

MAKING THE POWER OF ATTORNEY POWERFUL

I. INTRODUCTION

The use of a power of attorney for financial transactions can be a powerful tool in avoiding guardianship when a principal becomes incapacitated. Estate planners routinely draft powers of attorney for clients in the event the client becomes incapacitated in the future. Despite all the good that can come from a power of attorney, sometimes the power of attorney is used as a weapon to gain power or advantage over the principal. This usually occurs when the principal is suffering some incapacity. This article will discuss the means of making a financial power of attorney more of an effective tool to avoid guardianship in Texas and how to, hopefully, avoid the power of attorney battle between family members. In addition, this paper will discuss means by which an estate planner can tailor a power of attorney to better meet the needs of the client's particular circumstances.

II. DURABLE POWER OF ATTORNEY

A. What is it?

A power of attorney is an agency relationship between a principal and his agent. "Agency" is a consensual relationship between two parties where one, the agent, acts on behalf of the other, the principal. A fiduciary relationship exists between an agent and a principal. Tyler v. State of Texas, 137 SW3d 261 (Tex.Civ.App.—Houston 1st Dist., 2004). All powers of the agent are derived from the grant of authority by the principal and the agent only has the powers to perform the task assigned by the principal. In the agency relationship, whatever an agent does in the prosecution of a transaction that the principal has entrusted to him is considered the act of the principal. Consequently, a prime element of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent. See 3Am.Jur.2nd, Agency §2.

Under the common law, an agency relationship terminates upon the death or incapacity of the principal because the principal no longer has the ability to control and dictate the actions of the agent. An appointment of an attorney in fact under a power of attorney creates an agency relationship. Smith v. Lanier, 998 SW2d 324 (Tex.App.—Austin 1999). Consequently, under the common law a power of attorney will terminate upon the incapacity of the principal; therefore, making a traditional power of attorney ineffective in planning for incapacity.

By statute, all fifty (50) states permit a principal to create a power of attorney that survives the principal's incapacity. A power of attorney that

survives the principal's incapacity is a durable power of attorney. A durable power of attorney is either a general durable power of attorney or a special durable power of attorney. A special durable power of attorney limits the authority of the agent to one or more specific transactions. A general durable power of attorney grants the agent authority to perform any act on behalf of the principal that a principal may delegate to an agent. Consequently, the general durable power of attorney is what is used in estate planning to allow a principal to designate an agent to handle his or her financial affairs in the event of incapacity.

III. TEXAS REQUIREMENTS FOR DURABLE POWER OF ATTORNEY

The requirements for a durable power of attorney are found in Chapter 12 of the Texas Probate Code which is known as the Durable Power of Attorney Act. This Act is the adoption of the Uniform Durable Power of Attorney Act by Texas. The Durable Power of Attorney Act begins at §481 of the Texas Probate Code. Pursuant to §482 of the Code, a durable power of attorney means a written instrument that (1) designates another person as attorney in fact or agent; (2) is signed by an adult principal; (3) contains the words "This power of attorney is not affected by the subsequent disability or incapacity of the principal," or "This power of attorney becomes effective on the disability or incapacity of the principal," or similar words showing the principal's intent that the authority conferred on the attorney in fact or agent shall be exercised notwithstanding the principal's subsequent disability or incapacity; and (4) is acknowledged by the principal before an officer authorized to take acknowledgements to deeds of conveyance and to administer oaths under the laws of this state or any other state.

Acts done by an attorney in fact or agent pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal's successor in interest as if the principal were not disabled or incapacitated. TEX. PROB. CODE §484.

A durable power of attorney is only required to be recorded in the real property records if the power of attorney is for a real property transaction requiring the execution and delivery of an instrument that is to be recorded, including deeds, releases of liens, deeds of trust, etc.

In 1989, Texas law required a durable power of attorney to be recorded in the real property records. This requirement was later repealed; however, you may find that there are still banks and other third parties that require the recording of the power of attorney even if the power of attorney is not being used for real property transactions. This author generally

does not recommend to clients that they record their powers of attorney until the power of attorney needs to be used by an agent in a real property transaction. By recording the power of attorney, the power of attorney becomes public. If a client changes the power of attorney, the new power of attorney or a revocation will need to be recorded in the real property records to put everyone on notice that the prior power of attorney has been revoked, an action the client probably wanted to keep private. However, some third parties, such as brokerage firms and banks, will ask for a certified copy of a power of attorney. One way to obtain a certified copy of a power of attorney would be to record the power of attorney in the real property records and then obtain a certified copy.

