

BILL ANALYSIS

Senate Research Center

H.B. 1974
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State Affairs
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The Real Estate, Probate, and Trust Law Section of the State Bar of Texas (REPTL) proposes H.B. 1974, which provides several changes to the Texas Durable Power of Attorney Act intended to ensure that validly-executed durable powers of attorney (DPOA) can be used more effectively in Texas, in furtherance of the legislative goal of reducing the need for guardianship proceedings, and to provide additional powers to the designated agents.

DPOAs are vital for planning for the possibility of incapacity, and are specifically included as an alternative to guardianship under the Estates Code. But many Texas citizens have been unable to effectively use DPOAs due to their rejection for arbitrary or unexplained reasons. H.B. 1974 makes DPOAs more readily available.

Overview: H.B. 1974 makes important changes to the statute by:

- providing for reasonable acceptance of DPOAs in a timely fashion so that guardianship can be avoided;
- eliminating risk to persons who accept DPOAs by allowing them to rely on an agent's certification that the DPOA is valid for the purpose it is being presented or an opinion of the agent's counsel who is hired at the principal's expense;
- giving the person who is asked to accept the DPOA numerous valid reasons to reject, some of which cannot be challenged by the principal or agent; and
- providing a mechanism to have a court decide any disputes.

This bill does not require someone to automatically accept a DPOA and does not shift liability to those who do accept a DPOA. Rather, it provides new liability protection to those who accept a DPOA without knowledge that it was invalid and includes new procedures to properly reject a DPOA.

Similar provisions have been enacted in 30 other states without issue.

Difference from C.S.S.B. 926:

1. At the request of the Business Law Foundation, extended the deadlines to seek an opinion of counsel from seven days to 10 days; and extended the deadline to request an agent present a certification for the DPOA, from five days to seven days.
2. At the request of real estate attorneys, adds Section 751.007 to confirm current Texas law saying a deed that is void for any legal reason is not validated simply because it was executed by an agent using a DPOA.
3. Corrects Texas Legislative Council error in new Section 751.213 regarding liability of the principal executing a power of attorney, replacing an "and" at 751.213(a)(2) with an "or," and making conforming changes.

Fiscal impact: No significant fiscal implication to the State is anticipated.

Support: REPTL Section, State Bar of Texas, Statutory Probate Courts of Texas, and Disability Rights Texas (registered support in the House).

Opposition: Texas Bankers Association. Note: Business Law Foundation is now neutral.

Detailed overview of bill provisions:

Key provisions that require reasonable acceptance of a durable power of attorney include the following:

- A new section is added that requires, unless there is one or more valid ground for refusal as provided in the Act, a person presented with a valid durable power of attorney to accept the power or request either an agent's certificate or an opinion of counsel (each as set forth in the Act) within a reasonable period of time (seven business days after presentment, five business days after receipt of a requested certificate, or seven business days after receipt of a requested opinion of counsel). Any translation of a power must be requested within five business days from the date presented, and if requested the power is not considered presented for acceptance until that translation is provided. These time periods can be extended by agreement of the parties. If the agent refuses to provide a requested translation, agent's certificate or opinion of counsel, the person does not have to accept the power. (Section 8 - § 751.201)
- A provision is added to clarify that a person cannot require a special form of power of attorney for their purposes or require that it be recorded unless it must be under Section 751.151, Estates Code (i.e., certain real property transactions). (Section 8 - § 751.207)
- A provision is added to require a person who refuses to accept a power to provide written notice to the agent that the power is not accepted and either provide the reason or indicate under penalties of perjury that the reason for refusal is one of certain limited statutory provisions (i.e., those described below in the numbered paragraphs 2 and 3 below, the "Private Reason Affidavit"). This notice must be provided within the time limits described above, unless extended by the parties. (Section 8 - § 751.202)
- A provision is added to allow a principal or an agent to seek legal recourse for the failure of a person to accept a durable power of attorney within the required statutory timeframe without providing the reason for refusal (or the Private Reason Affidavit). Exclusive remedies available under the Act include a court order requiring acceptance of the power (unless the person later provides the Private Reason Affidavit) and liability for attorney's fees and costs (even if the person later provides the Private Reason Affidavit). (Section 8 - § 751.212)

There are numerous provisions that are added to protect those who accept durable powers of attorney in good faith and additional provisions that allow for denial of acceptance of durable powers of attorney. These protections do not exist under current law and will be an added benefit to those institutions who currently have reasonable acceptance policies. They include the following:

- A new section provides that termination of an agent's power is not binding on persons who accept the power if the person does not have notice and acts in good faith. (Section 5 - § 751.134)
- A new section provides that the execution of a new power of attorney does not automatically revoke any prior powers of attorney, unless specifically indicated. (Section 5 - § 751.134)
- A new section that requires a requested agent's certification to any factual matter concerning the principal, agent, or the power of attorney be signed under penalty of perjury and provides a form of certification that may be used. (Section 8 - § 751.203)

- New sections are added to permit a request for a translation or an opinion of counsel relating to any matter of law concerning the power. Such items will be paid for by the principal unless the person presented with the power of attorney delays that request beyond the statutory time to request such document. If the time for requesting has passed, the agent is not required but may still provide the translation or opinion. Any request for an opinion must provide the reason for the request. (Section 8 - § 751.204 and § 751.205)
- Several broadly defined reasons for refusing a power are delineated in § 751.206 (Section 8). These include when:
 1. the person would not engage with the principal or the agent in the same circumstances;
 2. the person 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;
 3. the person would not engage in a similar transaction with the agent because the person (or its affiliate) had filed a suspicious activity report on the principal or agent, the person believes in good faith that the principal or agent has a prior criminal history involving financial crimes, or 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. (If the reason for refusal is under this section or number 2 above, no specific explanation is required for the rejection under the Private Reason Affidavit. Rather, the Private Reason Affidavit would just state that the refusal is based on a reason described by one of the above paragraphs.);
 4. there is actual knowledge of the termination of the power or the agent's authority;
 5. a request for a certificate or opinion is refused;
 6. the certificate or opinion is unclear or qualified in a manner that makes it ineffective for its intended purpose;
 7. the person in good faith believes the power is not valid or the agent is exceeding his or her authority, even if a certificate or opinion is provided;
 8. the person has actual knowledge of a judicial proceeding to construe the power or review the agent's conduct and that proceeding is pending or was finally determined with a ruling 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;
 9. the person has made or is aware of a claim that the principal is being abused financially or physically;
 10. there are conflicting directions from co-agents or separate agents under different durable powers of attorney (but only with respect to the matter on which there is a conflict); or
 11. the power is governed by the law of another state that does not have provisions that require acceptance or the power the agent is attempting to exercise is not permitted under the other state's law.

