospital for Crippled Children v. Stahl*, 610 S.W. 2d 147, 150 (Tex. 1980) (recognizing that an exception to the ademption rule may involve an involuntary conversion of property or sale by a guardian under circumstances in which a testatrix "had no capacity or opportunity to adjust her testamentary disposition").

In *Plummer v. Estate of Plummer*, 51 S.W. 3d 840 (Tex. App. – Texarkana 2001, pet. denied), a daughter of the decedent sued her brother and sister for using a power of attorney to transfer funds out of an account the daughter had with the decedent as joint tenants with right of survivorship and into an account the brother and sister had with the decedent as joint tenants with right of survivorship. The mother died soon after the transfer. The agents under the power of attorney claimed that their mother had been told that she would require long term care, so the agents were consolidating their mother's funds into one account from which they would pay expenses for their mother's care. The court observed that the daughter who was suing did not have a vested right in her joint tenancy account before her mother's death and that her mother could have removed her name or spent the funds at any time before the mother's death. The question to be decided by the court was whether the agents violated their fiduciary duties to the decedent by acting in a manner that thwarted the mother's intent. The issue centered on whether the agents attempted "to gain benefit for themselves at the expense of their mother and thus placed themselves in a position where their self-

interest conflicted with their obligations as a fiduciary." *Plummer*, 51 S.W. 3d at 7. The jury found that the agents acted in the best interests of the decedent. The jury was probably swayed by the fact that one of the agents testified that, instead of claiming the funds remaining in the account as joint tenants, the agents planned on dividing the funds remaining in the account among all of the decedent's children. As a result, the agents were not found to have taken actions to benefit themselves at the expense of the decedent. *Plummer* 51 S.W.3d at 8.

It is not known at what point the agents in the *Plummer* case decided to share their joint tenancy account with their other brothers and sisters (whether this was always the plan or just a last minute explanation), but the above illustrates some of the ways powers of attorney can be used to alter a principal's estate plan.

B. Avoiding Situations That Encourage Abuse.

1. Educating the client.

The client should understand the extent and nature of the powers the client is granting to an agent and should be advised to exercise great care in the choice of agents. The client should be given a copy of the statutory definitions of the powers granted under a power of attorney. Each power described should be reviewed with the client so that the client may decide whether or not to grant the power.

2. Educating the agent –Duty to inform and account.

Section 489B of the Durable Power of Attorney Act states that the agent is a fiduciary and has a duty to inform and to account for actions taken pursuant to the power of attorney. The agent is also required to maintain records of each action taken or decision made by the agent and to inform the principal of all actions taken pursuant to the power of attorney. The principal may

demand an accounting by the agent. These rights of the principal may be given to another person designated by the principal and may also be exercised by the principal's guardian or other personal representative.

One way to possibly reduce the potential for abuse of a power of attorney is to make sure that the agent is aware of the duty to inform and account. The power of attorney could include a provision stating that the agent's power does not commence until the agent has signed a statement acknowledging and accepting these responsibilities.

3. Arrange for "watch dogs."

One way to avoid placing an agent in a situation which may lead to abuse of a power of attorney is to arrange for the agent's actions to be subject to review by one or more individuals. The principal may appoint a person other than the agent in a Designation of Guardian Before Need Arises, so that a guardian may be appointed in the event there is suspected abuse. The principal may also choose to designate another individual under Section 489B of the Durable Power of Attorney Act (discussed above) to whom the agent must account.

If the situation warrants it, drafting safeguards such as the following may be included in the durable power of attorney:

- a. appointing more than one agent and requiring that the agents act jointly;
- b. permitting one who is not an agent to terminate the authority granted under the durable power of attorney;
- c. requiring periodic accountings and advance notice of certain actions to one who is not an agent, but who is granted veto power; or
- d. authorizing the agent to do nothing more than to fund on the principal's

disability an already existing revocable trust established by the principal. An added precaution would be to have a corporate trustee of such trust.

IX. CONCLUSION

Though it is convenient to have the statutory durable power of attorney form, the ease and simplicity of the form is deceptive. The attorney must not forget that each client is different and that careful thought must be given to tailor this form to the client's specific needs and goals. It is also important to educate the client to the potential dangers and abuses that may occur through the use of powers of attorney. The attorney should also encourage the client to give careful thought to the choice of agent and to review with the client whether or not it is necessary to include any special safeguards to protect the client and the client's overall estate plan. If the client is made aware of the issues, with forethought, the dangers of a convenient and efficient estate planning tool may be minimized and the assets of the principal preserved and used according to the principal's intent.