A. Statutory Durable Power of Attorney

In 1993, the Texas Legislature provided us with a statutory durable power of attorney. Section 490 of the Texas Probate Code sets forth the form for a statutory durable power of attorney. A person may use a statutory power of attorney to grant an attorney in fact or agent powers with respect to a person's property and financial matters. A power of attorney in substantially the form found in Section 490 is considered a statutory durable power of attorney. The validity of a power of attorney as meeting the requirements of a statutory durable power of attorney is not affected by the fact that one or more of the categories or optional powers listed in the form are struck or the form includes specific limitations on or additions to the attorney in fact or agent's powers. A person is not required to use the statutory form but to be considered a statutory form, the form must be in substantially the form set forth in Section 490. Sections 491 through 504 set forth the construction of the powers that are given in the statutory power of attorney. This author believes that the statutory power of attorney should be used at all time with modifications for specific additional powers that may be appropriate in a given situation. This author has found that many local banks are more willing to accept the statutory form of the power of attorney than a non-statutory power of attorney. Consequently, this author always uses the statutory form for the power of attorney although it is not required to have a valid durable power of attorney.

B. Duration of Power of Attorney

A power of attorney terminates upon its revocation, death or the appointment of a permanent guardian of the estate for the principal. TEX. PROB. CODE §485. A durable power of attorney does not lapse because of the passage of time unless the instrument creating the power of attorney specifically states a time limitation. TEX. PROB. CODE §483. The revocation of a power of attorney or termination by death or the qualification of a guardian of the estate of the principal does not revoke or terminate the agency as to the attorney in fact or any

other person, who, without actual knowledge of the termination of the power of attorney by revocation, by the principal's death or by the qualification of the guardian of the estate of the principal, acts in good faith under or in reliance of the power of attorney. TEX. PROB. CODE §486, §488. If a court appoints a temporary guardian of the estate, then the court may suspend the powers of the attorney in fact until the date on which the term of the temporary guardianship expires. TEX. PROB. CODE §485.

A principal may revoke a durable power of attorney. TEX. PROB. CODE §490. No specific form of revocation is required under Texas law, thus, a principal can revoke a durable power of attorney either orally, in writing, or by any act that evidences the principal's intent to revoke. *See Chain v. Pye*, 429 S.W.2d 630 (Tex.Civ.App.-Beaumont 1968), writ ref'd n.r.e. Notice of revocation should be actual, and not constructive. See TEX. PROB. CODE §488. It can be argued that the executed subsequent power of attorney is evidence that the principal intended to revoke the prior power of attorney. However, actual notice of the principal's intent to revoke the power of attorney must be given to the original attorney-in-fact; constructive notice via recording the new power of attorney is insufficient to effectively revoke the agency created by the power of attorney.

If after the execution of a durable power of attorney, the principal is divorced from the agent, the powers of the agent granted to the principal's former spouse shall terminate on the date on which the divorce is granted by the Court unless otherwise expressly provided by the durable power of attorney. TEX. PROB. CODE §485A. The divorce of a principal from the person who has been appointed the principal's agent before the date on which the divorce is granted does not revoke or terminate the agency as to a person other than principal's former spouse if the person acts in good faith under or in reliance of the power of attorney. TEX. PROB. CODE §486.

C. Capacity Required to Effectively Execute a Durable General Power of Attorney

A power of attorney is the contractual authority that one person has to act in the place of, instead of, or on behalf of some other person. *Olive-Sternenberg Lumber Co. v. Gordon*, 143 S.W.2d 694, 698 (Tex.Civ.App.-Beaumont 1950), *rev'd on other grounds*, 138 Tex. 459, 159 S.W.2d 845 (1942). Thus, any person who may form a valid contract may execute a power of attorney. *See generally* Restatement (Second) of Agency §20. Persons of unsound mind do not have the capacity to effectively execute a power of attorney. *Daughtery v. McDonald*, 407 S.W.2d 954, 958 (Tex.Civ.App.-Fort Worth 1966, *no writ*). Thus, because the Durable Power of Attorney Act as set forth in the Texas Probate Code does not define capacity or

competency, the common-law standard for capacity to enter into a contract applies to the execution of a durable general power of attorney. See TEX. PROB. CODE §§ 481-506.

