

**ESTATE AND TRUST UPDATE**  
General Practice, Solo, and Small Firm Section

**Walter Wm. Hofheinz**  
**Law Office of Walter Wm. Hofheinz**  
**Dallas**

**Tessa Hofheinz Heinen**  
**Law Office of Tessa Hofheinz Heinen**  
**Dallas**

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## **Texas Estate and Trust Update 2017**

General Practice and Solo Section  
2017 State Bar of Texas Convention

Tessa Heinen  
Walter Wm. Hofheinz  
**Hofheinz Heinen PLLC**  
Dallas, Texas

June, 22, 2017

# Hofheinz Heinen PLLC

Probate & Trust Litigation ■ Estate Planning & Administration



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We represent clients in probate proceedings, including executors, administrators, beneficiaries, and creditors throughout the probate and estate settlement process.

## Walter Wm. Hofheinz

214.363.2400 ■ [wwh@hhtexaslaw.com](mailto:wwh@hhtexaslaw.com)

Walter has been Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization for more than 30 years. His practice emphasizes probate and trust litigation; estate planning from simple to complex, large estates, including wills, trusts, estate and gift tax, generation skipping transfer tax, dispositive planning, related business formation and transactions, and marital property agreements. He serves as lead counsel and as a testifying and consulting expert witness on issues related to estate planning, fiduciary duties in the context of trust administration and other estate planning implementation, and attorney's fees. From 1991 through 1997, he served as Associate Professor of Law at Texas Wesleyan (now Texas A&M) University School of Law. Walter graduated from The University of Texas School of Law in Austin, Texas.

## Tessa Heinen

214.814.0431 ■ [tessa@hhtexaslaw.com](mailto:tessa@hhtexaslaw.com)

Tessa is a licensed Texas attorney who focuses on probate and trust litigation, estate planning, and estate administrations. Tessa is a council member of the General Practice and Solo Section of the State Bar of Texas. She is also a member of the College of the State Bar of Texas as a result of her dedication to continuing education, both as an attendee and speaker. Tessa graduated magna cum laude from SMU Dedman School of Law. Prior to law school, Tessa attended The University of Texas at Austin, graduating with a B.A. in Economics. She is a proud Life Member of the Texas Exes.

# Hofheinz Heinen PLLC

Probate & Trust Litigation ■ Estate Planning & Administration

[hhtexaslaw.com](http://hhtexaslaw.com)

6500 East Mockingbird Lane, Suite 100, Dallas, TX 75214

# Hofheinz Heinen PLLC

Probate & Trust Litigation ■ Estate Planning & Probate

hhtexaslaw.com

Office 6500 E. Mockingbird Lane, Suite 100, Dallas, Texas 75214

Mailing P.O. Box 180177, Dallas, Texas 75218-0177

## Walter Wm. Hofheinz

Board Certified, Estate Planning & Probate Law  
Texas Board of Legal Specialization

214.363.2400

www@hhtexaslaw.com

## Tessa Heinen

214.814.0131

tessa@hhtexaslaw.com

## Tessa Heinen

Hofheinz Heinen PLLC, Member, 2017 – present, Dallas, Texas.

Probate and trust litigation, including representation of executors and administrators, trustees, beneficiaries, agents in disputes regarding breach of fiduciary duty, will contests, beneficiary rights, and inheritance; estate planning, including evaluation, creation, and implementation of estate plans, including Wills, Trusts, Medical and Property Powers of Attorney, and Pre- and Post- Marital Agreements; and estate administration, including representation of executors, administrators, beneficiaries, and creditors throughout probate and estate settlement process.

Law Office of Tessa Hofheinz Heinen, Attorney, 2013-2017

General civil law practice, focusing on legal issues that affect individuals, families, and small businesses; practice areas include estate planning and administration, probate and trust litigation, consumer law, employment law, and small business law.