- A new section is added to protect a person who accepts a power without knowledge that the signature is invalid by allowing that person to rely on a presumption that it is genuine. In addition, a person who accepts a power without knowledge of its invalidity or termination, or that the agent is exceeding his or her scope, may rely on that power. (Section 8 - § 751.209)
- An additional provision is added to allow a person to specifically rely upon the following without any further investigation or any liability to another person: an agent's certification under penalty of perjury, an English translation of the power, and an opinion of counsel. (Section 8 - § 751.210)
- A new section is added to clarify that an employee's lack of actual knowledge inures to the company for which the employee works. (Section 8 - § 751.211)
- A provision is added to allow a person to seek reimbursement of attorney's fees and costs from the principal if a proceeding to require acceptance of the durable power of attorney is filed after a refusal was timely provided or the person is not found to be required to accept the power in such proceeding. (Section 8 - § 751.213)

Other changes to the statute are being made to clarify and modernize provisions of the current Act.

- A provision is added to exclude certain powers that could be considered "durable" from the application of the Act (such as powers coupled with an interest medical powers of attorney, proxies, and governmental powers) to avoid conflict of laws issues. (Section 1 - § 751.0015)
- A new definition section is added to clarify terms used in the subtitle, with those terms only being applicable to this subtitle. A provision is added to permit a durable power of attorney to be signed by another at the direction of the principal. In addition, a provision is added to provide that if a power of attorney is governed by law of another jurisdiction and that law provides that the agent's authority is exercisable despite the principal's incapacity, the power is considered a durable power of attorney. (Section 2 - § 751.002, § 751.0021)
- Provisions are added to determine the validity of powers of attorney executed in this state that are subject to other laws and those executed outside of the state. A provision is added to confirm that a photocopy of a power of attorney has the same effect as an original, and can be relied upon as such. (Section 2 - § 751.0023, § 751.0024)
- The provisions relating to rights and remedies that remain available under other laws is updated and clarified. (Section 2 - § 751.006)
- A new section is added to clarify that the Act does not supersede any other law applicable to financial institutions or other entities, and if there is a conflict, the other law applies. (Section 2 - § 751.007)
- New provisions regarding agents are added, including the following:
 - A provision to explicitly allow co-agents to be appointed, with the default powers being independent powers unless otherwise specified. (Section 3 - § 751.021)
 - A provision to clarify that a person named as an agent is not a fiduciary until he or she accepts appointment as agent, which can be done by exercising authority, performing duties, or by any other assertion or conduct indicating acceptance. (Section 3 - § 751.022)
 - A provision to allow a principal to authorize an agent to appoint his or her own successor, who will have the same powers as the appointing agent unless specifically provided otherwise, and who will only serve after all other agents named by the principal cease or fail to serve. (Section 3 - § 751.023)

- A provision that specifically permits reimbursement and reasonable compensation of an agent if the power is silent. (Section 3 - § 751.024)
- A provision to clarify that acts performed under a valid power have the same effect as those made by the principal, whether or not the agent is under a disability or incapacitated, has been added. (Section 4 - § 751.051)
- A provision is added to protect a successor agent who is unaware of a predecessor's breach and to provide a mechanism to report actual knowledge of a prior or imminent breach (including liability for failing to so report). (Section 5 - § 751.121)
- A provision is added to allow certain persons to bring an action in court to construe a power of attorney (i.e., principal; agent; guardian, conservator or other fiduciary acting for the principal; a person who is a beneficiary of the principal; certain governmental agencies that protect the welfare 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), provided that the principal, if not incapacitated, can have the action dismissed. (Section 8 - § 751.251)
- A new provision is added to specifically require the recordation of a power of attorney for home equity liens and reverse mortgage transactions. (Section 7)
- A provision is added to clarify that a durable power of attorney is considered accepted on the first day the person agrees to act at the agent's direction under the power. (Section 8 - § 751.208)

Provisions to describe the authority of an agent under a durable power of attorney have been added.

- A provision is added to allow an agent, if expressly authorized by the principal and not otherwise prohibited by another agreement or instrument, to enter into certain estate planning transactions on behalf of the principal, including to: create, amend, revoke or terminate inter vivos trusts; make gifts with certain limitations; create or change rights of survivorship and beneficiary designations; and delegate authority granted under the power of attorney. Agents who are not an ancestor, spouse or descendant of the principal may not exercise such powers to their own benefit unless specifically permitted in the power. The provision clarifies that the authority of the agent exists over all property of the principal, whether later acquired or not located in Texas. (Section 3 - § 751.031) A sample provision to be added to the durable power of attorney for these purposes has been added to the Act. (Section 10)
- A provision is added to allow gifts made by an agent to include a gift to a trust, a uniform transfer to minor's account, or a tuition savings plan. Unless the power provides otherwise, the extent to which an agent may make gifts on behalf of the principal is limited to the annual exclusion amount or double that amount if the spouse consents to gift split. Any gifts made must be consistent with the principal's objectives, if known, or if not known, as consistent with the principal's best interest, based on all relevant factors (including the principal's property and foreseeable obligations, tax minimization goals, program eligibility desires, and history of gift-making). (Section 3 - § 751.032)
- A new provision allows an agent to be given authority with respect to beneficiary designations and entering into or changing pay on death, rights of survivorship, or trust accounts, subject to certain limitations. (Section 3 - § 751.033)
- A new section is added to allow incorporation of the terms of the Act by reference in a durable power of attorney. (Section 3 - § 751.034)
- A provision is added to require the agent to try to preserve the principal's estate plan, to the extent known, if consistent with the principal's best interest, considering factors such as

the extent of property, the principal's need for funds, minimization of taxes, and eligibility for benefit programs. (Section 5 - § 751.122)