If a person is incapacitated when he executes a power of attorney, the power of attorney and any contracts executed by the purported agent under the power of attorney are merely voidable by the principal or his legal representative and not void. *Williams v. Sapieha*, 61 S.W. 115, 116 (1901); *Gaston v. Copeland*, 335 S.W.2d 406, 409 (Tex.Civ.App.-Amarillo 1960, writ ref'd n.r.e.) (contracts or conveyances executed by a person of unsound mind or lacking sufficient mental capacity are not void but only voidable, and are valid and effective unless and until such are rescinded).

IV. ACCEPTANCE BY THIRD PARTIES

If a durable power of attorney is going to be an effective tool for avoiding guardianship, then it must be readily accepted by third parties with whom the agent is dealing on behalf of the principal. A growing problem in Texas is acceptance of a durable power of attorney by third party banks and brokerage firms. Texas has no statute that places a duty upon a bank or brokerage firm to accept a durable power of attorney and this author has found no Texas cases which place a duty upon a third party to recognize an agent's power under a power of attorney to conduct business on behalf of the principal. Because of the reluctance of third parties to honor powers of attorney, several states have enacted statutes to impose penalties on those who refuse to deal with an agent acting under a valid power of attorney. For example, the Florida statute provides:

In any judicial action under this section, including, but not limited to, the unreasonable refusal of a third party to allow an attorney in fact to act pursuant to the power, and challenges to the proper exercise of authority by the attorney in fact, the prevailing party is entitled to damages and cost including reasonable attorneys fees. Florida Statute Annotated, §709.08 (11)

Until Texas has a similar statute or case law that places a duty upon a third party to accept a power of attorney, then drafters need to design a power of attorney that will be more readily accepted by third parties. Following are suggestions that this author uses to increase the likelihood of acceptance of a power of attorney by third party institutions:

A. Original Power of Attorney Required

Many third party institutions require that they examine an original power of attorney or a certified

copy. Since most people do not record powers of attorney, it may be necessary that the agent be able to produce an original of a power of attorney. This can be a particular problem if the third party is located out of state and the power of attorney must be sent through the mail. In order to ensure the agent does not lose the only original of the power of attorney, this author has clients sign more than one original power of attorney and then either stamp each original in blue ink as "Original" or have the client use blue pens to sign the powers of attorney so there is no question that the power of attorney is an original. Make sure the power of attorney does not have language that revokes any prior power of attorney or you will not be able to have multiple originals because each subsequently signed power of attorney will revoke the one just signed. Also, ask your clients where the powers of attorney are to be kept and make note of that location in your file so if the agent ever needs a power of attorney, you will be able to assist in locating the power of attorney. Also, encourage your client to let the agent know where the power of attorney will be stored. If the power of attorney is going to be held in a safe deposit box, make sure the agent or someone close to the principal has access to that safe deposit box, including knowing the whereabouts of the keys and being a signor on the signature card. You may also want to consider having authorization in the power of attorney for you to reveal information about the power of attorney, including its whereabouts, to the agent named under the power of attorney. Otherwise, you may be faced with the dilemma of whether you can reveal confidential client information when an agent under a power of attorney calls wanting information because the principal is allegedly incapacitated and the agent under the power of attorney must act for the principal. This author does not make it a practice to keep an original power of attorney for the client so she is not put in the position of having to determine whether she can deliver a power of attorney to a purported agent who is alleging that the principal is incapacitated.

B. Springing v. Current

Under Texas law, a durable power of attorney may take effect immediately or upon the mental incapacity of the agent. The statutory durable power of attorney sets forth the means of determining whether the principal is mentally incapacitated. Under the statutory durable power of attorney, a person is considered disabled or incapacitated for purposes of the power of attorney if a physician certifies in writing at a date later than the date the power of attorney was executed that, based upon the physician's medical examination, the person is mentally incapable of managing his or her financial affairs. The statutory durable power of attorney further authorizes the

principal's physician to disclose his or her physical or mental condition to another person for purposes of the power of attorney. A third party who accepts the power of attorney is fully protected from any action taken under the power of attorney that is based on the determination by a physician of the principal's disability or incapacity. Despite these provisions in the statutory durable power of attorney, this author believes that by making a power of attorney effective upon the mental incapacity of the principal, you increase the likelihood that a third party will have hesitancy in accepting the power of attorney. If a third party sees that the power of attorney is conditioned upon the incapacity of the principal, the third party will have to determine whether the physician's letter sufficiently indicates that the principal is incapacitated for purposes of the power of attorney. This assumes that the agent under the power of attorney was able to convince the principal's doctor to write a letter setting forth whether the principal is incapacitated. Consequently, since the goal of the power of attorney is for it to be easily accepted by third parties, this author suggests that the principal make the power of attorney effective upon its signing as opposed to the incapacity of the principal. This way there is no question that the power of attorney is in effect and it may be used even if the principal is physically incapacitated as opposed to mentally incapacitated. This author cautions clients that if they have concern about the agent using the power of attorney when they should not, then they should not designate this agent.

