ESTATE PLANNING HIGHLIGHTS OF THE 2017 TEXAS LEGISLATURE

GERRY W. BEYER

Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law
Lubbock, TX 79409

(806) 834-4270
gwb@ProfessorBeyer.com
http://www.ProfessorBeyer.com
http://www.BeyerBlog.com/

SAN ANTONIO ESTATE PLANNERS COUNCIL

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Texas Tech University School of Law
Lubbock, TX 79409-0004
(806) 834-4270
gwb@ProfessorBeyer.com – www.ProfessorBeyer.com

EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)
J.D., Summa Cum Laude, Ohio State University (1979)
LL.M., University of Illinois (1983)
J.S.D., University of Illinois (1990)

SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: American Law Institute; American College of Trust and Estate Counsel (Academic Fellow); American Bar Foundation; Texas Bar Foundation; American Bar Association; Texas State Bar Association
Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Governor Preston E. Smith Regent's Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)
Visiting Professor (virtual), University of Illinois College of Law (2017)

SELECTED HONORS

Order of the Coif
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986

SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (6th ed. 2015); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2002); TEXAS WILLS AND ESTATES: CASES AND MATERIALS (7th ed. 2015); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (3rd ed. 2007); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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ESTATE PLANNING HIGHLIGHTS OF THE 2017 TEXAS LEGISLATURE

This article reviews the highlights of the legislation enacted by the 2017 Texas Legislature relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters. The reader is warned that not all recent legislation is presented and not all aspects of each cited statute are analyzed. You must read and study the full text of the hundreds of pages of legislation to gain a complete understanding of the new laws.

I. INTESTATE SUCCESSION

A. Equitable Adoption

Despite apparent clear statutory language to the contrary, the Texas courts have consistently held that when an adopted by estoppel child dies, the child's property passes to the biological family rather than to the adoptive family as is the case when a formally adopted child dies. See *Heien v. Crabtree*, 369 S.W.2d 28 (Tex. 1963). The Legislature changed the definition of "child" to expressly include an equitably adopted child and added language including equitably adopted children in the adoption statute which effectively overrule this case. Acts 2017, 85th Leg., ch. 844, §§ 1 & 9, eff. Sept. 1, 2017 (amending Estates Code § 22.004 and adding Estates Code § 201.054(e)).

B. Passage of Title

If there is more than one heir, they each hold title to every asset as tenants in common. For example, if three children inherit the property of their last-to-die parent, each owns one-third of each item of clothing, silverware, book, piece of furniture, etc. This, of course, can be extremely awkward if the three children are unable to agree among themselves regarding who receives full ownership of each asset. If they cannot agree, the item may be sold and proceeds divided proportionately. However, if the estate is being independently administered, the executor may make distributions in divided or undivided interests in proportionate or disproportionate shares, and value the property to adjust the distribution for the differences in value of the assets. Acts 2017, 85th Leg., ch. 844, § 33, eff. Sept. 1, 2017 (adding Estates Code § 405.0015).

The problems associated with heirs holding as tenants in common are exacerbated with real property. The 2017 Texas Legislature addressed two of these problems. First, the Legislature enacted the Uniform Partition of Heirs Property Act becoming the eighth state to do so. Acts 2017, 85th Leg., ch. 297, § 1, eff. Sept. 1, 2017 (adding Property Code Ch. 23A) Here is how the Uniform Law Commission describes the act:

> [The act] helps preserve family wealth passed to the next generation in the form of real property. Affluent families can engage in sophisticated estate planning to ensure generational wealth, but those with smaller estates are more likely to use a simple will or to die intestate. For many lower- and middle-income families, the majority of the estate consists of real property. If the landowner dies intestate, the real estate passes to the landowner's heirs as tenants-in-common under state law. Tenants-in-common are vulnerable because any individual tenant can force a partition. Too often, real estate speculators acquire a small share of heirs' property in order to file a partition action and force a sale. Using this tactic, an investor can acquire the entire parcel for a price well below its fair market value and deplete a family's inherited wealth in the process. UPHPA provides a series of simple due process protections: notice, appraisal, right of first refusal, and if the other co-tenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds.

Second, the Legislature changed the common law by providing that under certain circumstances, a co-heir may adversely possess property owned by the other co-heirs. An uninterrupted ten year period of adverse possession is needed followed by another five years after affidavits of heirship and adverse possession are filed, notice published in the county where the property is located, and written notice to the last known address of all the co-heirs by certified mail. Title will then vest in the co-heir unless another co-heir files a controverting affidavit or brings suit to recover the co-tenant's share within five years of the date of the filing of the affidavits. Acts 2017, 85th Leg., ch. 742, § 1, eff. Sept. 1, 2017 (adding Civil Practice & Remedies Code § 16.0265).

II. WILLS

A. Self-Proving Affidavit

The self-proving affidavit was revised to change the phrases "last will and testament" and "last will or testament" to "will" to reflect modern law which no longer maintains the common law distinction between wills which were for real property and testaments which were for personal property. Acts 2017, 85th Leg., ch. 844, § 17, eff. Sept. 1, 2017 (amending Estates Code § 251.104(e)). (Note that many other statutory references in the Estates Code were likewise updated.)

B. Posthumous Class Gift Membership

The Legislature fixed a glitch in the statute enacted in 2015 which limited class gift membership to members born or in gestation at the time of the testator's death. The statute originally made no distinction between immediate gifts ("to my grandchildren") and postponed gifts ("to my child for life and then to my grandchildren"). In the latter case, it is like the testator intended grandchildren born after the testator's death to be included in the gift. The clarification provides that the beneficiary must be alive or in gestation at the death of the person by whom the class is measured rather than the testator. Acts 2017, 85th Leg., ch. 844, § 21, eff. Sept. 1, 2017 (amending Estates Code § 255.401).

C. Will Reformation

The 2015 Legislature authorized the court to modify or reform a will even if the will is unambiguous but placed no time limit on that authority creating the possibility that wills admitted to probate decades ago could be modified or reformed. The Legislature now requires the action to be filed on or before the fourth anniversary of the date the will was admitted to probate. Acts 2017, 85th Leg., ch. 844, § 22, eff. Sept. 1, 2017 (adding Estates Code § 255.451(a-1)).