- A provision is added to set forth when a durable power of attorney is terminated, which include: death of the principal; revocation of the power; as provided in the power; once the purpose of the power is achieved; the agent's power is terminated and there are no successor agents; and the appointment of a permanent guardian of the estate of the principal. (Section 5 - '§ 751.131)
- A provision is added to clarify when an agent's authority under a durable power of attorney is terminated, which include: revocation by the principal; death, incapacity, disqualification, or resignation of the agent; dissolution of the marriage of the agent to the principal; or termination of the power itself. (Section 5 - § 751.132)
- A new section provides that termination of an agent's power is not effective as to the agent if the agent does not have notice and acts in good faith. (Section 5 - § 751.134)

Minimal changes are proposed to the form of durable power of attorney as follows. (Section 9)

- Notification is included in the preamble to alert the principal that under current law if the principal would like to permit the agent to have the authority to sign a home equity loan document on the principal's behalf that the power of attorney must be signed in the office of the lender, an attorney at law, or a title company.
- A new provision is added that indicates co-agents can be appointed and that they act independently unless specified otherwise.
- A new paragraph is added to the Special Instructions in the form to indicate whether an agent is or is not entitled to compensation and to also indicate how multiple agents will act (whether independently, jointly, or by majority vote).
- Changes are made to clarify that an agent is no longer qualified to serve (unless the power provides otherwise) if the marriage to the principal is dissolved and to change "revoked" to "termination" for consistency with the new proposed statute.
- A provision was added to clarify that the statutory power of attorney is governed by Texas law.

Other miscellaneous changes to the statute include the following:

- The term "attorney-in-fact" has been removed throughout the section of the Act amended as part of this bill, as an agent is defined to include an attorney-in-fact.
- Several nonsubstantive changes have been made to streamline existing language. (Section 4)
- Additions have been made to expand the current mineral estate management provisions, to add the power to designate the property that constitutes the principal's homestead, to add the power to mortgage and encumber real estate (including the power to sign documents to create a lien against the principal's homestead and to consent to the creation of a lien against the principal's spouse's homestead), and to make clarification changes to the provisions regarding retirement plan provisions. (Sections 11, 12, and 14)
- Personal and family maintenance powers are expanded to include the power to deal with the mail of the principal and, subject to the needs of the supported individuals of a principal, to provide for the reasonable care of the principal's pets. (Section 13)

H.B. 1974 amends current law relating to durable powers of attorney.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subchapter A, Chapter 751, Estates Code, by adding Section 751.0015, as follows:

Sec. 751.0015. **APPLICABILITY OF SUBTITLE.** Provides that this subtitle (Durable Powers of Attorney) applies to all durable powers of attorney except:

- (1) a power of attorney to the extent it is coupled with an interest in the subject of the power, including a power of attorney given to or for the benefit of a creditor in connection with a credit transaction;
- (2) a medical power of attorney, as defined by Section 166.002 (Definitions), Health and Safety Code;
- (3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; or
- (4) a power of attorney created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

SECTION 2. Amends Subchapter A, Chapter 751, Estates Code, by amending Sections 751.002, 751.003, and 751.006 and adding Sections 751.00201, 751.0021, 751.0022, 751.0023, 751.0024, and 751.007, as follows:

Sec. 751.002. New heading: **DEFINITIONS.** Defines “actual knowledge,” “affiliate,” “agent,” “durable power of attorney,” “principal,” and “record.”

Sec. 751.00201. **MEANING OF DISABLED OR INCAPACITATED FOR PURPOSES OF DURABLE POWER OF ATTORNEY.** Provides that, unless otherwise defined by a durable power of attorney, a person is considered disabled or incapacitated for purposes of the durable power of attorney if a physician certifies in writing at a certain date that, based on the physician’s medical examination of the person, the person is determined to be mentally incapable of managing the person’s financial affairs.

Sec. 751.0021. **REQUIREMENTS OF DURABLE POWER OF ATTORNEY.** (a) Creates this subsection from existing text. Provides that an instrument is a durable power of attorney for purposes of this subtitle if the instrument:

- (1) is a writing or other record that designates another person as agent, rather than designates another person as attorney in fact or agent, and grants authority to that agent to act in the place of the principal, regardless of whether the term “power of attorney” is used;
- (2) is signed by an adult principal or in the adult principal’s conscious presence by another adult directed by the principal to sign the principal’s name on the instrument;
- (3) contains:
 - (A) makes no changes to this paragraph;
 - (B) certain words that clearly indicate that the authority conferred on the agent is required to be exercised notwithstanding the principal’s subsequent disability or incapacity, rather than certain words that show the principal’s intent that the authority conferred

on the attorney in fact or agent is required to be exercised notwithstanding the principal's subsequent disability or incapacity; and

(4) is acknowledged by the principal or another adult directed by the principal as authorized by Subdivision (2) before an officer authorized under the laws of this state or another state to take certain actions.

Deletes existing text defining "durable power of attorney."

(b) Provides that a writing or other record is considered a durable power of attorney under this subtitle, if the law of a jurisdiction other than this state determines the meaning and effect of the writing or other record that grants authority to an agent to act in the place of the principal, regardless of whether the term "power of attorney" is used, and that law provides that the authority conferred on the agent is exercisable notwithstanding the principal's subsequent disability or incapacity.