C. Mobile Clients

Often times our older clients are mobile and spend extended periods of times in different states. They also may own real or personal property in more than one state; therefore, you may be confronted with having to use a power of attorney drafted in one state in another state, or drafting a power of attorney for a client with assets situated in another state or for a client who will be spending extended periods of time in another state. Generally, the validity of a power of attorney will be determined by reference to the laws of the state by which it is executed. The validity of the agent's acts is determined by the laws of the state where the agent is acting. These conflicts of law can cause problems where the power of attorney is drafted in one state but must be used in another state which has different execution requirements. Consequently, if there is a likelihood that a client, if they become incapacitated, may be moved to another state to live, such as to live with a child in that other state, then consider when executing the power of attorney to add subscribing witnesses to the power of attorney so that the power of attorney may be accepted in a state that requires not only an acknowledgment but also witnessing of the power of attorney, generally by two

witnesses. In addition, this author has suggested to clients who will be spending time in more than one state to execute powers of attorney under the laws of each state to be in effect simultaneously. If a client is going to have more than one power of attorney in effect at the same time, make sure that each power of attorney does not have language which revokes any prior power of attorney.

D. Section 487 Affidavit

In many instances, banks and brokerage companies are hesitant to accept a power of attorney for fear that they do not have knowledge that the power of attorney has been revoked in some manner. Section 487 of the Texas Probate Code provides a form of affidavit which can be signed by the agent under the power of attorney and provided to any third party being asked to accept the power of attorney. This affidavit is conclusive proof as between the attorney-in-fact and a person other than the principal or the principal's personal representative dealing with the attorney-in-fact of the non-revocation or non-termination of the power at that time. This author has found that this is particularly effective in persuading out of state brokerage companies and mutual fund companies to accept a Texas power of attorney. A form of such affidavit is attached.

E. Third Party's Power of Attorney Form

If you know the principal's main assets are with a particular brokerage firm or bank, have them check with their account manager to make sure the brokerage firm or bank first, will accept a power of attorney, and if so, will they accept a Texas power of attorney or do they require their own form of power of attorney. This author has found in some instances major brokerage firms will not accept a Texas power of attorney even if the statutory form is used, but require their own form of power of attorney.

In preparing for this speech, the author had students in her Elder Law class at Texas Wesleyan University School of Law interview various brokerage firms and banks on their willingness to accept powers of attorney and if they require their own form. Those students found that most places they interviewed will accept a form drafted by the accountholders personal attorney as long as their own legal counsel first reviewed the power of attorney. Most places interviewed had pre-drafted power of attorney forms they would prefer customers use. The students actually found one large brokerage firm that would only allow the use of their own power of attorney and no other form. Consequently, this author has clients check with their banks and brokerage firms to make sure they will accept a power of attorney and to determine if they will only accept their form. If a brokerage firm indicates that they will only accept

their form, then the client will obtain that form and it will be signed in addition to the statutory form.

F. Multiple Agents

This author always counsels clients not to name joint agents under a power of attorney. In Texas, where two persons are named as attorney in fact, they must act jointly unless the power of attorney affirmatively establishes a joint and several agency. Musquiz v. Marroquin, 124 SW3d 906 (Tex.App.—Corpus Christi 2004, writ denied). In preparation for this paper, the same law students at Texas Wesleyan University asked various banks and brokerage firms whether they would accept a power of attorney with joint agents. Although all institutions indicated that they would accept a power of attorney with joint agents, they all indicated that they would only allow one agent under the power of attorney to sign on an account. This author has also had a problem with a large bank not accepting a power of attorney because joint agents were designated on the power of attorney. Consequently, if a client insists on joint agents, language must be included in the power of attorney that each agent has the right to act independent of the other. This may well defeat the purpose for naming joint agents in the first place. This can also be a problem for the agents as discussed below.