D. Will Deposit

A person who has possession of a testator's original will and who cannot locate the testator after making a diligent search may deposit the will for a five dollar fee with the county clerk of the county of the testator's last known residence. This provision solves the problem of what someone, especially an attorney, should do with an original will when the person does not know how to locate the testator or even if the testator is still alive. Acts 2017, 85th Leg., ch. 710, § 1, eff. Sept. 1, 2017 (adding Estates Code § 252,001(a-1)). The clerk's duties with respect to deposited wills were expanded and clarified. Acts 2017, 85th Leg., ch. 710, § 33, eff. Sept. 1, 2017 (adding Estates Code § 252.2015).

III. ESTATE ADMINISTRATION

A. Applications

Applications to probate a will with an administration or as a muniment of title and applications for letters of administration must now contain the last three numbers of the driver's license numbers and social security numbers of both the decedent (if known or ascertainable with reasonable diligence) and the applicant. Acts 2017, 85th Leg., ch. 1039, § 1-3, eff. Sept. 1, 2017 (amending Estates Code §§ 256.052, 257.051, & 301.052).

B. Venue

The venue provision for probating a will and granting of letters was amended to clarify how "next of kin" is defined when venue is based on their residence when the decedent died outside of Texas. Basically, a spouse is the closest next of

kin with others within the third degree by blood being determined by the normal intestacy order. Acts 2017, 85th Leg., ch. 844, § 2, eff. Sept. 1, 2017 (adding Estates Code § 33.001(b)).

C. Time for Probate

The Legislature clarified that it is the *application* for probate that must be filed within four years of the testator's death to open an estate administration rather than the will actually being admitted to probate within that time period. Acts 2017, 85th Leg., ch. 844, § 23, eff. Sept. 1, 2017 (amending Estates Code § 256.003(b)).

D. Muniment of Title

The requirements for the application for the probate of a will as a muniment of title and required proof were made consistent with the situations where a muniment is authorized by allowing the application and proof to explain another reason why there is no necessity for administration besides the testator's estate not owing unpaid debts other than those secured by a lien on real property. Acts 2017, 85th Leg., ch. 844, §§ 24 & 25, eff. Sept. 1, 2017 (amending Estates Code § 257.051(a)(10) & 257.054(5)).

E. Notice to Creditors

Previously, the notice to creditors which a personal representative must provide was by publication in a newspaper printed in the county where the letters were issued. This caused difficulty in compliance as many newspapers are physically printed in a county different from where they are distributed. To solve this problem, the Legislature authorized publication in a newspaper "of general circulation" in the county where letters were issued. Acts 2017, 85th Leg., ch. 844, § 27, eff. Sept. 1, 2017 (amending Estates Code § 308.051(a)).

F. Affidavit in Lieu of Inventory

The 2011 Legislature authorized an independent executor to file an affidavit in lieu of the inventory, appraisement, and list of claims if no debts other than secured debts, taxes, and administration expenses remain by the inventory due date. This procedure keeps the decedent's property from being listed on the public record and thus helps with privacy concerns. However, the executor must still prepare a sworn inventory and provide a copy to each beneficiary unless an exception exists. The 2017 Legislature authorized the court to fine the executor up to $1,000 if the executor misrepresents that all required beneficiaries received the inventory. Acts 2017, 85th Leg., ch. 1043, § 1, eff. Sept. 1, 2017 (adding Estates Code § 309.0575).

G. Distributions by Independent Executors

Independent executors now have much greater leeway in distributing residuary property. Instead of giving each beneficiary an undivided share in every asset, the executor may make distributions in divided or undivided interests in proportionate or disproportionate shares, and value the property to adjust the distribution for the differences in value of the assets. Acts 2017, 85th Leg., ch. 844, § 33, eff. Sept. 1, 2017 (adding Estates Code § 405.0015).

H. Accountings

Under prior law, the personal representative in a dependent administration was required to file the annual accounting by the end of the first and subsequent years after receiving letters. This was virtually impossible to do because there was no lead time from the end of the year to when the accounting was due. Now, the personal representative has sixty days from the end of a year to file the accounting. Acts 2017, 85th Leg., ch. 844, §§ 29 & 30, eff. Sept. 1, 2017 (amending Estates Code §§ 359.001(a) & 359.002(a)).

I. Final Settlement

The dependent personal representative's final settlement need no longer show that all inheritance taxes have been paid since Texas no longer has an inheritance tax. Acts 2017, 85th Leg., ch. 844, § 37, eff. Sept. 1, 2017 (repealing Estates Code § 362.010).

J. Small Estate Affidavit

The maximum value of an intestate estate (excluding homestead and exempt property) eligible to use the small estate affidavit procedure was raised to $75,000 from $50,000. Acts 2017, 85th Leg., ch. 844, § 12, eff. Sept. 1, 2017 (amending Estates Code § 205.001(3)).

K. Lawyer Trust Accounts

The 2015 Legislature added Chapter 456 to address what happens to trust and escrow accounts when an attorney dies. The 2017 Legislature updated these provisions in two regards. First, after receiving the appropriate instructions regarding the distribution of the funds, the financial institution must comply within seven business days (previously it was "a reasonable time"). Acts 2017, 85th Leg., ch. 844, § 35, eff. Sept. 1, 2017 (amending Estates Code § 456.003). Second, any person aggrieved by the financial institution's failure to distribute funds timely, now may bring a private cause of action against the institution. Acts 2017, 85th Leg., ch. 844, § 36, eff. Sept. 1, 2017 (adding Estates Code § 456.003).

IV. TRUSTS

A. Reformation

The 2015 Legislature granted the court broad authority to reform a will in Estates Code §§ 255.451-255.455. The 2017 Legislature placed an equivalent provision in the Trust Code. A court may now reform a trust if necessary or appropriate to (1) prevent waste or impairment of the trust's administration, (2) achieve tax objectives, (3) qualify a beneficiary for governmental benefits, and (4) correct a scrivener's error, even if the trust is unambiguous, provided the settlor's intent is established by clear and convincing evidence. Acts 2017, 85th Leg., ch. 62, § 5, eff. Sept. 1, 2017 (adding Property Code § 112.054(b-1), (e), & (f)).

B. Posthumous Class Gift Members

To be consistent with the Estates Code provision on posthumous class gift members, the Legislature amended the Trust Code to include a parallel provision. Thus, a beneficiary must be alive or in gestation at the death of the person by whom the class is measured unless the trust instrument expressly provides otherwise. Acts 2017, 85th Leg., ch. 844, § 37, eff. Sept. 1, 2017 (adding Property Code § 112.011).