Sec. 751.0022. PRESUMPTION OF GENUINE SIGNATURE. Provides that a signature on a durable power of attorney that purports to be the signature of the principal or of another adult directed by the principal as authorized by Section 751.0021(a)(2) is presumed to be genuine, and the durable power of attorney is presumed to have been executed under Section 751.0021(a) if the officer taking the acknowledgment has complied with the requirements of Section 121.004(b) (relating to requiring the officer to take certain actions relating to the acknowledgment of a written instrument), Civil Practice and Remedies Code.

Sec. 751.0023. VALIDITY OF POWER OF ATTORNEY. (a) Provides that a durable power of attorney executed in this state is valid if the execution of the instrument complies with Section 751.0021(a).

(b) Provides that a durable power of attorney executed in a jurisdiction other than this state is valid in this state if, when executed, the execution of the durable power of attorney complied with certain requirements by law.

(c) Provides that, except as otherwise provided by statute other than this subtitle or by the durable power of attorney, a photocopy or electronically transmitted copy of an original durable power of attorney has the same effect as the original instrument and authorizes it to be relied on, without liability, by a person who is asked to accept the durable power of attorney to the same extent as the original.

Sec. 751.0024. MEANING AND EFFECT OF DURABLE POWER OF ATTORNEY. Provides that the meaning and effect of a durable power of attorney is determined by the law of the jurisdiction indicated in the durable power of attorney and, in the absence of an indication of jurisdiction, by certain laws.

Sec. 751.003. UNIFORMITY OF APPLICATION AND CONSTRUCTION. Requires that this subtitle be applied and construed to effect the general purpose of this subtitle, which is to make uniform to the fullest extent possible the law with respect to the subject of this subtitle among states enacting these provisions.

Sec. 751.006. New heading: REMEDIES UNDER OTHER LAW. Provides that the remedies under this chapter (General Provisions Regarding Durable Powers of Attorney) are not exclusive and do not abrogate any right or remedy under any law of this state other than this chapter, rather than provides that the rights set out under this subtitle are cumulative of any other rights or remedies the principal may have at common law or other applicable statutes and are not in derogation of those rights.

Sec. 751.007. CONFLICT WITH OR EFFECT ON OTHER LAW. Provides that this subtitle does not:

(1) supersede any other law applicable to financial institutions or other entities, and to the extent of any conflict between this subtitle and another law applicable to an entity, the other law controls; or

(2) have the effect on validating a conveyance of an interest in real property executed by an agent under a durable power of attorney if the conveyance is determined under a statute or common law to be void but not voidable.

SECTION 3. Amends Chapter 751, Estates Code, by adding Subchapters A-1 and A-2, as follows:

SUBCHAPTER A-1. APPOINTMENT OF AGENTS

Sec. 751.021. CO-AGENTS. Authorizes a principal to designate in a durable power of attorney two or more persons to act as co-agents and authorizes each co-agent, unless the durable power of attorney otherwise provides, to exercise authority independently of the other co-agent.

Sec. 751.022. ACCEPTANCE OF APPOINTMENT AS AGENT. Provides that, except as otherwise provided in the durable power of attorney, a person accepts appointment as an agent under a durable power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance of the appointment.

Sec. 751.023. SUCCESSOR AGENTS. (a) Authorizes a principal to designate in a durable power of attorney one or more successor agents to act if an agent resigns, dies, or becomes incapacitated, is not qualified to serve, or declines to serve.

(b) Authorizes a principal to grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function.

(c) Provides that, unless the durable power of attorney otherwise provides, a successor agent has the same authority as the authority granted to the predecessor agent and is not considered an agent under this subtitle. Prohibits the successor agent from acting until all predecessor agents, including co-agents, to the successor agent have resigned, died, or become incapacitated, are not qualified to serve, or have declined to serve, unless the durable power of attorney otherwise provides.

Sec. 751.024. REIMBURSEMENT AND COMPENSATION OF AGENT. Provides that, unless the durable power of attorney otherwise provides, an agent is entitled to reimbursement of reasonable expenses incurred on the principal's behalf and compensation that is reasonable under the circumstances.

SUBCHAPTER A-2. AUTHORITY OF AGENT UNDER DURABLE POWER OF ATTORNEY

Sec. 751.031. GRANTS OF AUTHORITY IN GENERAL AND CERTAIN LIMITATIONS. (a) Provides that, subject to Subsections (b), (c), and (d) and Section 751.032, if a durable power of attorney grants to an agent the authority to perform all acts that the principal could perform, the agent has the general authority conferred by Subchapter C (Construction of Powers Related to Statutory Durable Power of Attorney), Chapter 752 (Statutory Durable Power of Attorney).

(b) Authorizes the agent to take certain actions on the principal's behalf or with respect to the principal's property only if the durable power of attorney designating the agent expressly grants the agent the authority, and the exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject.

(c) Prohibits an agent who is not an ancestor, spouse, or descendant of the principal, notwithstanding a grant of authority to perform an act described by Subsection (b), from exercising authority under the power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise, unless the durable power of attorney otherwise provides.

(d) Provides that, subject to Subsections (b) and (c) and Section 751.032 and if the subjects over which authority is granted in a durable power of attorney are similar or overlap, the broadest authority controls.

(e) Provides that authority granted in a durable power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, regardless of whether the property is located in this state and the authority is exercised in this state or the power of attorney is executed in this state.

Sec. 751.032. GIFT AUTHORITY. (a) Provides that, in this section, a gift for the benefit of a person includes a gift to a trust, an account under the Texas Uniform Transfers to Minors Act (Chapter 141, Property Code) or a similar law of another state, and a qualified tuition program of any state that meets the requirements of Section 529, Internal Revenue Code of 1986.

(b) Provides that, unless the durable power of attorney otherwise provides, a grant of authority to make a gift is subject to the limitations prescribed by this section.

(c) Provides that language in a durable power of attorney granting general authority with respect to gifts authorizes the agent to only:

(1) make outright to, or for the benefit of, a person a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed certain amounts; and

(2) consent, as provided by Section 2513, Internal Revenue Code of 1986, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual federal gift tax exclusions for both spouses.