V. COUNSELING THE AGENT

A. Agent is a fiduciary

An agent under a power of attorney is a fiduciary and has common law as well as statutory duties required of a fiduciary to its beneficiary. TEX. PROB. CODE §489. Such duties generally include the duty to act prudently and in the best interest of the beneficiary, to render accurate accounts and the duty of full disclosure. One Texas court has held that merely being named as an agent under a power of attorney creates a fiduciary relationship as a matter of law thereby placing upon the agent a duty to establish fairness with respect to transactions involving the principal and the agent. Vogt v. Warnock, 107 SW3d 778 (Tex.Civ.App.—El Paso, 2003).

Texas Probate Code §489B places the following statutory duties on an agent under a power of attorney:

- a. To inform and to account for actions taken pursuant to the power of attorney;
- b. To timely inform the principal of all actions taken pursuant to the power of attorney;
- c. To maintain records of each action taken or decision made by the attorney in fact;

- d. That upon demand by the principal, to account for the actions of the attorney in fact in accordance with the requirements of §489B;
- e. Upon request by the principal, the agent shall provide to the principal all documentation regarding the principal's property; and
- f. The duty to maintain all records until delivered to the principal, released by the principal or discharged by a court.

Consequently, by being designated as an agent under a power of attorney, an agent is taking on a fiduciary responsibility and needs to be informed of that responsibility and counseled on his duties to act in the best interest of the principal, not to place his own interests above the interests of the principal, not to use the principal's assets for the agent's benefit, and to keep good records and accounts of the transactions undertaken on behalf of the principal. If called upon to account, the agent needs to have sufficient records to account for his actions; therefore, counsel the agent to maintain copies of all checks written or arrange with the bank to have images of the checks returned with statements. Also, counsel the agent not to use cash for transactions because it cannot be documented or properly accounted for.

Section 489 of the Texas Probate Code further provides that an agent under a power of attorney shall account for his actions to anybody to whom the principal has given the authority to act, has been designated by the principal, is a guardian of the estate of the principal, or other personal representative of the principal. Consequently, an agent under a power of attorney may also be required to give an accounting to the principal's guardian of the estate if one is appointed, to his successor agent serving on behalf of the principal if a new power of attorney is given by the principal or the current agent resigns. In order to prevent family discord and to prevent another family member or well-meaning person from applying for guardianship for the principal because of suspicions about the actions of the agent, it is good to address in the power of attorney to whom the agent must or may account if the principal becomes incapacitated. If one child of the principal is serving as agent, then consider requiring that the agent, if handling transactions on behalf of the principal, account, annually or more frequently, to the principal's other children of his actions in serving as agent for the principal. This type of clause will give the agent the specific authority to reveal financial transactions to the people designated by the principal and allows suspicious siblings to have access to the actions of the agent, hopefully preventing family discord or unnecessary guardianship applications. If the principal has designated more than

one agent each to act independent of the other, then since each agent is a fiduciary, it appears that each agent would have the duty to account to the other agent as well as to monitor the actions of the other agent to verify that the actions of the other agent are proper. Consequently, agents should be counseled on the risks associated with serving as a co-agent when there is little control over the co-agent or little protection in the power of attorney for a co-agent.

B. Personal liability

When an agent under a power of attorney is acting on behalf of the principal, counsel the agent to always specify that he is transacting business on behalf of the principal and not on his own behalf. Under agency law, if an agent is to avoid personal liability, he has the duty to disclose not only that he is acting in a representative capacity, but also the identity of his principal. Wynne v. Adcock Pipe and Supply, 761 SW2d 67 (Tex.App.—San Antonio 1988). Consequently, when an agent is signing nursing home admission papers or hospital admission papers on behalf of a principal, counsel the agent to clearly show that he is signing in his representative capacity on behalf of the principal by signing the principal's name followed by "_____, agent under power of attorney dated _____" or signing the agent's name followed by "only in his capacity as power of attorney for _____". This author has encountered at least one case where an agent signed nursing home admission papers without revealing the agency; and, therefore, was sued by the nursing home.

