



LEGAL HOTLINE FOR TEXANS

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DURABLE POWER OF ATTORNEY ACT

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The Legal Hotline for Texans (LHT) is a telephone hotline providing free legal advice and consultation and other free legal services to Texans Age 60 and Older or Eligible for Medicare; Crime Victims Age 60 and Older and their Family Members and Authorized Claimants; and Pension and Retirement Plan Employees, Participants and Beneficiaries.

Eligible Clients can consult with an attorney of the Legal Hotline for Texans free of charge by calling one of the phone numbers listed above. If clients would like to consult with an attorney in their communities, or if ongoing representation by an attorney is needed, the Legal Hotline for Texans may be able to make a referral.

Depending on individual circumstances and local availability, such a referral may be to an organization providing free attorneys to low income persons, or may be to an attorney on the Legal Hotline for Texans' reduced-fee panel, or may be to a statewide or local lawyer referral service.

The Legal Hotline for Texans is a project of the Texas Legal Services Center with support from the Texas Department of Aging, and Disability Services (DADS), the U.S. Centers for Medicare and Medicaid Services (CMS), the U.S. Administration on Aging (AoA) and the Texas Equal Access to Justice Foundation through the Texas Basic Civil Legal Services Program (BCLS) and the Texas Crime Victims Civil Legal Services Program (CVCLS)

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DURABLE POWER OF ATTORNEY ACT

Texas Probate Code, Chapter XII ([§§ 481-506](#))

What is a durable power of attorney?

A durable power of attorney is a written instrument under which an individual, the principal, designates another person as attorney in fact or agent. The durable power of attorney is a contract which creates an agency-principal relationship. By executing the durable power of attorney the principal authorizes the agent to engage in certain specified business or financial transactions on behalf of the principal with third parties such as banks, landlords, title companies, stockbrokers, etc.

Durable means that the authority of the agent to act on behalf of the principal survives the disability of the principal. Under the common law the authority conferred upon the agent terminated at the time the principal became mentally incapacitated. The time the principal became disabled usually was when the principal had the greatest need for an agent to be able to act on behalf of the principal. The Texas legislature solved this problem by enacting the Durable Power of Attorney Act.

A third party who relies in good faith on the acts of an attorney in fact or agent within the scope of the durable power of attorney is not liable to the principal.

What are the basic content and execution requirements?

The durable power of attorney must be signed by an adult principal and must contain the words "This power of attorney is not affected by subsequent disability or incapacity of the principal," or "This power of attorney becomes effective on the disability or incapacity of the principal," or similar words showing the 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. The durable power of attorney must be acknowledged by the principal before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of Texas or any other state.

What basic considerations should go into selecting the attorney in fact or agent?

First, the attorney in fact or agent should be somebody who the principal can trust implicitly such as a spouse or adult child of mature character. Secondly, the agent should be physically able to act. The power of attorney should give enough authority to the agent to accomplish the goals of the principal otherwise a guardianship may be necessary notwithstanding the power of attorney. However, too much authority could result in a

transaction which was not desired. A principal may expressly restrict the agent's authority in the durable power of attorney.

When does the durable power of attorney take effect?

It may take effect at the time of execution or "spring" into effect at the time when the principal becomes disabled or incapacitated or when some other specified event takes place.

The principal may put a definition of disability or incapacity into a springing durable power of attorney in which case the durable power of attorney would take effect at the time the definition is met. If a definition of disability or incapacity is not contained in the power of attorney, then the principal shall be considered disabled or incapacitated for purposes of the power of attorney if a physician certifies in writing that the principal is incapable of managing her or his financial affairs. Under a springing durable power of attorney that does not contain a definition of disability, the principal authorizes the physician who examines the principal to disclose the principal's physical or mental condition to another person for purposes of the power of attorney. A third party who accepts the springing power of attorney that does not contain a definition of disability is fully protected from any action taken under the power of attorney that is based on the determination made by a physician of the principal's disability or incapacity.