(d) Authorizes an agent to make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if the agent actually knows those objectives. Authorizes the agent, if the agent does not know the principal's objectives, to make a gift of the principal's property only as the agent determines is consistent with the principal's best interest based on all relevant factors, including the factors listed in Section 751.122, as added by this Act, and the principal's personal history of making or joining in making gifts.

Sec. 751.033. AUTHORITY TO CREATE OR CHANGE CERTAIN BENEFICIARY DESIGNATIONS. (a) Provides that, unless the durable power of attorney otherwise provides and except as provided by Section 751.031(c), authority granted to an agent under Section 751.031(b)(4) (relating to authorizing an agent to create or change a beneficiary designation) empowers the agent to take certain actions relating to a beneficiary designation, certain accounts, or a certain nontestamentary payment or transfer.

(b) Provides that, if an agent is granted authority under Section 751.031(b)(4) and the durable power of attorney grants the authority to the agent described in Section 752.108 (Insurance and Annuity Transactions) or 752.113 (Retirement

Plan Transactions), then, unless the power of attorney otherwise provides, the authority of the agent to designate the agent as a beneficiary is not subject to the limitations prescribed by Sections 752.108(b) (relating to authorizing an attorney in fact or agent to be named a beneficiary of an insurance contract) and 752.113(c) (relating to authorizing an attorney in fact or agent to be named a beneficiary under a retirement plan).

(c) Provides that, if an agent is not granted authority under Section 751.031(b)(4) but the durable power of attorney grants the authority to the agent described in Section 752.108 or 752.113, then, unless the power of attorney otherwise provides and notwithstanding Section 751.031, the agent's authority to designate the agent as a beneficiary is subject to the limitations prescribed by Sections 752.108(b) and 752.113(c).

Sec. 751.034. INCORPORATION OF AUTHORITY. (a) Provides that an agent has authority described in this chapter if the durable power of attorney refers to general authority with respect to the descriptive term for the subjects stated in Chapter 752 or cites the section in which the authority is described.

(b) Provides that a reference in a durable power of attorney to general authority with respect to the descriptive term for a subject in Chapter 752 or a citation to one of those sections incorporates the entire section as if the section were set out in its entirety in the power of attorney.

(c) Authorizes a principal to modify authority incorporated by reference.

SECTION 4. Amends Sections 751.051, 751.057, 751.101, 751.102, 751.103, 751.104, 751.105, and 751.106, Estates Code, as follows:

Sec. 751.051. New heading: EFFECT OF ACTS PERFORMED BY AGENT. Provides that an act performed by an agent under a durable power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act. Deletes existing text providing that each act performed by an attorney in fact or agent under a durable power of attorney during a period of the principal's disability or incapacity has the same effect, and inures to the benefit of and binds the principal and the principal's successors in interest, as if the principal were not disabled or incapacitated.

Sec. 751.057. EFFECT OF BANKRUPTCY PROCEEDING. Makes conforming changes.

Sec. 751.101. FIDUCIARY DUTIES. Provides that a person who accepts appointment as an agent under a durable power of attorney as provided by Section 751.022 is a fiduciary as to the principal only when acting as an agent under the power of attorney and has a duty to inform and to account for actions taken under the power of attorney, rather than provides that an attorney in fact or agent is a fiduciary and has a duty to inform and to account for actions taken under the power of attorney.

Sec. 751.102. DUTY TO TIMELY INFORM PRINCIPAL. (a) Requires the agent to timely inform the principal of each action taken under a durable power of attorney, rather than under the power of attorney. Makes a conforming change.

(b) Makes conforming changes.

Sec. 751.103. MAINTENANCE OF RECORDS. Makes conforming changes.

Sec. 751.104. ACCOUNTING. (a) Makes a conforming change.

(b) Requires an accounting under Subsection (a) (relating to authorizing the principal to demand an accounting by the agent), unless otherwise directed by the

principal, to include, among certain other items, the property belonging to the principal that has come to the agent's knowledge or into the agent's possession, rather than the property belonging to the principal that has come to the attorney in fact's or agent's knowledge or into the attorney in fact's or agent's possession. Makes conforming changes.

(c) Makes a conforming change.

Sec. 751.105. EFFECT OF FAILURE TO COMPLY; SUIT. Authorizes the principal, if the agent fails or refuses to complete certain tasks within a certain period, to file suit to terminate the durable power of attorney. Makes conforming changes.

Sec. 751.106. EFFECT OF SUBCHAPTER ON PRINCIPAL'S RIGHTS. Makes conforming changes.

SECTION 5. Amends Chapter 751, Estates Code, by adding Subchapters C-1 and C-2, as follows:

SUBCHAPTER C-1. OTHER DUTIES OF AGENT

Sec. 751.121. DUTY TO NOTIFY OF BREACH OF FIDUCIARY DUTY BY OTHER AGENT. (a) Requires an agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent to notify the principal and, if the principal is incapacitated, take any action reasonably appropriate under the circumstances to safeguard the principal's best interest. Provides that an agent who fails to notify the principal or take the required action is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken the action.

(b) Provides that, except as otherwise provided by Subsection (a) or the durable power of attorney, an agent who does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

Sec. 751.122. DUTY TO PRESERVE PRINCIPAL'S ESTATE PLAN. Requires an agent to preserve to the extent reasonably possible the principal's estate plan to the extent the agent has actual knowledge of the plan if preserving the plan is consistent with the principal's best interest based on certain relevant factors.

SUBCHAPTER C-2. DURATION OF DURABLE POWER OF ATTORNEY AND AGENT'S AUTHORITY

Sec. 751.131. TERMINATION OF DURABLE POWER OF ATTORNEY. Provides that a durable power of attorney terminates under certain circumstances.