APPENDIX A

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, CHAPTER XII, TEXAS PROBATE 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.

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 except for a power that I have crossed out below.

TO WITHHOLD A POWER, YOU MUST 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.

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY AND MY AGENT (ATTORNEY IN FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT.

SPECIAL INSTRUCTIONS:

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, 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 ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT 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. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the 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.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the

following (each to act alone and successively, in the order named) as successor(s) to that agent:

_____.

Signed this _____ day of _____, 20____.

(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: _____

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

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POWERS OF ATTORNEY – UPDATE AND ABUSES

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Bar Admission and Certification:

Licensed in Texas, November, 1985
Board Certified in Estate Planning and Probate Law, 1992, re-certified, 1997, 2002

Education:

University of Houston Law Center, Houston, TX
J.D. Degree, 1985
The Houston Law Review, Legal Developments Editor
Order of the Barons Honor Society

L'Alliance Francaise, Paris, France
Certificate in French Language Studies, 1975-1976

University of Massachusetts, Amherst, MA
B.A. Degree, cum laude, in 1975

Attorney-Mediator Institute, Austin, Texas, September 1998

Professional Affiliation:

Member of Texas Academy of Probate and Trust Lawyers
Houston Bar Association and Houston Bar Association Probate Section
Texas Bar Association and Texas Bar Association Real Property, Probate and Trust Section
Former Member of Texas Power of Attorney Act State Bar Sub-Committee

Employment:

Galligan & Manning, Houston, Texas, December 1, 1997 to present:
Practice focuses on estate planning and estate administration, including wills, trusts, life insurance planning, family limited partnerships, marital property agreements, estate tax returns, funding of trusts, all matters relating to the probate of decedents' estates, and representing creditors in claims against decedents' estates.

Mary Galligan, Attorney At Law, Houston, TX, May 1, 1994 to November 30, 1997:
Practice focused on estate planning and estate administration.

Butler & Binion, Houston, TX, October, 1986 to April 30, 1994:
Associate attorney, Trust and Estates (9/1/87 to 4/30/94)
Emphasis on pre and post-mortem estate and tax planning, including life insurance planning. Experience in all phases of estate administration, including preparation of estate and fiduciary tax returns and funding trusts. Extensive document drafting, including wills, trusts and marital property agreements. Experience with nonprofit organizations and charitable giving.

Associate attorney, Corporate Section (10/1/86 to 9/1/87)
Experience in joint ventures, limited partnerships, private offerings, shareholder agreements, contract negotiations, acquisitions and sales of businesses.

Lapin, Tutz & Mayer, Houston, TX, June 1984 to September 1986:
Associate attorney, Corporate Section
Focus on business planning for owners of closely held businesses.

Speeches and Articles:

- Author/Speaker: Topic: Basic Estate Planning Considerations: Representing Clients with HIV/AIDS
Houston Bar Association-Texas Accountants and Lawyers for the Arts Seminar on AIDS and the Law, May 2002
- Co-Author: Topic: Who has Standing in Probate Court?
South Texas College of Law Wills and Probate Institute, September 2001
- Speaker: Topic: Appraisal Issues in Estate Administration
International Society of Appraisers, October 2000
- Author/Speaker: Topic: Estate Planning for Qualified Retirement Plans and IRA's
National Business Institute, August 2000
- Author/Speaker Topic: Trust and Asset Protection Alternatives in Texas
National Business Institute, March 2000
- Author/Speaker Topic: Estate Planning With Statutory Forms
National Association of Legal Secretaries National Forum, August 1999
- Author/Speaker: Topic: Representing the Elderly and Terminally Ill
University of Houston Wills and Probate Institute, June 1999 and July 1998
- Speaker: Topic: Wills and Trusts – Special Considerations for the Child or Adult Who Has Cystic Fibrosis
Cystic Fibrosis Foundation, June 1995
- Author/Speaker: Estate Planning for Artists
Texas Accountants and Lawyers for the Arts, June 1995
- Author/Speaker: Topic: Basic Considerations in Estate Planning
Houston Bar Association Aids and the Law Seminars, November 1994