C. Compensation

Nothing in Texas law addresses compensation of an agent under a power of attorney. Most family members, when acting as an agent under a power of attorney, do not expect to be compensated. However, clients may name friends, financial advisors, CPA's or bank trust departments as agents under the power of attorney. Most professionals and bank trust departments expect to be compensated when acting as agent under a power of attorney, especially considering the fiduciary liability and obligations they are undertaking. Before an agent agrees to serve under a power of attorney, he should insist that the drafter of the power of attorney address with the principal the issue of compensation and then make sure that it is documented in the power of attorney. Consider placing the following in the special instructions section of the statutory durable power of attorney when the agent is expected to be compensated: "My agent (attorney in fact) and any successors, shall be entitled to reasonable compensation for services rendered in acting as my agent". This clause should be made more specific depending on the arrangements for compensation, such as the agent being compensated in

accordance with its fee schedule or at the hourly rate he would normally charge for professional services. The more specific the compensation clause, the more protection the agent will have in paying himself from the principal's funds for acting as agent. Since an agent is a fiduciary and derives its powers only from the direction given by the principal, without specific authority to compensate the agent, the agent would be violating the agency relationship and be guilty of self-dealing.

D. Gifting by Agent

Under the Texas statutes, an agent is not given the power to make gifts on behalf of the principal. Since there is no statutory authority for gifting by an agent, the common law applies and the general common law of agency is that an agent does not have the right to gift the property of the principal because the agent is to be acting only with the powers given by the principal and in the principal's best interest. Consequently, if there is no explicit power given by the principal to the agent to gift the principal's property, then a gift of the principal's property would not be in the best interest of the principal and would be outside the agent's powers. If it is the intention of the principal that the agent be able to make gifts on behalf of the principal, then those powers must be specifically stated in the power of attorney. In addition, if the principal expects the agent to make gifts to himself, then in order to avoid the issue of self-dealing, the power of attorney must not only specifically authorize gifts, but authorize gifts to the agent. The IRS often litigates the validity of gifts made for Federal tax purposes by an agent under a power of attorney without express authority in the power of attorney. The IRS argues that an incapacitated principal loses the ability to make gifts under state law; and, therefore, loses the ability to take advantage of the annual gift tax exclusion under §2503 and other gifting strategies. The IRS takes the position that if the agent under state law does not have the authority to make gifts under the power of attorney, then gifts made on behalf of an incapacitated principal are not valid for IRS purposes. Since Texas does not specifically grant an agent under a power of attorney gifting authority, to avoid litigation with the IRS over gifting for tax purposes, the power of attorney should specifically authorize the agent to make gifts. The statutory durable power of attorney does include a gifting clause for Federal gift tax purposes under the special instructions provision. Under the statutory power of attorney form this power is only granted if the principal initials this special instruction with respect to gifting. The following is the special instructions for gifts found in the statutory form: "_____ I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of the

gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gifts”. Note that this statutory language does not specifically authorize gifts to the agent or set forth the class of individuals for whom gifts are to be made. This author often uses the following special instructions with respect to gifts for tax purposes: “_____ I grant my agent (attorney in fact) the power to apply such income and principal which is not required for my support or the support of my spouse during my lifetime toward the establishment of an estate plan which my agent deems advisable for the purpose of minimizing my income taxes or the projected estate, inheritance or other taxes with respect to my estate, including gifts of my real or personal property, outright or in trust, on my behalf, to or for the benefit of (i) organizations to which charitable contributions may be made under the Internal Revenue Code and in which I have previously demonstrated an interest; and (ii) any one or more persons out of a group consisting of my lineal descendants and their spouses (including my agent); provided that, any gifts to any individual shall not exceed the annual exclusion from the federal gift tax for the calendar year of the gifts”.

With the increased concern over nursing home costs, many individuals and their families wish to take advantage of various gifting techniques in order to qualify the principal or the principal’s spouse for Medicaid assistance for long term care. In order to fund the community spouse resource allowance, assets may have to be gifted from the institutionalized spouse to the community spouse. Other clients may wish to make transfers of their interests in their home to a spouse or disabled child. These transfers are exempt from the Medicaid transfer penalties, but if the principal is incapacitated, argument can be made that the gifts are not valid if the gifts were not authorized by a specific power in a power of attorney. For Medicaid qualification purposes, an agent may need to make gifts of unlimited amounts to family members, including the agent. Also, clients may have children or other family members who they assist on a regular basis such as assisting with college expenses for a grandchild, caring for an adult disabled child or helping support elderly parents. Without specific authorization in a power of attorney addressing those situations, an agent cannot continue such arrangements without risking breaching his fiduciary duty to the principal.