Sec. 751.132. TERMINATION OF AGENT'S AUTHORITY. (a) Provides that an agent's authority under a durable power of attorney terminates under certain circumstances.

(b) Authorizes an agent's authority, unless the durable power of attorney otherwise provides, to be exercised until the agent's authority terminates under Subsection (a), notwithstanding a lapse of time since the execution of the power of attorney.

Sec. 751.134. EFFECT ON CERTAIN PERSONS OF TERMINATION OF DURABLE POWER OF ATTORNEY OR AGENT'S AUTHORITY. Provides that termination of an agent's authority or of a durable power of attorney is not effective as to the agent or another person who, without actual knowledge of the termination, acts in good faith under or in reliance on the power of attorney. Provides that an act performed as described by this section, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

Sec. 751.135. PREVIOUS DURABLE POWER OF ATTORNEY CONTINUES IN EFFECT UNTIL REVOKED. Provides that the execution of a durable power of attorney does not revoke a durable power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other durable powers of attorney are revoked.

SECTION 6. Transfers Section 751.052, Estates Code, to Subchapter C-2, Chapter 751, Estates Code, as added by this Act, redesignates it as Section 751.133, Estates Code, and amends it, as follows:

Sec. 751.133. New heading: RELATION OF AGENT TO COURT-APPOINTED GUARDIAN OF ESTATE. (a) Provides that, if, after execution of a durable power of attorney, a court of the principal's domicile appoints a permanent guardian of the estate of the principal, the powers of the agent, rather than the powers of the attorney in fact or agent, terminate on the qualification of the guardian of the estate. Requires the agent to, among certain other actions, deliver to the guardian of the estate all assets of the incapacitated person's estate, rather than all assets of the ward's estate, that are in the possession of the agent. Makes conforming changes.

(b) Makes a conforming change.

SECTION 7. Amends Section 751.151, Estates Code, to require a durable power of attorney for a real property transaction requiring the execution and delivery of an instrument that is to be recorded, including a release, assignment, satisfaction, mortgage, including a reverse mortgage, security agreement, deed of trust, encumbrance, deed of conveyance, oil, gas, or other mineral lease, memorandum of a lease, lien, including a home equity lien, or other claim or right to real property to be recorded in the office of the county clerk of the county in which the property is located not later than a certain date.

SECTION 8. Amends Chapter 751, Estates Code, by adding Subchapters E and F, as follows:

SUBCHAPTER E. ACCEPTANCE OF AND RELIANCE ON DURABLE POWER OF ATTORNEY

Sec. 751.201. ACCEPTANCE OF DURABLE POWER OF ATTORNEY REQUIRED; EXCEPTIONS. (a) Requires a person who is presented with and asked to accept a durable power of attorney by an agent with authority to act under the power of attorney, unless one or more grounds for refusal under Section 751.206, which is added by this Act, exist, to accept the power of attorney or, before accepting the power of attorney, make certain requests.

(b) Provides that, unless one or more grounds for refusal under Section 751.206 exist and except as provided by Subsection (c), a person who requests:

(1) an agent's certification is required to accept the durable power of attorney not later than a certain date; and

(2) an opinion of counsel is required to accept the durable power of attorney not later than a certain date.

(c) Authorizes an agent presenting a durable power of attorney for acceptance and the person to whom the power of attorney is presented to agree to extend a period prescribed by Subsection (a) or (b).

(d) Provides that, if an English translation of a durable power of attorney is requested as authorized by Subsection (a)(2)(B) (relating to a request of an English translation not later than a certain date), the power of attorney is not considered presented for acceptance under Subsection (a) until the date the requestor receives the translation. Requires the power of attorney, on and after

that date, to be treated as a power of attorney originally prepared in English for all the purposes of this subchapter.

(e) Provides that a person is not required to accept a durable power of attorney under this section if the agent refuses to or does not provide a requested certification, opinion of counsel, or English translation under this subchapter.

Sec. 751.202. OTHER FORM OR RECORDING OF DURABLE POWER OF ATTORNEY AS CONDITION OF ACCEPTANCE PROHIBITED. Prohibits a person who is asked to accept a durable power of attorney under Section 751.201 to require that an additional or different form of the power of attorney be presented for authority that is granted in the power of attorney presented to the person or to require the power of attorney be recorded in the office of a county clerk unless the recording of the instrument is required by Section 751.151 or another law of this state.

Sec. 751.203. AGENT'S CERTIFICATION. (a) Authorizes the person to whom the power of attorney is presented, before accepting a durable power of attorney under Section 751.201, to request that the agent presenting the power of attorney provide to the person an agent's certification, under penalty of perjury, of any factual matter concerning the principal, agent, or power of attorney.

(b) Sets forth the authorized language and content used in an agent's certification form.

(c) Provides that a certification made in compliance with this section is conclusive proof of the factual matter that is the subject of the certification.

Sec. 751.204. OPINION OF COUNSEL. (a) Authorizes the person to whom the power of attorney is presented, before accepting a durable power of attorney under Section 751.201, to request from the agent presenting the power of attorney an opinion of counsel regarding any matter of law concerning the power of attorney so long as the person provides to the agent the reason for the request in a writing or other record.

(b) Requires a requested opinion of counsel, except as otherwise provided in an agreement to extend the request period under Section 751.201(c), to be provided by the principal or agent, at the principal's expense. Authorizes, but does not require, the principal or agent, if without an extension, the requestor requests the opinion later than a certain date, to provide the opinion, at the requestor's expense.

Sec. 751.205. ENGLISH TRANSLATION. (a) Authorizes the person to whom the power of attorney is presented, before accepting a durable power of attorney under Section 751.201 that contains, wholly or partly, language other than English, to request from the agent presenting the power of attorney an English translation of the power of attorney.

(b) Requires a requested English translation, except as otherwise provided in an agreement to extend the request period under Section 751.201(c), to be provided by the principal or agent, at the principal's expense. Authorizes, but does not require, the principal or agent, if, without an extension, the requestor requests the translation later than a certain date, to provide the translation, at the requestor's expense.