C. Divorce Ramifications

The Legislature made several clarifications to the impact of divorce on a trust. First, the divorce of a person who is not the settlor of a trust does not trigger automatic revocation of provisions in favor of that person's former spouse or other ex-relatives. Acts 2017, 85th Leg., ch. 844, § 5, eff. Sept. 1, 2017 (amending Estates Code § 123.052(a)). Second, if a married couple creates a joint revocable trust, divorce, and they do not divide the trust before the first spouse dies, the trust is divided into shares for each settlor based on each spouse's contributions to the trust. Then, the provisions in favor of the ex-spouse and the ex-spouse's relatives are rendered ineffective with regard to the share created for the deceased spouse unless a court order, express trust terms, or an applicable marital agreement provides otherwise. Acts 2017, 85th Leg., ch. 844, § 6, eff. Sept. 1, 2017 (adding Estates Code § 123.056).

D. Forfeiture Clauses

The Legislature clarified the provision governing forfeiture clauses to make it clear that forfeiture clauses will "not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust." Acts 2017, 85th Leg., ch. 62, § 3, eff. Sept. 1, 2017 (amending Property Code § 112.038).

E. Disclaimers

Disclaimers by trustees were simplified in several respects: (1) a trustee does not need to give the attorney general notice of a disclaimer involving a charitable trust if the attorney general executes a written waiver, and (2) a beneficiary is deemed to have waived notice if an authorized person on behalf of an incapacitated beneficiary has received the disclaimer notice. Acts 2017, 85th Leg., ch. 62, § 16, eff. Sept. 1, 2017 (amending Property Code § 240.0081).

F. Delegation of Real Property Powers

The Legislature expanded the ability of a trustee to delegate a wide variety of powers to an agent by providing a non-exclusive laundry list of

powers so that an agent may deal with all aspects of a real property transaction. The trustee's delegation must be in a writing which is properly acknowledged. The agent's authority only lasts six months and will end sooner if the delegation contains an earlier date or the trustee dies, becomes incompetent, resigns, or is removed. The trustee remains responsible to the beneficiaries for all of the agent's actions. Acts 2017, 85th Leg., ch. 62, § 12, eff. Sept. 1, 2017 (amending Property Code § 113.018).

G. Decanting

The Legislature made several changes to the decanting provisions to make this technique available in a greater number of situations than when originally enacted in 2013. In addition, a clarification makes it clear that merely because a court has authorized a trustee to decant does not limit the ability of a beneficiary to sue the trustee for a breach of trust. Acts 2017, 85th Leg., ch. 62, §§ 7-11, eff. Sept. 1, 2017 (amending Property Code §§ 112.071, 112.072, 112.074, 112.078, & 112.085).

H. Institutional Funds

The Texas Uniform Prudent Management of Institutional Funds Act originally provided that the Trust Code did not apply to certain charitable funds held in trust form under the act. The 2017 Legislature revised this provision to limit only the applicability of Chapter 116 (Uniform Principal and Income Act) and Chapter 117 (Uniform Prudent Investor Act). The rest of the Trust Code now applies to these institutional funds. Acts 2017, 85th Leg., ch. 62, § 14, eff. Sept. 1, 2017 (amending Property Code § 163.011).

V. ACCESS TO DIGITAL ASSETS

Prudent professionals must address digital assets in all estates they plan or administer. The 2017 Texas Legislature enacted the Texas Revised Uniform Fiduciary Access to Digital Assets Act as Chapter 2001 of the Estates Code which adds clarity to the steps you need to take when planning and administering estates.

A. What terms of art do I need to know before we start our discussion?

To have a common ground for discussing The Texas Revised Uniform Fiduciary Access to Digital Assets Act (TRUFADAA), you need to know the definitions of several key terms of art.

Digital assets are electronic records (think binary 1s and 0s) in which a person has a right or interest. The term "digital asset" is a very broad term which encompasses all electronically-stored information, including (a) information stored on a user's computer and other digital devices, (b) content uploaded onto websites, (c) rights in digital property, and (d) records that are either the catalogue or the content of an electronic communication. Examples include e-mails, text messages, photos, digital music and video, word processing documents, social media accounts (e.g., Facebook, LinkedIn, Twitter), on-line financial, utility, credit card, and loan accounts, and gaming avatars. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record. TEX. EST. CODE § 2001.002(8).

A ***fiduciary*** means a personal representative of an estate (executor or administrator), an agent under a non-medical power of attorney, a guardian of an estate, and a trustee of a trust. TEX. EST. CODE § 2001(12).

A ***user*** is a person who has an account dealing with digital assets. In this context, the user would be the decedent, principal, ward, or trustee. TEX. EST. CODE § 2001.002(24).

The ***custodian*** is the person who carries, maintains, processes, receives, or stores a digital asset (e.g., the user's e-mail provider such as Yahoo, Google, or Suddenlink; the hosts of the user's social media accounts such as Facebook or LinkedIn; and the user's financial accounts maintained on-line in banks, brokerage firms, utility providers, credit card issuers, and mortgage companies). TEX. EST. CODE § 2001.002(6).

B. Why does a fiduciary care about the digital assets of the person represented?

There are many reasons why a fiduciary would desire access to the user's digital assets.

(1) Many people forego paper statements for financial accounts such as bank accounts, retirement accounts, and brokerage accounts. A personal representative may seek access to the contents of the decedent's e-mail messages to ascertain where these accounts are located and to gain the information necessary to complete the estate inventory, pay bills, and distribute the funds appropriately. Likewise, an agent or guardian may need this information for similar purposes.

(2) Many people forego paper statements for utilities, credit cards, car loans, and home mortgages. The fiduciary may need to give notice to and pay these creditors and thus needs access to e-mail messages to determine the names of the creditors and the amounts owed.

(3) Some digital assets like domain names, customer lists, manuscripts, and compositions may have significant economic value. The personal representative needs access to these assets for management, inventory, and distribution purposes.

(4) Some digital assets like family photos and videos do not have monetary value but they have great sentimental value and need to be preserved or transferred to the proper heirs or beneficiaries.

C. Does it matter when the decedent died, the power of attorney, will, or trust executed, or guardianship opened?

No. TRUFADAA applies to a fiduciary regardless of when the decedent died, the power of attorney or will executed, the guardianship commenced, or the trust created. Acts 2017, 85th Leg., ch. 400, § 7, eff. Sept. 1, 2017.

D. How is priority for access to a decedent's digital assets determined?

First priority is given to the user's instructions using the custodian's online tool, that is, the custodian's service that allows the user to provide directions for disclosure (or nondisclosure) of digital assets to a third person. TEX. EST. CODE § 2001.051(a). Examples include Google's Inactive Account Manager and Facebook's Legacy Contact.