If it is anticipated that gifting will be required by the agent, then the gifting clauses for the power of attorney should be drafted for the particular circumstances anticipated. Giving an open ended, broad gifting power to an agent under a power of attorney is not only risky for the principal but may cause adverse estate tax consequences for the agent. If the gifting power granted to an agent allows the agent to make a gift to himself and is not restricted by an ascertainable

standard, then the principal may inadvertently create a general power of appointment for the agent thereby causing the principal’s assets to be included in the agent’s estate for estate tax purposes if the agent should predecease the principal. INTERNAL REVENUE CODE §2041.

There are exceptions to the powers given the agent from receiving general power of appointment treatment such as the power being exercisable only in conjunction with a person who has a substantial adverse interest in the property, or the power being subject to an ascertainable standard. If broad gifting powers need to be given to the agent, then to avoid the potential power of appointment problem the principal may require the consent of an adverse party before gift giving powers can be exercised or if there is no such adverse party, to have a “special agent” appointed to make gifts but who does not have the right to make a gift to himself.

E. Changing Testamentary Disposition

Although there is little Texas law addressing the authority of an agent under a power of attorney to change the testamentary disposition of a principal, it is generally believed that this is an action that is personal to an individual and cannot be delegated to an agent. The Supreme Court of Texas has held that even a guardian, with court authority, does not have the right, without a prior agreement by the Trustor, to revoke a revocable trust created by the Trustor at a time when Trustor was competent. The Supreme Court held that the right to revoke a revocable trust is a purely personal right of the Trustor and thus, could not vest in a guardian of an incapacitated Trustor of the trust. Weatherly v. Byrd, 556 SW2d 292 (Tex. 1978). Under the same reasoning, it would appear that an agent under a power of attorney would not have the right, without specific authority, to change testamentary disposition or estate plan created by the principal at a time when the principal was competent. However, agents sometime inadvertently, or believing they are doing what the principal would want, attempt to change the testamentary disposition of the principal by changing beneficiary designations on life insurance and retirement accounts or moving assets from or to accounts with “pay on death” or “right of survivorship” designations. In the unreported case of Tetens v. Garcia, WL 656443 (Tex.App.—Austin 1996) the Austin Court of Appeals found that an agent under a power of attorney breached his fiduciary duty to the principal by removing funds from an account that was designated for the benefit of the principal’s granddaughter upon the death of the principal and moving them into an account of which the granddaughter was not a beneficiary. The court found that the agent under the power of attorney interfered with the principal’s testamentary wishes when there were sufficient other assets to care for the principal without interfering with the account in question. To interfere with or change the testamentary disposition of the

principal may subject the agent not only to breach of fiduciary duty claims, but also possibly to a tortious interference with inheritance rights claim. See *King v. Acker*, 725 SW2d 750 (Tex.App.—Houston [1st Dist.] 1987, no writ). Also if anyone assists the agent in these activities, including the attorney advising the agent, such third party can be guilty of conspiring with the agent to breach his fiduciary duty. Consequently, never suggest that an agent under a power of attorney change beneficiary designations or transfer funds among accounts to avoid prior beneficiary designations of the principal unless such is clearly necessary for the protection of the principal; otherwise, you could be opening the agent, as well as yourself, to potential breach of fiduciary duty and tortious interference with inheritance rights claims.

VI. A FEW ADDITIONAL THOUGHTS ON EFFECTIVELY AVOIDING GUARDIANSHIP WITH A POWER OF ATTORNEY

A. Successor Agents

The Texas statutory durable power of attorney form allows for the designation of alternate agents in the event the first agent is unable to serve. This author always suggests to clients that they designate alternate agents if they have alternates available that they feel comfortable designating. It is also suggested that the successor agents be individuals in a younger generation. Also, if a client notifies you that the primary agent under his or her power of attorney has died or has become incapacitated, you should suggest to the client that they execute a new power of attorney so there is not a question about whether the first agent under the power of attorney is available to serve if the time comes to use the power of attorney.

B. Using the Power of Attorney with Revocable Trusts

This author has found that the use of a power of attorney with a revocable trust can be a very effective tool in avoiding the need for a guardian of the estate. If a client wishes to name a professional or corporate trustee as agent under the power of attorney, then their estate plan should also include a revocable trust and a power of attorney to transfer assets to the revocable trust once it is necessary for the agent to serve. It will be much more efficient for the agent to manage the principal's assets on a long term basis with the use of a revocable trust as opposed to using a power of attorney to manage those assets.