Law Office of Walter Wm. Hofheinz, Of Counsel, Attorney, 2013-2017, Legal Research Assistant, 2011-2013

Provides legal counsel and associated representation of clients of the firm having legal needs outside of the primary practice areas of the firm; provides support as associated counsel in litigation, estate administration, and other matters. Legal research for attorney emphasizing probate and trust litigation, including research regarding the relationship between executor and creditors of estate

SMU Dedman School of Law, J. D., *magna cum laude*, May 2013

The University of Texas, B.A. in Economics, Minor in Biology, December 2007

### Professional & Community Affiliations

State Bar of Texas

General Practice and Solo Section, Council Member, 2016-present

The College of the State Bar of Texas, Member, 2014-present

Patrick E. Higginbotham Inn of Court, Member, 2014-2015

Junior League of Dallas, Active Member, 2014-present

Texas Exes, Life Member, 2007- present

### Publications and Speaking

"Practical Trust Drafting," Co-Author, State Bar of Texas Annual Meeting, June 2016

"What Litigation Teaches You About Document Drafting," Co-Author, Texas Bar CLE: Essentials for the General Practitioner, December 2014

"Planning to Conquer the Real World of Private Practice," Invited Speaker, Southern Methodist University, April 2014

Complete Vita and practice information available on request, or visit our website at [www.hhtexaslaw.com](http://www.hhtexaslaw.com).

# Hofheinz Heinen PLLC

Probate & Trust Litigation ■ Estate Planning & Probate

hhtexaslaw.com

Office 6500 E. Mockingbird Lane, Suite 100, Dallas, Texas 75214

Mailing P.O. Box 180177, Dallas, Texas 75218-0177

## Walter Wm. Hofheinz

Board Certified, Estate Planning & Probate Law  
Texas Board of Legal Specialization

214.363.2400

wwh@hhtexaslaw.com

## Tessa Heinen

214.814.0131

tessa@hhtexaslaw.com

## Walter Wm. Hofheinz

### Hofheinz Heinen PLLC, 2017 – present, Dallas, Texas.

Probate and trust litigation, estate planning and administration, and service as an expert witness on related topics. Board Certified - Estate Planning and Probate, Texas Board of Legal Specialization (1984, renewed 1989, 1994, 1999, 2004, 2009, 2014), admitted to practice State of Texas, Northern and Western Districts of Texas, Fifth and Fourth Circuits, and U.S. Supreme Court. Fully qualified for court appointment for mediation in civil and family cases. Numerous publications and presentations on estate planning, estate administration, the effective use of computers and systems in law office management, marital property, mediation, and mediation advocacy for professional and lay groups including presentations sponsored by the State Bar of Texas Professional Development Program, South Texas College of Law, the University of Houston Law School, the Internal Revenue Service, Apple Computer, Texas Woman's University, North Texas Legal Services, the Society of Professionals in Dispute Resolution, the Dallas Bar Association, Baylor Law School, and the General Practice and Solo Section of the State Bar of Texas. Invited judge, Regional ABA Section of Dispute Resolution Representation in Mediation Competition, 2006, 2008.

### Walter Wm. Hofheinz, Attorney • Counselor • Mediator, 1982 – 2017.

Dallas and Abilene (1982 – 1990), Texas.

Probate and trust litigation, estate planning and administration (including multi-generation transfer tax and dispositive planning), service as an expert witness on related topics, business planning (including ownership and operating entities, operating maintenance, acquisitions and sales of closely held businesses), and civil litigation in state and federal courts. Fully qualified for court appointment for mediation in civil and family cases. Prior practice: family law, civil trial, and commercial collection representation of individual and institutional clients.

### Texas Wesleyan University School of Law, Irving, Texas, 1991 – 1997.

Associate Professor of Law (Adjunct and Visiting Associate Professor 1991 – 1992), teaching courses in Property, Estate Planning (including Wills, Trusts, Estate Administration, Transfer Taxation), Seminar on Law and Computers (substantive intellectual property and transactional issues in an electronic environment, including copyright, patent, trade secrets, contract, evidence and liability problems), and Texas Pre-Trial Civil Procedure. Chair/Facilitator, 1993 – 1994 Texas Wesleyan University School of Law Self Study (primary management and editorial responsibility for six-month project involving entire faculty and staff in writing and production of comprehensive analysis of law school program required for and leading to accreditation). Assisting trainer for Mediation Clinics and Workshops.

### University of Texas School of Law, Austin, Texas, 1978 – 1979.

Research Assistant to Professor Stanley M. Johanson: Legal research and writing in the area of estate planning.