Second priority is given to the user's instructions in the user's will, power of attorney, or trust. TEX. EST. CODE § 2001.051(b).

If the user has not provided instructions through an online tool or other writing or electronic record, then the service provider's terms of service agreement (the "I agree' button) will govern the rights of the decedent's personal representative. Typically, these provisions will prohibit access by third parties.

E. Is there anything special about "access" that I need to know?

Yes! There is a major difference between two types of access. The first type is access to the contents of electronic communications which refers to the substance or meaning of the communication such as the subject line and text of e-mail messages.

The second type of access encompasses both the catalogue of electronic communications (e.g., the name of sender, the e-mail address of the sender, and the date and time of the message but *not* the subject line or the content) and other digital assets (e.g., photos, videos, material stored on the user's computer, etc.).

F. I am drafting a client's will. How do I proceed with regard to digital assets?

You need to address digital assets from two perspectives. First, you need to ascertain if your client owns any digital assets that are transferable upon death. If so, you need to determine whom your client wants to receive them just as you would any other type of property. If you do not make a specific gift of digital assets, they will pass under the residuary clause.

Second, you need to find out your client's desires regarding the executor reading the substance of email messages, texts, and private social media postings. If your client wants the executor to have this access, express language granting access must be included in the will.

G. I am drafting a client's durable power of attorney for property. How do I proceed with regard to digital assets?

You should ask your client whether the client wants the principal to have access to contents of

electronic communications and/or the catalogue of those communications and other digital assets. Under the statutory durable power of attorney form (power "N"), the agent will have full access to digital assets including contents. TEX. EST. CODE § 752.051. If this is not the principal's intent, the principal should *not* initial powers "N" or "O" (the power that grants all powers listed on the form). The principal may also cross out clause N. If the principal wishes to grant partial access, you should include appropriate language in the "special instructions" section.

H. I am applying to the court for my client to be appointed as the guardian of the estate of a ward. How do I proceed with regard to digital assets?

Public policy is in favor of a ward retaining as many rights as possible. Thus, the ward is presumed to retain a right to privacy in personal electronic communications. Accordingly, access to digital assets is not automatically granted to a guardian by virtue of the fact that the person is appointed as a guardian.

If there is a hearing on the matter, a court may grant a guardian complete access to the ward's digital assets, that is, the contents of electronic communications, the catalogue of electronic communications, and other digital assets in which the ward has a right or interest. TEX. EST. CODE § 2001.171(a).

Without a hearing, a guardian may obtain access to the catalogue and digital assets other than the content of electronic communications but a court order is still required along with other specified required documentation including a certified copy of the court order that granted the guardian authority over the ward's digital assets. TEX. EST. CODE § 2001.171(b).

In addition, a guardian may also request that an account be terminated or suspended for good cause upon providing the custodian with a copy of the court order giving the guardian general authority over the protected person's property. TEX. EST. CODE § 2001.171(d).

I. I am the executor of a decedent's estate. How do I get access to the contents of the decedent's electronic communications?

If a deceased user consented in the user's will, a custodian must disclose the contents of electronic communications to the personal representative of a deceased user's estate if the representative provides:

- a written request for disclosure,
- a certified copy of the deceased user's death certificate,
- a certified copy of letters testamentary or letters of appointment proving the representative's authority, and
- a copy of the documentation (typically, the will) in which the user consented to the disclosure of the content of electronic communications specifically (if not so provided pursuant to an online tool). Tex. Est. Code § 2001.101(a).

Before complying with the request, the custodian has the right to request additional information such as:

- information necessary to identify the user's account,
- evidence linking such account to the user, and
- a finding by the court that the account actually belonged to the decedent, the disclosure of the contents would not violate the Stored Communications Act and other federal laws, the user consented to disclosure, disclosure is permitted by TRUFADAA, and disclosure is reasonably necessary for estate administration. TEX. EST. CODE § 2001.101(b).

If the deceased user did not consent to the disclosure of contents (e.g., no express language in the will or died intestate), you will not be able to obtain access to the contents.

J. I am the executor of a decedent's estate. How do I get access to the catalogue of decedent's electronic communications and other digital assets?

The requirements for a personal representative to gain access to the catalogue and digital assets other than the content of electronic communications are less stringent. Unless prohibited by the user or court order, the personal representative is granted access to the catalogue and digital assets other than the content by default (upon providing the custodian with the specified required documentation, which is basically the same as is required to access contents except there is no requirement that the decedent's will be produced or that the decedent specifically consented to disclosure). TEX. EST. CODE § 2001.102.

K. Is there a practical problem for a personal representative to gain access to a decedent's digital assets?

Yes! The ability of a custodian to request a court order under any circumstance makes access very burdensome for personal representatives as well as the courts. This author has heard from representatives of Google and Facebook that they will *always* require a court order. They want the security of a court order before releasing any information for fear of liability for improper disclosure.

Because of the likelihood that a custodian will require a court order before granting access, include the appropriate language in the earliest possible pleading in the administration of the estate of a deceased user such as the application for an independent administration, determination of heirship, or admission of a will as a muniment of title. (Note: It is uncertain how judges will react to being asked to make these findings in these proceedings.)

L. I am an agent for a principal. How do I get access to the contents of the principal's electronic communications?

The rules for agents under powers of attorney are similar to those for personal representatives of decedents' estates. Upon receiving the specified required documentation (a request in written or electronic form, the original or a copy of the power of attorney containing the express consent to disclose, and a certification under perjury that the power of attorney remains in effect) a custodian must disclose to the agent under a financial power of attorney the contents of electronic communications of the principal if the principal's power of attorney expressly grants the agent authority to access content. TEX. EST. CODE § 2001.131.

M. I am an agent for a principal. How do I get access to the contents of the catalogue of the principal's electronic communications and other digital assets?

Upon receiving the specified required documentation (basically the same as discussed above for access to contents), a custodian must disclose to the agent under a power of attorney (who has been granted specific authority over digital assets or general authority to act on behalf of the user) the catalogue and digital assets other than content unless otherwise ordered by the court, provided in the power of attorney, or directed by the principal. TEX. EST. CODE § 2001.132.

N. I am a trustee. How do I obtain access to digital assets?

If the trustee is the original user, meaning that the trustee, in his or her capacity as the trustee, opened an online account or procured a digital asset, the custodian must provide the trustee with all content, catalogues, and digital assets of the trust. TEX. EST. CODE § 2001.151.

If the trustee is not the original user (for example, a settlor has a digital asset and then transfers it to a trust, either during life or at death), then different rules apply based on whether the trustee is requesting content or non-content material.