Sec. 751.206. GROUNDS FOR REFUSING ACCEPTANCE. Sets forth the conditions under which a person is not required to accept a durable power of attorney under this subchapter.

Sec. 751.207. WRITTEN STATEMENT OF REFUSAL OF ACCEPTANCE REQUIRED. (a) Requires a person who refuses to accept a durable power of attorney under this subchapter, except as provided by Subsection (b), to provide to the agent

presenting the power of attorney for acceptance a written statement advising the agent of the reason or reasons the person is refusing to accept the power of attorney.

(b) Provides that, if the reason a person is refusing to accept a durable power of attorney is a certain reason:

(1) the person is required to provide to the agent presenting the power of attorney for acceptance a written statement signed by the person under penalty of perjury stating certain information relating to the reason for refusal; and

(2) the person refusing to accept the power of attorney is not required to provide any additional explanation for refusing to accept the power of attorney.

(c) Requires the person to provide to the agent the written statement required under Subsection (a) or (b) on or before the date the person would otherwise be required to accept the durable power of attorney under Section 751.201.

Sec. 751.208. DATE OF ACCEPTANCE. Provides that a durable power of attorney is considered accepted by a person under Section 751.201 on the first day the person agrees to act at the agent's direction under the power of attorney.

Sec. 751.209. GOOD FAITH RELIANCE ON DURABLE POWER OF ATTORNEY.

(a) Authorizes a person who in good faith accepts a durable power of attorney without actual knowledge that the signature of the principal or of another adult directed by the principal to sign the principal's name as authorized by Section 751.0021 is not genuine to rely on the presumption under Section 751.0022 that the signature is genuine and that the power of attorney was properly executed.

(b) Authorizes a person who in good faith accepts a durable power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated; that the purported agent's authority is void, invalid, or terminated; or that the agent is exceeding or improperly exercising the agent's authority to rely on the power of attorney as if the power of attorney were genuine, valid, and still in effect; the agent's authority were genuine, valid, and still in effect; and the agent had not exceeded and had properly exercised the authority.

Sec. 751.210. RELIANCE ON CERTAIN REQUESTED INFORMATION. Authorizes a person to rely on, without further investigation or liability to another person, an agent's certification, opinion of counsel, or English translation that is provided to the person under this subchapter.

Sec. 751.211. ACTUAL KNOWLEDGE OF PERSON WHEN TRANSACTIONS CONDUCTED THROUGH EMPLOYEES. (a) Provides that this section applies to a person who conducts a transaction or activity through an employee of the person.

(b) Provides that, for the purposes of this chapter, a person is not considered to have actual knowledge of a fact relating to a durable power of attorney, principal, or agent if the employee conducting the transaction or activity involving the power of attorney does not have actual knowledge of the fact.

(c) Provides that, for the purposes of this chapter, a person is considered to have actual knowledge of a fact relating to a durable power of attorney, principal, or agent if the employee conducting the transaction or activity involving the power of attorney has actual knowledge of the fact.

Sec. 751.212. CAUSE OF ACTION FOR REFUSAL TO ACCEPT DURABLE POWER OF ATTORNEY. (a) Authorizes the principal or an agent acting on the principal's behalf

to bring an action against a person who refuses to accept a durable power of attorney in violation of this subchapter.

(b) Prohibits an action to be commenced against a person until after the date the person is required to accept the durable power of attorney under Section 751.201.

(c) Requires the court, if the court finds that the person refused to accept the durable power of attorney in violation of this subchapter, as the exclusive remedy under this chapter, to order the person to accept the power of attorney. Authorizes the court, if the court finds that the person refused to accept the durable power of attorney in violation of this subchapter, as the exclusive remedy under this chapter, to award the plaintiff court costs and reasonable and necessary attorney's fees.

(d) Requires the court to dismiss an action that was commenced after the date a written statement described by Section 751.207(b) was provided to the agent.

(e) Prohibits the court, notwithstanding Subsection (c) and if the agent receives a written statement described by Section 751.207(b) after the date a timely action is commenced under this section, from ordering the person to accept the durable power of attorney, but instead authorizes the court to award the plaintiff court costs and reasonable and necessary attorney's fees as the exclusive remedy under this chapter.

Sec. 751.213. **LIABILITY OF PRINCIPAL.** (a) Provides that Subsection (b) applies to an action brought under Section 751.212 if the court makes certain findings.

(b) Authorizes the principal, under any of the circumstances described by Subsection (a), to be liable to the person who refused to accept the durable power of attorney for court costs and reasonable and necessary attorney's fees incurred in defending the action as the exclusive remedy under this chapter.

SUBCHAPTER F. CIVIL REMEDIES

Sec. 751.251. **JUDICIAL RELIEF.** (a) Authorizes certain individuals and entities to bring an action requesting a court to construe, or determine the validity or enforceability of, a durable power of attorney, or to review an agent's conduct under a durable power of attorney and grant appropriate relief.

(b) Authorizes a person who is asked to accept a durable power of attorney to bring an action requesting a court to construe, or determine the validity or enforceability of, the power of attorney.

(c) Requires the court, on the principal's motion, to dismiss an action under Subsection (a) unless the court finds that the principal lacks capacity to revoke the agent's authority or the durable power of attorney.

SECTION 9. Amends Section 752.051, Estates Code, to set forth the amended language and content of a "statutory durable power of attorney" form.

SECTION 10. Amends Subchapter B, Chapter 752, Estates Code, by adding Section 752.052, as follows:

Sec. 752.052. **MODIFYING STATUTORY FORM TO GRANT SPECIFIC AUTHORITY.** Authorizes the statutory durable power of attorney to be modified to allow the principal to grant the agent the specific authority described by Section 751.031(b) by including certain language. Sets forth the language.