### University of Texas School of Law, Austin, Texas, 1976 – 1979, J.D.

Complete Vita and practice information available on request, or visit our website at [www.hhtexaslaw.com](http://www.hhtexaslaw.com).

# Texas Estate and Trust Update 2017

Tessa Heinen  
Walter Wm. Hofheinz

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### Introduction and Overview

This article is not intended to provide a comprehensive overview of changes made by the legislature during the past session. Instead, it is intended to provide a focused look at certain selected provisions that the authors believe are particularly common, important, or particularly problematic.

For more detailed overview of all changes, see William D. Pargaman's excellent outline at [www.snpalaw.com/resources/2017LegislativeUpdate](http://www.snpalaw.com/resources/2017LegislativeUpdate).

The authors bring a somewhat unusual perspective to the analysis of the provisions chosen in that they do both estate planning and probate and trust litigation, focusing on breach of fiduciary duty by personal representatives and trustees. The litigation part of their practice highlights practical problems that may not be apparent in the best of all possible worlds.

The bold emphasis in the statutory provisions has been added for this article. Underlining denoting added provisions in the original bill text has been removed for readability purposes, but provisions deleted are shown by strikethroughs as in the original bill text. The entire texts of the referenced bills are attached as PDFs to this article, and are available online at the links provided.

This paper is also available at <https://hhtexaslaw.com/publications/wwh/etupdate.php> and [gpsolo.com/2017barconvcl/etupdate.php](http://gpsolo.com/2017barconvcl/etupdate.php), and may be updated with suggested language as the authors continue to work through the implications of the changes made.

### Durable Powers of Attorney

A number of changes were made by House Bill 1974 to the Estates Code provisions governing durable powers of attorney. The full text of this bill is available at

<http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB1974>,  
and provided as an appendix to this article.

It appears to the authors that most changes made to the durable powers of attorney provisions are intended to reduce formalities, broaden the powers of the attorney-in-fact, and to make acceptance by third parties more likely. These changes present problems that must be resolved by the practitioner in working with their clients.

Sec. 751.002. DEFINITIONS [~~DEFINITION OF DURABLE POWER OF ATTORNEY~~]. In this subtitle:

(1) **"Actual knowledge" means the knowledge of a person without that person making any due inquiry, and without any imputed knowledge, except as expressly set forth in Section 751.211(c).**

(2) "Affiliate" means a business entity that directly or indirectly controls, is controlled by, or is under common control with another business entity.

(3) "Agent" includes:

(A) an attorney in fact; and

(B) a co-agent, successor agent, or successor co-agent.

(4) "Durable power of attorney" means a writing **or other record** that complies with the requirements of Section 751.0021(a) or is described by Section 751.0021(b).

(5) "Principal" means an adult person who signs or directs the signing of the person's name on a power of attorney that designates an agent to act on the person's behalf.

(6) **"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.**

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

Sec. 751.0021. REQUIREMENTS OF DURABLE POWER OF ATTORNEY. (a) An instrument is a durable power of attorney for purposes of this subtitle if the [~~A "durable power of attorney" means a written~~] instrument [~~that~~]:

(1) is a writing **or other record** that designates another person as [~~attorney in fact or~~] agent and grants authority to that agent to act in the place of the principal, regardless of whether the term "power of attorney" is used;

(2) is signed by an adult principal or in the adult principal's conscious presence by another adult directed by the principal to sign the principal's name on the instrument; ....

Comment: The new definitions allow for a purely electronic power of attorney. While probably intended to better conform with an ever increasing trend to go paperless, the effect could be substantially dangerous to the unwary. For example, this expansion raises a serious concern about the practicality of a principal ever being able to effectively

revoke a power of attorney once created. As we all know, once information exists in digital form it generally exists in perpetuity. Moreover, how can the principal ever be sure that all digital copies are destroyed? Once emailed or otherwise electronically transmitted, the principal cannot possibly account fully for every location that electronic document may have found its way to. The practitioner should advise the principal of this fact and the possible consequences in order to protect against unintended consequences later should the designated attorney in fact prove untrustworthy. Additionally, the planner should consider some creative modifications to limit the effect a rogue electronic copy could take on should the powers granted need to be limited or stopped.