A custodian (upon receiving the specified required documentation, including a certified copy of the trust agreement that grants disclosure of the content specifically and a certification by the trustee under penalty of perjury that the trust exists and the trustee is currently serving as the trustee) must disclose to a trustee the content of electronic communications unless otherwise directed by the user, provided for in the trust agreement, or ordered by the court. TEX. EST. CODE § 2001.152.

When the trustee is not the original user, a custodian (upon receiving the specified required documentation) must disclose to a trustee the catalogue and all digital assets other than the content unless otherwise directed by the user, provided for in the trust agreement, or ordered by the court. TEX. EST. CODE § 2001.153.

In both cases, the custodian may request additional information such as a number, user name, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account or evidence which links the account to the trust.

O. How long does the custodian have to comply with my disclosure request?

The custodian must comply with a request to disclose not later than sixty days after receipt of a proper request along with the required documentation. TEX. EST. CODE § 2001.231(a).

P. If the user is alive, will the custodian notify the user of my request?

The custodian may, but is not required to, notify the user, e.g., the principal or ward, that a fiduciary made a disclosure request. TEX. EST. CODE § 2001.231(c).

The custodian may properly deny a disclosure request if the custodian is aware of any lawful access to the account following the receipt of the request. In other words, if the principal or ward is still using the account, the custodian may properly deny your request for access. TEX. EST. CODE § 2001.231(d).

Q. How does a custodian disclose the information I requested?

When a custodian discloses digital assets, the custodian may at its sole discretion:

- grant the fiduciary full access to the user's account,
- limit access to the access that is sufficient for the fiduciary's performance of designated tasks,
- provide the fiduciary with a paper or digital copy of a digital asset,
- assess a reasonable administrative charge for disclosing digital assets,
- withhold an asset deleted by a user, and/or
- make the determination that a request imposes an undue burden on the custodian, and if necessary, petition the court for an order.

TEX. EST. CODE § 2001.053.

The comments to the Uniform Act acknowledge that each custodian has a different business model, and some may prefer one method for disclosure over another. An example of the type of situation that is preemptively addressed by allowing the custodian to claim that a request imposes an undue burden is where a fiduciary requests disclosure of "any email pertaining to financial matters," which would require the custodian to sift through all emails and determine which ones were relevant or irrelevant. In such event, the custodian may decline the fiduciary's request, and either the fiduciary or the custodian may request guidance from a court. Comment to § 6 of the Uniform Act.

R. What if the custodian ignores my request or refuses to disclose?

A custodian incurs no penalty for failing to disclose within sixty days of a proper request.

If the custodian does not disclose, the fiduciary may apply to the court for an order directing compliance. TEX. EST. CODE § 2001.231(a). This court order must state that compliance is not in violation of 18 U.S.C. § 2702. The decedent's estate, principal, ward, or trust bears all the expenses of seeking and obtaining the court order such as attorney fees and court costs.

A custodian is immune from liability for disclosing or failing to disclose if done in good faith. TEX. EST. CODE § 2001.232. However, a custodian is likely to be liable if it fails to comply with a valid court order.

S. Once I obtain access, what fiduciary duties do I have with regard to the information?

The legal duties imposed on the fiduciary normally also apply to digital assets such as the

duty of care, loyalty, and confidentiality. TEX. EST. CODE § 2001.201(a).

T. Once I obtain proper access, am I treated as an authorized user under the law?

Yes. A fiduciary acting within the scope of the fiduciary's duties is deemed an authorized user "for the purpose of applicable computer fraud and unauthorized computer access laws, including all laws of [Texas] governing unauthorized computer access." TEX. EST. CODE § 2001.201(d).

U. Where can I get more information about TRUFADAA?

The Uniform Act has extensive Comments which are very helpful. You may access them on the website of the Uniform Law Commission at http://www.uniformlaws.org/.

V. You often mention the importance of including language in wills and powers of attorney. You also mentioned request letters and court applications. How do I get forms I may use as a starting point for drafting my documents.

Basic forms you may use as a starting point are found in Gerry W. Beyer & Kerri G. Nipp, *Cyber Estate Planning and Administration* which is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166422.

VI. DURABLE POWER OF ATTORNEY[1]

After many years of work by many, many people, Texas has finally come into the modern era with the new Texas Durable Power of Attorney Act (the Act). Numerous attorneys volunteering their time through REPTL, in conjunction with attorneys from the Business Law Foundation and other various stakeholders, spent countless hours working through issues important to each stakeholder to arrive at our current Act. Although the recent additions to the Act were originally based on the Uniform Statutory Durable Power of Attorney Act, which has been enacted in twenty-three states to date, it bears only a slight resemblance to the Uniform Act following its makeover in the legislative process.

This [section] highlights the most significant changes to the Act, including an overview of its acceptance and reliance provisions. A careful reading of the new Act is strongly recommended, as there have been numerous changes and this [section] is not intended to be a summary of every change that may affect your clients.[2]

It is important to keep in mind that the Act applies only to durable powers of attorney. A durable power grants authority to the agent to act on the principal's behalf even if the principal is incapacitated. The power must clearly indicate that it is intended to be durable. Sec. 751.0021.[3] In addition, there are several new "default" rules that have been added. However, in all cases, the durable power of attorney can provide for a different outcome by including a specific statement regarding the issue in question.

Below is an overview of some of the key changes.

A. Agent Powers and Duties

1. Co-Agents

While there has been no statutory limitation on appointing two or more co-agents, there also has been no guidance on how they should make decisions if the power is silent on that issue. A default provision regarding co-agents has been added that provides that unless the power states otherwise, co-agents can act independently of each other. Sec. 751.021. Note that the new statutory durable power of attorney form includes a section in the special instructions to select how

[1] This section was authored by Lora G. Davis of Davis Stephenson, PLLC and is reprinted here with her kind and generous permission.

[2] For an excellent summary of all of the 2017 legislative changes, the *2017 Texas Estate and Trust Legislative Update*, written by William D. Pargaman can be found on the Resources page of his firm website at www.snpalaw.com.

[3] References to "Section" or "Sec." are to sections of the Texas Estates Code unless indicated otherwise.

co-agents will act (i.e., independently, jointly, or by majority).

2. Agent Status

The Act now provides that an agent is not a fiduciary until he or she accepts appointment and then only when acting as an agent. Sec. 751.101. Acceptance can be made by exercising authority, performing duties as an agent, or by any assertion or conduct indicating acceptance. Sec. 751.022. These provisions are intended to negate the finding in *Vogt v. Warnock*, 107 S.W.3d 778 (Tex. App.—El Paso 2003, pet. denied) (finding that the agent named under the durable power of attorney was a fiduciary as a matter of law even though she never acted under the power).