As to acts undertaken in good-faith reliance on the durable power of attorney, an affidavit executed by the attorney in fact or agent under a durable power of attorney stating that the principal is disabled or incapacitated, as defined by the power, is conclusive proof as between the attorney in fact or agent and a person other than the principal or the principal's personal representative dealing with the attorney in fact or agent of the disability or incapacity of the principal at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is to be recorded, the affidavit, when authenticated for record, may also be recorded.

As a practical matter, it is generally recommended that a power of attorney that springs upon the principal's disability not be used because that potentially puts the agent in the position of trying to prove to third parties, who might rely on the power of attorney, that the principal is incapacitated.

All 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 apply to the benefit of and bind the principal and the principal's successors in interest as if the principal were not disabled or incapacitated.

A durable power of attorney for a real property transaction requiring the execution and delivery of an instrument that is to be recorded, including a release, assignment, satisfaction, mortgage, security agreement, deed of trust, encumbrance, deed of conveyance, oil, gas, or other mineral lease, memorandum of a lease, lien, or other claim

or right to real property, must be recorded in the office of the county clerk of the county in which the property is located.

What is the duration of the durable power of attorney?

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. The principal may not revoke or countermand the durable power of attorney after the principal has become disabled.

Certain events terminate the attorney in fact or agent's authority.

(1) Court-appointed guardian of the estate.

If, after execution of a durable power of attorney, a court of the principal's domicile appoints a guardian of the estate of the principal, the powers of the attorney in fact or agent terminate on the qualification of the guardian of the estate, and the attorney in fact or agent is required to deliver to the guardian of the estate all assets of the estate of the ward in the attorney's or agent's possession and is required to account to the guardian of the estate as the attorney or agent would to the principal had the principal terminated his powers. An agent's power may be suspended or terminated during a temporary guardianship. The revocation by the qualification of a guardian of the estate of a principal who has executed a durable power of attorney does not revoke or terminate the agency as to the attorney in fact or agent person who, without actual knowledge of the termination of the power appointment of a guardian of the estate of the principal, acts in good faith under or in reliance on the power.

(2) Principal's divorce or marriage annulment if former spouse is attorney in fact or agent.

If, after execution of a durable power of attorney, the principal is divorced from a person who has been appointed the principal's attorney in fact or agent or the principal's marriage to a person who has been appointed the principal's attorney in fact or agent is annulled, the powers of the attorney in fact or agent granted to the principal's former spouse terminate on the date on which the divorce or annulment of marriage is granted by a court, unless otherwise expressly provided by the durable power of attorney.

Such divorce or annulment does not revoke or terminate the agency as to a third party other than the principal's former spouse if the person acts in good faith under or in reliance on the power.

(3) Revocation by principal.

The principal may revoke the power of attorney. In order to revoke the power of attorney the agent or attorney in fact must receive actual notice. A good method of revocation is to send the agent and the third parties written notice by certified mail, return receipt

requested. If the durable power of attorney is recorded or required to be recorded then a written and acknowledged revocation instrument generally should also be recorded. In an emergency situation, the third parties should be notified by telephone, and the telephone notice should be followed by the sending of notice by certified mail with return receipt requested.

(4) Designation of expiration time or occurrence.

The principal may provide for termination of a durable power of attorney by expiration of time or occurrence of an event other than express revocation.

(5) Death of the Principal.

The death of the principal revokes the power of attorney. The revocation by the death of a principal who has executed a durable power of attorney does not revoke or terminate the agency as to the attorney in fact or agent who, without actual knowledge of the termination of the power by the principal's death, acts in good faith under or in reliance on the power.

What acts are authorized under a durable power of attorney?

The principal, by executing a statutory durable power of attorney that confers authority with respect to any class of transactions, empowers the attorney in fact or agent for that class of transactions to:

(1) demand, receive, and obtain by litigation, action, or otherwise any money or other thing of value to which the principal is, may become, or may claim to be entitled;

(2) conserve, invest, disburse, or use any money or other thing of value received on behalf of the principal for the purposes intended;

(3) contract in any manner with any person, on terms agreeable to the attorney in fact or agent, to accomplish a purpose of a transaction and perform, rescind, reform, release, or modify the contract or another contract made by or on behalf of the principal;

(4) execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or other instrument the agent considers desirable to accomplish a purpose of a transaction;

(5) prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in an action or litigation relating to the claim;

(6) seek on the principal's behalf the assistance of a court to carry out an act authorized by the power of attorney;

(7) engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant;

(8) keep appropriate records of each transaction, including an accounting of receipts and disbursements;

(9) prepare, execute, and file a record, report, or other document the attorney in fact or agent considers necessary or desirable to safeguard or promote the principal's interest under a statute or governmental regulation;

(10) reimburse the attorney in fact or agent for expenditures made in exercising the powers granted by the durable power of attorney; and

(11) in general, do any other lawful act that the principal may do with respect to a transaction.