Sec. 751.0023. VALIDITY OF POWER OF ATTORNEY....

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

Comment: This provision expressly allowing the acceptance of an electronic copy of the power of attorney further expands the concern of how one limits or stops the power conferred by the document if at a later time it seems prudent to do so. Exacerbating the concern of ever being able to effectively revoke the power discussed above, the limitation of liability of a person relying on an electronic power of attorney makes the potential for the use of a previously revoked power substantially more likely by an agent with bad intention. When coupled with the concern that a poorly intentioned attorney in fact may simply not give up all electronic copies of the document when requested by the principal, the new expansion of express validity creates serious questions about how as practitioners we can protect our clients from such opportunity for exploitation. Obviously, there is recourse if an attorney in fact breaches their fiduciary duties under the powers granted, but as any fiduciary litigator knows, it is not preferable to rely on litigation as a back stop, particularly given the unpredictability of outcome. Instead, planners should carefully consider modifying this provision in the document itself.

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

Sec. 751.023. SUCCESSOR AGENTS.

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

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

Comment: The ability for an appointed agent to appoint a successor agent is an interesting addition to the potential powers conferred by a power of attorney. In some situations, the authors believe this could be a very useful and appropriate way to accomplish a client's goals by building in flexibility for unforeseen changes of circumstance. Undoubtedly, this power is intended to accomplish just such flexibility.



However, it is important to note and directly discuss with the principal the practical consequences of granting such authority, specifically delegation of their ability to control who may act as their agent. To the extent the client retains capacity, the principal could always veto a successor agent designation by revoking the power. However, it is common practice that powers of attorney are not used by the appointed agent unless and until the principal is unable to undertake the financial or other property management tasks personally. In fact, we as practitioners often discuss durable powers of attorney as the first defense against the need for a guardianship. When this is the case, the principal may well not be able to revoke the power. Further, planners must remember that they are working in family systems. Commonly the principal appoints one of his or her family members as their agent. Other family members often view this as innocuous, but would those family members feel the same if that initially appointed family member appointed a non-relative successor agent? Say, his or her spouse, for example? Would the result be different if the initially appointed agent was the spouse of the principal versus the youngest child of the principal? The answer will obviously be different in any given family, but these questions are important if you grant such authority to the agent.

(c) Unless the durable power of attorney otherwise provides, a successor agent:

(1) has the same authority as the authority granted to the predecessor agent; and

(2) is not considered an agent under this subtitle and may not act until all predecessor agents, including co-agents, to the successor agent have resigned, died, or become incapacitated, are not qualified to serve, or have declined to serve.

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

##### Sec. 751.031. GRANTS OF AUTHORITY IN GENERAL AND CERTAIN LIMITATIONS.

(a) Subject to Subsections (b), (c), and (d) and Section 751.032, if a durable power of attorney grants to an agent the authority to perform all acts that the principal could perform, the agent has the general authority conferred by Subchapter C, Chapter 752.

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

**(1) create, amend, revoke, or terminate an inter vivos trust;**

**(2) make a gift;**

**(3) create or change rights of survivorship;**

**(4) create or change a beneficiary designation; or**

**(5) delegate authority granted under the power of attorney.**

Comment: WOAHH. SLOW DOWN. These are the infamous "hot powers" that are now expressly authorized to be included in power of attorneys. If a practitioner is

considering inclusion of any of these powers, he or she should take the time to discuss each one with the principal. Further, careful thought should be given to any potentially appropriate limitations that can be included. Remember the concerns regarding revocation above – those concerns magnify many times over as the power conferred on the agent expands. An entire paper of caution could be written regarding these powers, which should not be interpreted to mean they are never appropriate. However, the inclusion of these powers emphasizes the need for practitioners to step away from thinking about powers of attorneys as “form” documents and substitute instead the careful craft of drafting applied to Wills.