3. Power to Appoint Successors

The Act now specifically provides that an agent may be given the ability to name one or more successor agents either in lieu of or to follow the named successor agents. If the power does not specify, any successors named by an agent will act only after those listed in the power by the principal. Sec. 751.023.

4. Compensation

With respect to durable powers executed on or after September 1, 2017, a default rule has been added providing that an agent is entitled to reasonable compensation and reimbursement of reasonable expenses. Of course, the power can always provide otherwise. Sec. 751.024.

5. Gifting and Estate Planning Powers

An agent may be given the power to (i) create, amend, revoke, or terminate an *inter vivos* trust, (ii) make gifts, (iii) create or change rights of survivorship, (iv) create or change a beneficiary designation (e.g., pay on death and right of survivorship designations), or (v) delegate authority granted under the durable power of attorney. Unless the power provides otherwise, an agent who is not an ancestor, spouse, or descendant of the principal cannot exercise these powers in favor of himself, herself, or anyone he or she has a legal obligation to support. Sec. 751.031. Any gifts made under this new provision will be limited to the annual exclusion amount (currently $14,000, or twice that amount if the principal's spouse agrees to split a gift) unless the durable power provides otherwise. Sec. 751.032. In addition, any such gifts made must either be consistent with the principal's objectives, if known to the agent, and if not known, then as the agent determines is in the principal's best interest. Sec. 751.032(d). If the agent is given the power to create or change beneficiary designations along with the general powers to enter into insurance, annuity, and retirement plan transactions, then the agent is not limited in his or her ability to name himself or herself as a beneficiary of such accounts (and can thus increase the amounts passing to himself or herself over the amounts originally designated by the principal) unless the power provides otherwise. Secs. 751.031, 751.033, 751.108 and 751.113.

6. Duty to Notify

An agent with actual knowledge of a breach or imminent breach of fiduciary duty by another agent (whether a co-agent under the same durable power of attorney or another durable power of attorney) has the duty to notify the principal of the breach. If the principal is incapacitated, the agent must take reasonably appropriate action to act in the best interest of the principal. If the agent does not do so, he or she may be liable for any reasonably foreseeable damages. However, if an agent is unaware of another agent's breach, then he or she is not liable. Sec. 751.121.

7. Duty to Preserve Estate Plan

An agent has a duty to preserve the principal's estate plan, to the extent he or she has actual knowledge of the plan, as long as doing so is in the principal's best interest based upon all relevant factors. Sec. 751.122.

8. Termination of Agent's Power on Appointment of Guardian

If a temporary guardian is appointed for a principal, the agent's powers are immediately suspended unless the court affirms the effectiveness of the durable power of attorney and the validity of the appointment of the agent named. In addition, if the powers are revoked, the agent is required to account for and deliver the assets to the guardian. Sec. 751.133.

9. Additional Scope of Powers

Agents now have expanded powers relating to entering into mineral transactions, consenting to homestead liens, handling mail, providing for pets, and accessing digital assets. Secs. 752.102, 752.111, and 752.1145.

B. General Changes

1. Removal of Agent

An agent may be removed by a court if it finds that the agent (i) breached his or her fiduciary duties, (ii) materially violated or attempted to violate the terms of the durable power and the violation or attempted violation resulted in a material financial loss to the principal, (iii) is incapacitated or incapable of acting as agent, or (iv) fails to provide a required accounting. If an agent is so removed, the court can authorize the appointment of the successor named in the power if the successor is willing to serve. Any compensation under the power that the removed agent could have received can be denied by the court. A successor agent named in the power can request the removal of an agent. If a guardianship proceeding has been commenced for the principal, then any person interested in the guardianship can also request the removal of an agent. A "person interested" is broadly defined to include any heir, devisee, spouse, creditor, person having a property right in or claim against the principal, person interested in the welfare of the principal, attorney *ad litem*, or guardian *ad litem*. Sec. 753.001. If an agent is so removed, the successor agent must give actual notice of the order removing the agent to anyone the successor agent believes has relied on the agent's authority under the durable power previously or may rely upon it in the future. Sec. 753.002.

2. Power to Request a Construction of a Durable Power

To address concerns about who can review the actions of an agent, new provisions were added that allow certain persons to bring an action in court to construe a power of attorney. The persons who can bring an action include the following: principal; agent; guardian, conservator, or other fiduciary acting for the principal; a person who is a named beneficiary of the principal; certain governmental agencies that have authority to protect the welfare or estate of a principal; any person who demonstrates sufficient interest in the principal's welfare to a court; and any person asked to accept the power. If the principal is not incapacitated, then he or she can have the action dismissed. Sec. 751.251.

3. Copies

A copy, including a digital copy, has the same effect as the original unless the power itself or another statute provides otherwise. Sec. 751.0023(c).

4. Applicable Law

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

C. Acceptance and Reliance Provisions

Subchapter E of the Act is dedicated to the new provisions that require reasonable acceptance of valid durable powers of attorney. As REPTL section members have discovered over the years, many clients have been unable to effectively use durable powers of attorney due to rejection of those powers for arbitrary and often unexplained reasons. These new provisions are intended to balance the rights of principals and those asked to rely upon the durable powers of attorney so that principals can be more confident that their wishes will be followed while still affording numerous options for third parties to reasonably refuse acceptance without any increased liability. Following is an overview of these new provisions.

Generally, a person requested to accept a durable power must either accept the power or reject it with a specific cited reason within the statutory timeframe.

1. Timeframes for Acceptance – Sec. 751.201.

- Initial Timeframe. Unless there is one or more valid ground for refusal (as discussed below), a person presented with a valid durable power of attorney must accept or reject the power or request either an agent's certificate or an opinion of counsel within ten business days after presentment. However, if the power contains language other than English, 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.
- Secondary Timeframe if Agent's Certificate is Requested. If an agent's certificate is requested, the durable power of attorney must be accepted or rejected within seven business days after receipt of the requested certificate.
- Secondary Timeframe if Opinion of Counsel is Requested. If an opinion of counsel is requested, the durable power of attorney must be accepted or rejected within seven business days after receipt of the requested opinion of counsel.

2. No Specific Form

A specific form (e.g., the financial institution's own form) cannot be required by the person asked to accept the durable power. Sec. 751.202.