In addition, it may be necessary for the agent under the power of attorney to create a revocable trust for the benefit of the principal to manage the principal's assets. This may come about if a qualified income trust is necessary in order to qualify the principal for Medicaid or if the principal has become incapacitated and there is

no successor agent under the power of attorney. If a revocable trust is created and a successor trustee is named in the revocable trust, then the agent under the power of attorney can transfer the principal's assets to the revocable trust and manage the assets as trustee of the revocable trust. If the agent named under the power of attorney should then predecease the principal, there is a successor trustee of the revocable trust to manage the assets within the trust for the benefit of the principal without the necessity of obtaining a guardian.

The Texas Power of Attorney Act does not clearly address whether an agent under a power of attorney has authority to create and fund a trust on behalf of the principal. An agent under a statutory durable power of attorney is given the power to transfer all or part of the principal's interest in his assets to the trustee of a revocable trust created by the principal as Settlor. TEX. PROB. CODE §499(6). By implication this suggests that an agent does not have the power to create a trust on behalf of the principal, but only the right to fund a trust already created by the principal. The Houston Court of Appeals has recently addressed this issue in *Filipp v. Till*, 230 SW3d 197 (Tex.App.-Houston [14th Dist.] 2006, no writ). In this case the Court held that an agent under a power of attorney does not have the right to create a trust on behalf of the principal unless the power of attorney gives that specific authority to the agent. However under Texas Power of Attorney Act, an agent under a statutory durable power of attorney is given the power to do any lawful act that a principal may do with respect to a transaction; to do any act of management or conservation with respect to the principal's real or personal property; and to change the form under which the principal's business is operated including entering into partnership agreements or organizing a corporation to take over the operation of the principal's business. TEX. PROB. CODE §491, §492, §493 and §497. It would seem from these statutes that if a revocable trust is created strictly as a means to manage the principal's estate and to preserve the estate for the benefit of the incapacitated principal, then §499 of the TEX. PROB. CODE does not limit an agent's power to create a trust for the management of the principal's estate. However, the Court in *Filipp v. Till* did not consider the powers given to an agent under these sections of the TEX. PROB. CODE, but instead found that an agent under a power of attorney cannot create a trust for the principal even if the purpose of the trust is only to manage the principal's assets without changing the testamentary disposition of the principal.

As long as *Filipp V. Till* is the authority on an agent's ability to create a trust for the benefit of the principal, drafters should include in their power of attorney not only the ability to fund a trust but also the ability to create a trust for the principal's benefit. One of the problems in using a power of attorney to avoid the appointment of a guardian of the estate is that a power of

attorney does not take away an incapacitated principal's right to also manage his or her affairs. In many instances, an incapacitated principal may still try to write checks or give away assets when it is not in his or her best interest. If the agent under a power of attorney cannot effectively control or prevent this behavior by the principal, then a guardian of the estate may be necessary in order to take away the principal's rights to continue with these transactions. With the use of a revocable trust, an agent under a power of attorney may be successful in moving assets into accounts in the name of the revocable trust with the agent, now acting as trustee, as the only person with access to these accounts thereby protecting the accounts from the detrimental behavior of the principal. However, if the principal then tries to revoke the trust or the power of attorney, or begins to threaten the agent with legal action, then a guardianship may still be the only option for the protection of the principal and the agent.

VII. CONCLUSION

It is hoped that this paper gives you at least a few ideas on how to more effectively use the durable power of attorney as a tool to avoid guardianship as well as to provide you with ideas on how to avoid the battle of the powers of attorney when the principal begins to show signs of incapacity.

AFFIDAVIT OF AGENT UNDER POWER OF ATTORNEY

BEFORE ME, the undersigned authority, on this day personally appeared _____ and under oath stated the following:

“I am the agent under the Power of Attorney executed by _____ on the _____ day of _____, _____. Such power of attorney is still in full force and effect and has not been revoked by _____. _____ is not deceased and no guardianship has been granted with respect to _____. _____ has not revoked this power of attorney and is no longer competent act on her own behalf. Attached hereto as Exhibit “A” is a true and correct copy of the Power of Attorney executed by _____ on _____, which is in full force and effect.”

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

Sworn to and subscribed before me this ____ day of _____, _____, by _____.

Notary Public State of Texas

My Commission Expires:
_____, 20____