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

Comment: Oh, good – finally a limitation! While useful to have such a limitation, we must remember in practice how powers of attorneys are used. By the authors’ completely anecdotal estimation, 90% of the powers of attorney created by our office appoint an “ancestor, spouse, or descendant of the principal” as attorney in fact. Therefore in practice, this limitation will not affect the vast majority of agents. Further, there are two classic set-ups for allegations of breach of fiduciary duty: 1) fiduciary second spouse of principal v. children of principal’s first marriage and 2) fiduciary sibling v. sibling. This limitation does not apply in either situation. All of this is to say, we must, as practitioners, be very careful to review, discuss, document decisions, and carefully draft powers of attorney to avoid unintended consequences. If you include a hot power in the power of attorney designating second spouse of principal agent, and spouse changes every beneficiary designation to pay on death to her instead of principal’s estate – expect a call from the children of principal’s first marriage. While current malpractice law would limit liability to those other than the client for such actions, one can imagine a change to the underlying privity rule given particularly egregious facts.

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

(e) Authority granted in a durable power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, regardless of whether:

(1) the property is located in this state; and

(2) the authority is exercised in this state or the power of attorney is executed in this state.

Sec. 751.032. GIFT AUTHORITY.

(a) In this section, a gift for the benefit of a person includes a gift to:

(1) a trust;

(2) an account under the Texas Uniform Transfers to Minors Act (Chapter 141, Property Code) or a similar law of another state; and

(3) a qualified tuition program of any state that meets the requirements of Section 529, Internal Revenue Code of 1986.

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

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

(1) make outright to, or for the benefit of, a person a gift of any of the principal's property, including by the exercise of a presently exercisable provided by Section 2513, Internal Revenue Code of 1986, twice the annual federal gift tax exclusion limit; and

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

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

Comment: This section, as well as the referenced section 751.122, reflects the common difficulty in distinguishing the principal's best interest from that of potential beneficiaries. It is difficult to see how the gift could ever be the best interest of the principal, although frequently individuals make gifts to accomplish their dispositive objectives. Often, we think that a gift is in the donor's interest because of the moral or emotional reward of the act of generosity. For obvious reasons, that emotional payoff is not likely applicable to incapacitated principals. While the reference to known objectives of the principal provides a useful standard for making gifts, great care should be taken to assure that the objectives of the beneficiaries seeking the gifts are not confused with the objectives of the principle. If you are advising an agent who seeks to make gifts of the principal's property under the authority granted, it would be wise to encourage thorough record keeping as well as an aggregation of any documentary proof of the context surrounding the exercise of this power. This is especially true if the agent believes it is consistent with the "principal's personal history of making" gifts. Often, those not benefitted by gifts are unaware when and why they are made.

#### Sec. 751.033. AUTHORITY TO CREATE OR CHANGE CERTAIN BENEFICIARY DESIGNATIONS.

(a) Unless the durable power of attorney otherwise provides, and except as provided by Section 751.031(c), authority granted to an agent under Section 751.031(b)(4) empowers the agent to:

(1) create or change a beneficiary designation under an account, contract, or another arrangement that authorizes the principal to designate a beneficiary, including an insurance or annuity contract, a qualified or nonqualified retirement plan, including a retirement plan as defined by Section 752.113, an employment agreement, including a deferred compensation agreement, and a residency agreement;

(2) enter into or change a P.O.D. account or trust account under Chapter 113; or

(3) create or change a nontestamentary payment or transfer under Chapter 111.

(b) If an agent is granted authority under Section 751.031(b)(4) and the durable power of attorney grants the authority to the agent described in Section 752.108 or 752.113, then, unless the power of attorney otherwise provides, the authority of the agent to designate the agent as a beneficiary **is not subject to the limitations prescribed by Sections 752.108(b) [Insurance and Annuity Transactions] and 752.113(c) [Retirement Plan Transactions]**.

Comment: While not so simply stated, this section simply provides the ability for an agent granted authority under 751.031 complete discretion to change beneficiaries, with the authority to completely change the dispositive plan of the principle. As noted above in connection with the discussion of the hot powers, extreme care should be used in granting such powers, and the practitioner should be sure to discuss the actual implications of the power with the client. Almost invariably, disputes regarding the appropriate application of powers of attorney rise between family members who have different understandings regarding a parents and their intentions, how an incapacitated parent should be supported and in what environment, the behavior of siblings, or whether descendents actually deserve to receive anything from the parents. These factors, and how they are viewed differently between various interested parties, should be considered when evaluating the prudence of conferring such power on the agent.