3. Recording

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

4. Agent's Certificate

A form for an agent's certificate is provided in the new statute. Note that this form is not a mandatory form and that the person asked to accept the durable power can ask for certification of any factual matter relating to the principal, agent, or power of attorney. This form is signed by the agent under penalty of perjury. If the power is springing in nature, so that it becomes effective only on the incapacity of the principal, the person asked to accept the power can require a written statement from the principal's physician confirming incapacity of the principal. Sec. 751.203. The optional form included in the Act was revised during the legislative session at the request of other organizations and contains certifications that the agent may not feel comfortable making. If you are preparing the certificate, it would be prudent to review and edit the statutory certificate and remove any statements that are not appropriate for your client's actual situation. The person requesting the certificate can request that the agent sign a specific form of certificate. If you are presented with a form from another person, it will be important to review this carefully to ensure that the agent is only certifying factual matters to the best of his or her knowledge and is not certifying as to any legal matter.

5. Opinion of Legal Counsel

A person asked to accept a durable power may request an opinion of counsel regarding any legal matter relating to the durable power. Any such request must be in writing (or other record, which includes electronic mail) and must explain the reason for the request. The principal or agent, as the case may be, selects the counsel to give the opinion and the principal must pay for the opinion. Sec. 751.204.

6. English Translation

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

7. Valid Grounds for Refusal

There are several broadly-defined reasons for refusing a durable power of attorney. Sec. 751.206. Note, however, that the power being "too old" or "not on our preferred form" is not valid grounds for refusal. The reasons a power can be refused include the following:

1. the person would not engage with the principal or the agent in the same circumstances (e.g., opening a new account or attempting to obtain a service the person does not offer);
2. the person's engaging in the transaction with the agent or the principal would be inconsistent with another Texas or federal law, a request from a law enforcement agency, or a policy adopted by the person in good faith that is needed to comply with another Texas or federal law, regulation, regulatory directive, guidance, or executive order;
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;
4. the person has actual knowledge of the termination of the power or the agent's authority;
5. a request for a certificate or opinion is refused or the certificate or opinion is unclear or qualified in a manner that makes it ineffective for its intended purpose;
6. the person in good faith believes the power is not valid, the agent is exceeding his or her authority or the performance of the requested act would violate the terms of a business entity's governing documents or an agreement affecting a business entity, even if a certificate or opinion is provided;
7. the person has actual knowledge of a judicial proceeding to construe the power or review the agent's conduct and that proceeding is pending;
8. the person has actual knowledge of a judicial proceeding to construe the power or review the agent's conduct in which a final determination was made that the power was invalid for the purpose being presented or the agent lacked authority to act in the manner the agent is attempting to act;
9. the person has made or is aware of a report to a law enforcement or federal or state agency that the principal is being financially or physically abused, neglected, exploited, or abandoned by the agent or a person acting on behalf of the agent;
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 where the power the agent is attempting to exercise is not permitted under the other state's law.

8. Form of Refusal

In most cases, a refusal to accept a durable power must be in writing with the reason for the refusal provided. However, if the reason for refusal is under #2 or #3 above, no specific explanation is required for the rejection. The person refusing under those circumstances can provide an affidavit signed under penalty of perjury (referred to herein as the Private Reason Affidavit) that indicates that the refusal is based on a reason described in Estates Code Section 751.206(2) or (3) (#2 and #3 above). The reason for this special treatment is that a financial institution cannot tell anyone, even a judge, that they have filed a suspicious activity report. Due to the requirement that the person sign an affidavit under penalty of perjury if relying on this exception, it seems unlikely to be used with great frequency. Any refusal must be provided in writing within the

appropriate timeframe described above. Sec. 751.207.

9. Protection for Good Faith Reliance

If a person accepts a power in good faith without knowledge that the signature is invalid, he or she can rely on a presumption that it is genuine. In addition, a person who accepts a power in good faith without knowledge of its invalidity or termination, or that the agent is exceeding his or her scope of authority, may rely on that power. Sec. 751.209. A person who accepts an agent's certification, an opinion of counsel or an English translation can rely on it without further investigation. Sec. 751.210.

10. Cause of Action for Refusal to Accept a Durable Power of Attorney

Although rather limited in nature, there is now a statutorily provided cause of action to force the acceptance of a valid durable power. An agent (or principal) may bring an action against a person who does not accept a valid power within the requisite timeframe. If the court finds the person improperly refused the power, then the person shall be ordered to accept the power and the court may award the agent (or principal) court costs and attorney's fees. Note that if the person provides the Private Reason Affidavit at any time during the proceeding, then the court can only award costs and fees and cannot order acceptance of the power. Sec. 751.212. The Act includes a "loser pays" rule, so that if the person asked to accept the power is sued and the court finds the person had a valid reason to reject the power, then the person can recover costs and fees from the principal. Sec. 751.213. Even though the recourse of a principal and agent is limited under the Act, there may be other avenues for recourse, including equitable claims. Those claims will not be abrogated by the Act. Sec. 751.006.

D. Statutory Durable Power of Attorney Form (Sec. 752.051)[4]

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

The expanded gifting powers that can be given to an agent are a key addition to the Act that you may want to incorporate into your form. While the gifting power language is not included in the statutory form, Section 752.052 includes specific gifting language that can be added to the form. Before jumping in with both feet by including the gifting powers in your forms, you should carefully consider the implication of allowing agents to make these decisions on behalf of the principal. Does the principal feel comfortable giving such broad powers to the agent? Should the power only be given to the spouse of the principal and not to other agents? Should the agent be restricted from making gifts to himself or herself? Will inclusion of these powers result in adverse estate tax issues for the agent? The issues that surround these powers should be discussed in detail with a client and careful consideration should be given to these issues prior to the addition of gifting powers to the durable power of attorney.

Another significant addition to the Act is the provision that allows the agent to name his or her own successor agent. The new statutory form does not include sample language for this purpose, so you will need to craft your own language in this regard. Careful drafting will be required when giving these powers to one or more agents so that there will be no confusion as to who is next in line to serve when the current agent fails or ceases to serve. Keep in mind that the default provisions under the Act provide that any successors appointed by an agent will step in only if all of the agents originally named in the power fail or cease to serve. If that is not the desired result, then the provisions added should clearly state that the successor agents appointed by an agent will serve before the successor agents named in the power.