SECTION 11. Amends Section 752.102, Estates Code, as follows:

Sec. 752.102. REAL PROPERTY TRANSACTIONS. (a) Creates this subsection from existing text. Provides that the language conferring authority with respect to real property transactions in a statutory durable power of attorney empowers the agent, rather than the attorney in fact or agent, without further reference to a specific description of the real property, to, among certain other actions, perform any act of management or of conservation with respect to an interest in real property, or a right incident to real property, owned or claimed to be owned by the principal, including the authority to manage and supervise an interest in real property, including the mineral estate, rather than manage and supervise an interest in real property, including the mineral estate, by, for example, entering into a lease for oil, gas, and mineral purposes; making contracts for development of the mineral estate; or making pooling and unitization agreements. Provides that the language conferring authority with respect to real property transactions in a statutory durable power of attorney empowers the agent, without further reference to a specific description of the real property, to, among certain other actions, enter into certain mineral transactions and designate the property that constitutes the principal's homestead. Makes a conforming change.

(b) Provides the power to mortgage and encumber real property provided by this section includes the power to execute documents necessary to create a lien against the principal's homestead as provided by Section 50 (Homestead; Protection from Forced Sale; Mortgages, Trust Deeds, and Liens), Article XVI (General Provisions), Texas Constitution, and to consent to the creation of a lien against property owned by the principal's spouse in which the principal has a homestead interest.

SECTION 12. Amends Section 752.108(b), Estates Code, to authorize an agent, unless the principal has granted the authority to create or change a beneficiary designation expressly as required by Section 751.031(b)(4), to be named a beneficiary of an insurance contract or an extension, renewal, or substitute for the contract only to the extent the agent was named as a beneficiary by the principal, rather than authorizes an attorney in fact or agent to be named a beneficiary of an insurance contract or an extension, renewal, or substitute for the contract only to the extent the attorney in fact or agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney.

SECTION 13. Amends Sections 752.109 and 752.111, Estates Code, as follows:

Sec. 752.109. ESTATE, TRUST, AND OTHER BENEFICIARY TRANSACTIONS. Provides that the language conferring authority with respect to estate, trust, and other beneficiary transactions in a statutory durable power of attorney empowers the agent, rather than the attorney in fact or agent, to act for the principal in all matters that affect a trust, probate estate, guardianship, conservatorship, life estate, escrow, custodianship, or other fund from which the principal is, may become, or claims to be entitled, as a beneficiary, to a share or payment, including to take certain actions.

Sec. 752.111. PERSONAL AND FAMILY MAINTENANCE. Provides that the language conferring authority with respect to personal and family maintenance in a statutory durable power of attorney empowers the agent to, among certain other actions, perform certain acts necessary in relation to the principal's mail and, subject to the needs of the individuals described by Subdivision (1) (relating to performing certain acts necessary to maintain the customary standard of living of certain persons), provide for the reasonable care of the principal's pets. Makes conforming and nonsubstantive changes.

SECTION 14. Amends Sections 752.113(b) and (c), Estates Code, as follows:

(b) Provides that the language conferring authority with respect to retirement plan transactions in a statutory durable power of attorney empowers the agent, rather than the attorney in fact or agent, to perform any lawful act the principal may perform with respect to a transaction relating to a retirement plan, including to, among certain other actions, waive the principal's right to be a beneficiary of a joint or survivor annuity if the principal is not the participant in the retirement plan, rather than waive the principal's

right to be a beneficiary of a joint or survivor annuity if the principal is a spouse who is not employed.

(c) Authorizes an agent, unless the principal has granted the authority to create or change a beneficiary designation expressly as required by Section 751.031(b)(4), to be named a beneficiary under a retirement plan only to the extent the agent was a named a beneficiary by the principal under the retirement plan, or, in the case of a rollover or trustee-to-trustee transfer, the predecessor retirement plan. Deletes existing text authorizing an attorney in fact or agent to be named a beneficiary under a retirement plan only to the extent the attorney in fact or agent was a named beneficiary under the retirement plan before the durable power of attorney was executed. Makes a conforming change.

SECTION 15. Repealers: Sections 751.004 (Duration of Durable Power of Attorney), 751.053 (Effect of Principal's Divorce or Marriage Annulment if Former Spouse is Attorney in Fact or Agent), 751.054 (Knowledge of Termination of Power; Good-Faith Acts), 751.055 (Affidavit Regarding Lack of Knowledge of Termination of Power or of Disability or Incapacity; Good-Faith Reliance), 751.056 (Nonliability of Third Party on Good-Faith Reliance), and 751.058 (Effect of Revocation of Durable Power of Attorney on Third Party), Estates Code.

SECTION 16. (a) Provides that, except as otherwise provided by this Act, this Act applies to a durable power of attorney, including a statutory durable power of attorney, created before, on, or after the effective date of this Act and a judicial proceeding concerning a durable power of attorney pending on, or commenced on or after, the effective date of this Act.

(b) Provides that the following provisions apply only to a durable power of attorney, including a statutory durable power of attorney, executed on or after the effective date of this Act:

(1) Section 751.024, Estates Code, as added by this Act;

(2) Subchapter A-2, Chapter 751, Estates Code, as added by this Act;

(3) Subchapters B, C, and D, Chapter 751, Estates Code, as amended by this Act; and

(4) Chapter 752, Estates Code, as amended by this Act.

(c) Provides that a durable power of attorney, including a statutory durable power of attorney, executed before the effective date of this Act is governed by the provisions specified in Subsections (b)(3) and (4) as those provisions existed on the date the durable power of attorney was executed, and the former law is continued in effect for that purpose.

(d) Provides that, if the court finds that application of a provision of this Act would substantially interfere with the effective conduct of a judicial proceeding concerning a durable power of attorney commenced before the effective date of this Act or would prejudice the rights of a party to the proceeding, the provision of this Act does not apply and the former law continues in effect for that purpose and applies in those circumstances.

(e) Provides that an act performed by a principal or agent with respect to a durable power of attorney before the effective date of this Act is not affected by this Act.

SECTION 17. Effective date: September 1, 2017.