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

#### Sec. 751.034. INCORPORATION OF AUTHORITY.

(a) An agent has authority described in this chapter if the durable power of attorney refers to general authority with respect to the descriptive term for the subjects stated in Chapter 752 or cites the section in which the authority is described.

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

(c) A principal may modify authority incorporated by reference.

Sec. 751.051. EFFECT OF ACTS PERFORMED BY ~~[ATTORNEY IN FACT OR]~~ AGENT ~~[DURING PRINCIPAL'S DISABILITY OR INCAPACITY]~~. An ~~[Each]~~ act performed by an ~~[attorney in fact or]~~ agent under a durable power of attorney ~~[during a period of the principal's disability or incapacity]~~ has the same effect~~[,]~~ and inures to the benefit of and binds the principal and the principal's successors in interest~~[,]~~ **as if the principal had performed the act ~~[were not disabled or incapacitated]~~.**

Comment: Prior to this change, standard defenses related to the actions of an agent provided by the law of agency might be available if the agent abused their power and took actions that should not bind the principal. The language changed here seems by its plain language to completely abolish such defenses. Until these provisions are interpreted through litigation, it is unclear to what extent the courts will apply such a broad prohibition of common law defenses.

Sec. 751.121. DUTY TO NOTIFY OF BREACH OF FIDUCIARY DUTY BY OTHER AGENT.

(a) **An agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate under the circumstances to safeguard the principal's best interest.** An agent who fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken the action.

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

Comment: Although appearing to impose a duty, this section actually narrows the obligation under the duty of loyalty that an agent would have in any event to protect his principal's interest if he were to become aware of breach by another agent since "actual knowledge" is required. Recall that under the applicable definitions "actual knowledge" has no duty of inquiry and no constructive notice attached. In effect, only if an agent participates in or conceals a breach by the other agent will liability attach. By extension, this provision actually just creates an ancillary breach of the agent's fiduciary duties in such a case, since it is only triggered by having breached his or her own duties by participating or concealing the underlying conduct. Further, this provision's plain language relieves the attorney in fact of liability unless they would be liable for the underlying conduct.

Sec. 751.122. DUTY TO PRESERVE PRINCIPAL'S ESTATE PLAN. An agent shall preserve to the extent reasonably possible the principal's estate plan **to the extent the agent has actual knowledge of the plan if preserving the plan is consistent with the principal's best interest based on all relevant factors,** including:

- (1) the value and nature of the principal's property;
- (2) the principal's foreseeable obligations and need for maintenance;
- (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
- (4) eligibility for a benefit, a program, or assistance under a statute or regulation.

Comment: While we speak in common language of an individual's "estate plan," what is included? The Estates Code does not provide a statutory definition of the term, and the authors are unaware of construction that would provide clarity to such an instruction. Once again, as noted above with respect gifts, the third factor listed would seem to have more to do with the interest of beneficiaries than the principal, as might the fourth. Most

frequently when working with clients, it is the beneficiaries of an individual that are more concerned with creating or preserving eligibility for government benefits than the individual themselves. Further problems are raised by the duty created to “preserve to the extent reasonably possible” the principal’s estate plan. How does a fiduciary weigh and balance the numerous factors that an individual takes into account when determining what estate planning to implement? For example, if choices are to be made about support for an incapacitated parent, does the duty imposed to preserve the estate plan require that the expense of that maintenance be minimized in order to preserve assets for children, where a Will provides for gifts at death to children? We suspect we will see interesting litigation arising from application of this new requirement to existing and future powers of attorney.

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

Comment: This section illustrates the difficult tension between protecting those who agree to accept an agent’s action and the need for a principal to be able to terminate an agent’s right to act. Recall that actual knowledge, as defined by Estates Code Section 751.002 is an extremely high bar, particularly with respect to institutions as discussed under Section 751.211. In conjunction with provisions that a person presented with a durable power of attorney may not insist on recording in public records, and that an electronic “record” is of equal validity with a writing, it is difficult to see how one can effectively revoke a durable power of attorney once it has escaped into the wild. Serious consideration should be given to express provisions in the power of attorney requiring *some* inquiry before reliance is justified. An alternative might be to simply have one original copy with no scans or copies, with the principal retaining the original until such time as it becomes necessary for the agent to act on the basis of the power of attorney. This, of course, presents a great deal of inconvenience and the possibility that the power of attorney will not be available for use should the principal become legally incapacitated. The difficulty in practice to revoke powers of attorney requires serious consideration and discussion with the principal prior to implementation.