The statutory form now includes cautionary language in the initial paragraph that reminds the principal that the power must be signed in the offices of an attorney, a title company, or the

[4] You can see the changes to the statutory form by looking at the final version of H.B. 1974 on Texas Legislature Online.

lender if the power is intended to be used for a home equity loan (as required under the holding in *Finance Commission of Texas v. Norwood,* 418 S.W.3d 566 (Tex. 2013)). And, if you have not already done so, you should now feel free to remove the term "attorney-in-fact" and replace it with "agent," as the term agent is now defined to include an attorney-in-fact. Sec. 751.002.

E. Effective Date

The new Act generally takes effect on September 1, 2017 and applies to durable powers of attorney executed before, on, and after that date. However, the following sections apply only to durable powers of attorney executed on or after September 1, 2017: Sec. 751.024 (creating the default rule that agents are entitled to reasonable reimbursement and compensation if the power is silent); Subchapter A-2 (relating to additional gifting authority that can be given to an agent); Subchapter B (relating to the effect of acts of agent, but note that much of this subchapter was repealed); Subchapter C (relating to the agent's duty to inform and account, including the clarification that an agent is not a fiduciary until the agent accepts appointment as agent); Subchapter D (relating to the addition of reverse mortgages and home equity liens to the list of reasons that a power may be required to be recorded); and Chapter 752 (relating to the new statutory form and the construction of powers provisions).

F. Looking to the Future

The Act is imperfect and does not include all of the provisions that REPTL had hoped would be enacted. As with all legislative efforts, there were many compromises along the way. There will inevitably be ambiguity in the application of some of the new provisions and clarifications that will need to be made in future legislative sessions. However, having laws in place that require financial institutions and others who are asked to accept durable powers of attorney to make a determination as to whether the power will be accepted or not within a reasonable timeframe and under reasonable guidelines is of enormous benefit to our clients, who may now more easily be able to rely on their validly-executed durable powers to avoid costly and time-consuming guardianship proceedings.

Note: If you have any ideas for improvement to the Act, please share those with the author of this [section], Lora G. Davis, Chair of the REPTL Powers of Attorney and Advance Directives Committee, at lora@davisstephenson.com.

VII. OTHER ESTATE PLANNING MATTERS

A. Medical Power of Attorney

The disclosure statement is no longer a separate document. Instead, it will be included within the medical power of attorney form itself. Acts 2017, 85th Leg., ch. 995, § 3, eff. Jan. 1, 2018 (amending Health & Safety Code § 166.164).

B. Self-designation of Guardian

If the self-designation of guardian does not disqualify anyone from serving as a guardian, the formalities were reduced—an acknowledgement by a notary substitutes for the two witnesses and it is then considered self-proved if it contains the new acknowledgement language found in the statute. Acts 2017, 85th Leg., ch. 298, §§ 1-2, eff. Sept. 1, 2017 (amending Estates Code §§ 1104.203 & 1104.204).

C. Mental Health Treatment Declaration

The formalities for a declaration of mental health treatment were modernized. Instead of having two witnesses sign the declaration, it is now permissible for the declarant to have the declaration notarized. The statutory form was also updated to reflect this change. Acts 2017, 85th Leg., ch. 349, § 1-3, eff. Sept. 1, 2017 (amending Civil Practice & Remedies Code §§ 137.003 and 137.011).

D. Transfer on Death Deeds

The 2017 Legislature clarified the Texasized version of the Uniform Real Property Transfer on Death Act enacted in 2015 as Chapter 114 of the Estates Code by providing (1) if a beneficiary fails to survive the transferor by 120 hours (regardless of whether the beneficiary is a sole or co-beneficiary) and the deed fails to provide otherwise, the beneficiary's share passes under the normal lapse rules of the Estates Code and (2) more options for the transferor to select regarding

how the property passes if one or more beneficiaries fails to survive. Acts 2017, 85th Leg., ch. 971, §§ 1 & 2, eff. Sept. 1, 2017 (amending Estates Code §§ 114.103 & 114.151).

E. Transfer on Death Motor Vehicles

The 2017 Legislature added Chapter 115 to the Estates Code to allow the owners of a motor vehicle to name a beneficiary (co-beneficiaries are not allowed) who will own the vehicle upon the owner's death. The designation is a revocable non-testamentary transfer and cannot be changed by the owner's will. If the vehicle is jointly owned with survivorship rights, both co-owners must agree to the beneficiary designation. The beneficiary must apply for a transfer of the vehicle's title within 180 days of the owner's death. Acts 2017, 85th Leg., ch. 586, eff. Sept. 1, 2017 (adding Estates Ch. 115 and adding Transportation Code § 501.0315).

F. Multiple Party Accounts

1. Form

The statutory Uniform Single-Party or Multiple-Party Account Selection Form Notice no longer requires the customer to initial to the right of each paragraph which was rarely done because the form had the blanks to the left of some, but not all, of the paragraphs. Instead, the customer now must merely sign a paragraph indicating that the customer read the form and received disclosure of the ownership rights to the accounts. Acts 2017, 85th Leg., ch. 304, §§ 2-2, eff. Sept. 1, 2017 (amending Estates Code §§ 113.052 & 113.053).

2. Ramifications of Divorce

An ex-spouse, as well as the ex-spouse's relatives who are not also relatives of the deceased spouse, are now prevented from taking under provisions of a joint account with survivorship rights unless there has been a reaffirmation of the survivorship agreement. Prior to this amendment, only ex-spouses and their relatives named as P.O.D. or trust account beneficiaries were automatically preventing from receiving the funds. Acts 2017, 85th Leg., ch. 844, § 7, eff. Sept. 1, 2017 (amending Estates Code § 123.151(b)). The funds are distributed as if the ex-spouse or ex-relative had predeceased the deceased joint account holder. Acts 2017, 85th Leg., ch. 844, § 7, eff. Sept. 1, 2017 (adding Estates Code § 123.151(c-1)). However, a financial institution is not liable for paying the funds to ex-spouse or ex-spouse's relative. Acts 2017, 85th Leg., ch. 844, § 7, eff. Sept. 1, 2017 (adding Estates Code § 123.151(d-1)).

3. Liability for Estate Taxes

A multiparty account is now liable for estate taxes caused by the inclusion of that account in a decedent's estate regardless of whether other assets of estate are sufficient to pay them. Acts 2017, 85th Leg., ch. 844, § 4, eff. Sept. 1, 2017 (amending Estates Code § 113.252).

VIII. ADDITIONAL SOURCE

For an excellent and comprehensive review of the new legislation, I recommend that you consult the update article prepared by William D. Pargaman & Craig Hopper, *2017 Texas Estate and Trust Legislative Update*, available at http://www.snpalaw.com/resources.