The durable power of attorney act sets out in detail the construction of power of the attorney in fact or agent with respect to the following transactions: real estate, tangible personal property, stock and bond transactions, commodity and option transactions, business operation transactions, insurance transactions, estate, trust, and other beneficiary transactions, claims and litigation, personal and family maintenance, benefits from certain governmental programs or civil or military service, retirement transactions, and tax matters.

The powers described above may be exercised equally with respect to an interest the principal has at the time the durable power of attorney is executed or acquires later, whether or not the property is located in Texas and whether or not the powers are exercised or the durable power of attorney is executed in Texas.

Is a Durable Power of Attorney a form of general power of attorney?

A Durable Power of Attorney is treated as a general power of attorney unless specific instructions are provided. If specific instructions are provided, it will be treated as a specific power of attorney for the areas specified. All other matters will be treated as if the power of attorney is general

Is an attorney required to assist in obtaining and executing a durable power of attorney?

No, but it is highly recommended.

Can a non-attorney assist another individual in obtaining and executing a durable power of attorney?

No. A non-attorney assisting another individual in obtaining and executing a durable power of attorney would be engaging in the unauthorized practice of law and would be subject to civil and criminal penalties. Such person may also be exposed to liability to the principal and others depending on the facts and circumstances.

What if the third party does not honor the power of attorney?

The third party generally cannot be forced by a court to honor the power of attorney.

What if the attorney in fact or agent transfers the property of the principal to the attorney in fact or agent or makes unauthorized transfers?

Under Texas law, there must be specific gifting language in the power of attorney to allow a transfer to the agent or attorney in fact.

The agent or attorney in fact may be subject to contract and tort causes of action by the principal for unauthorized transfers.

Texas Civil Practice & Remedies Code Section 41.008 provides for exemplary damages in a civil case based on conduct described as a felony under Texas Penal Code Section 32.45 (Misapplication of Fiduciary Property) if the conduct was committed knowingly or intentionally.

In addition, the attorney in fact or agent may be subject to criminal prosecution for misapplication of fiduciary property (Texas Penal Code Section 32.45).

Also, if the principal is 65 years of age or older or disabled, the attorney in fact or agent may be engaging in exploitation under Texas Human Resources Code [§ 48](#). Further, under Texas Human Resources Code [§ 102](#), on request of a Texan age 60 or older or their representative, the agent or attorney in fact is required to make available the related financial records and provide an accounting of the principal's money.

Finally under the Durable Power of Attorney Act, the principal may make a written request for an accounting, and the agent is required to provide a timely accounting or face a suit to compel an accounting by the principal.

Why should I execute a Designation of Guardian in Advance for a Competent Adult if have a Durable Power of Attorney?

A Designation of Guardian in Advance for a Competent Adult, while not necessary, will be helpful if the Durable Power of Attorney is challenged. Should the Durable Power of Attorney fail a court challenge, the Designation of Guardian in Advance for a Competent Adult will effectively direct the naming of your guardian. This provides you with a secondary layer of control as to who will have legal power to make decision for you if you become incapacitated in the future.

What is a statutory durable power of attorney?

The Durable Power of Attorney Act contains a durable power of attorney form known as a statutory power of attorney. This form, or a power of attorney in substantially the following form, has the meaning and effect prescribed by the Durable Power of Attorney Act. 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 of optional powers listed in the form are struck or the form includes specific limitations on or additions to the attorney in fact's or agent's powers. The principal must elect whether to have the form become effective upon execution or have it spring into effect upon the principal's disability.