

- SUBJECT:** Durable and statutory durable powers of attorney
- COMMITTEE:** Judicial Affairs — committee substitute recommended
- VOTE:** 7 ayes — Thompson, Hartnett, Capelo, Deshotel, Garcia, Solis, Uresti
0 nays
2 absent — Hinojosa, Talton
- WITNESSES:** (*On the original bill:*)
For — None
Against — Jerry Jones, Texas Academy of Probate Attorneys
On — Judge Guy Herman
- BACKGROUND:** Under current law, revocation of a durable power of attorney is not effective as to a third party relying on the power of attorney until the third party receives actual notice of the revocation. Durable power of attorney for a real property transaction requiring the execution and delivery of an instrument that is to be recorded must be recorded in the county clerk's office. The current durable power of attorney does not contain safeguards to protect principals.

Probate Code, sec. 490 outlines a form that may be used to assign statutory power of attorney. The validity of a power of attorney is not affected by the fact that one or more of the categories of optional powers listed in the form are struck.
- DIGEST:** (The author intends to offer a floor substitute. The digest below reflects that substitute.)

HB 1883 as substituted would allow the statutory durable power of attorney to be revoked by filing notice of the revocation in the county clerk's office and giving notice of revocation to the attorney in fact or agent. On receiving notification of the revocation of statutory durable power of attorney, the

attorney in fact or agent would have to return to the principal any of the principal's property administered by the attorney in fact or agent.

The bill would require a statutory durable power of attorney and the statement of the principal to be recorded in the county in which the principal lived. The attorney in fact or agent could not engage in real property or tangible property transactions before the 11th day after the date on which the durable power of attorney was recorded.

A statutory durable power of attorney would not be effective unless the principal, on or before executing the durable power of attorney, signed a statement declaring that the principal had received, read, and understood the disclosure statement. A statement similar in form to the statutory form offered in HB 1883 as substituted would be acceptable.

The attorney in fact or agent would have to maintain records of each transaction, including an accounting of receipts and disbursements. The attorney would have to make all records available, on request, to the principal or any guardian or other personal representative of the principal's estate. If there was a failure to comply, the person making the request could ask a court for an order to enforce the request. After notice and hearing, the court could order that the records be made available. The records would have to be maintained for at least four years after the date the durable power of attorney or statutory power of attorney expired or expressly was revoked.

HB 1883 as substituted would provide a form that could serve to assign statutory durable power of attorney. The new form would add a disclosure statement. Optional powers would be initialed if granted instead of struck out if not granted. The disclosure statement explicitly would:

- ! describe the powers granted to persons appointed with durable power of attorney;
- ! suggest that the principal assign successor agents;
- ! stress that the principal would retain the right to make decisions regarding his or her property;
- ! remind the principal that the power of attorney could be revoked at any time;
- ! state that the principal was entitled to an accounting; and

- ! remind the principal that the statutory durable power of attorney form did not authorize anyone to make medical or health-care decisions for the principal.

The principal could require the agent or attorney in fact to provide a sample signature on the form. The form would not be effective unless notarized and signed by at least one witness who was not the principal, the agent, successor agent, or notary and the disclosure statement was signed by the principal.

HB 1883 as substituted would take effect September 1, 2001, and would apply only to a durable power of attorney or statutory power of attorney executed on or after that date.

NOTES:

The floor substitute would address concerns expressed during the House Judicial Affairs Committee hearing on HB 1883 relating to provisions for people over age 55, bonding requirements, and court appearances. The substitute would rewrite the durable power of attorney statute to include new safeguards to protect principals from abuse. These provisions include:

- ! requiring durable power of attorney to be witnessed;
- ! requiring the principal to initial the powers given;
- ! requiring the filing of a durable power of attorney in the county of the principal's address;
- ! new notice requirements of the duties of the attorney in fact;
- ! a cooling-off period of 10 days after filing before the attorney in fact may exercise the powers given; and
- ! new recordkeeping requirements.