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

Sec. 751.201. ACCEPTANCE OF DURABLE POWER OF ATTORNEY REQUIRED; EXCEPTIONS. (a) **Unless one or more grounds for refusal under Section 751.206 exist**, a person who is presented with and asked to accept a durable power of attorney by an agent with authority to act under the power of attorney shall:

- (1) accept the power of attorney; or
- (2) before accepting the power of attorney:

(A) request an agent's certification under Section 751.203 or an opinion of counsel under Section 751.204 not later than the 10th business day after the date the power of attorney is presented, except as provided by Subsection (c); or

(B) if applicable, request an English translation under Section 751.205 not later than the fifth business day after the date the power of attorney is presented, except as provided by Subsection (c).

Sec. 751.206. GROUNDS FOR REFUSING ACCEPTANCE. A person is not required to accept a durable power of attorney under this subchapter if:.....

Comment: There are a large number of grounds for refusal to accept a durable power of attorney. While the intent of the addition of Subchapter E is to facilitate acceptance of durable powers of attorney, the breadth of the exception to required acceptance is unlikely to change the practical difficulty of using durable powers to engage in transactions, particularly with large financial institutions. In practice, if a third-party doesn't want to rely on the powers conferred there will undoubtedly be a way to justify refusing to do so. However, the imposition of acceptance as the default position for third parties when presented a power of attorney again reflects the substantial broadening and increasing strength powers of attorney are given under this new legislation.

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

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

(b) A person who in good faith accepts a durable power of attorney **without actual knowledge** that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely on the power of attorney as if:

- (1) the power of attorney were genuine, valid, and still in effect;
- (2) the agent's authority were genuine, valid, and still in effect; and
- (3) the agent had not exceeded and had properly exercised the authority.

Comment: This section also illustrates the difficult tension between protecting those who agree to accept an agent's action and the need for a principal to be able to terminate an agent's right to act. It is not apparent why this section and Section 751.134 might not have been combined. As discussed with respect to that section, the definition of "actual knowledge" is problematic, particularly in conjunction with the provisions of Section 751.211 that follows.

Sec. 751.211. ACTUAL KNOWLEDGE OF PERSON WHEN TRANSACTIONS CONDUCTED THROUGH EMPLOYEES.

(a) This section applies to a person who conducts a transaction or activity through an employee of the person.

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

Comment: This change is extremely problematic. As we all know, organizations only obtain knowledge through their employees and agents. The effect of this provision is to preclude any institution, as an institution, from having actual knowledge of a fact related to a durable power of attorney principle or agent. Formal notification of the institution will not be sufficient. Coupled with the changes allowing reliance in the absence of actual knowledge, these changes greatly enhance the possibility of abuse by an agent. Simply because the regular banker calls in sick, an opportunity for a long revoked power of attorney to be used arises. Moreover, as discussed above, the institution essentially will not have liability for relying on that power.

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

Sec. 752.051. FORM. Actual form omitted. Update!

Comment: The statutory form has changed. Update your form!

## Medical Powers of Attorney

HB 995

<http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB995>

House Bill 995, available at

<http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB1877>, and provided as an appendix to this article, changed the mandatory statutory form so the required “this is an important thing you are doing language” is an actual part of the Medical Power of Attorney rather than a separate document. While there are other minor changes to language, they are non-substantive.

Update the form you use!

## Smaller, but noteworthy

### Penalty For Inaccurate Affidavit in Lieu of Inventory

A penalty for Inaccurate Affidavit in Lieu was added by HB 1877 available at <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB1877>, and provided as an appendix to this article.

Many practitioners have simply adopted, at least in practice, the view that Affidavit in Lieu of Inventory substitutes for an actual Inventory prepared by the personal representative, whether provided to beneficiaries or not by reason of waiver. It is clear from a reading of the all provisions related to the Affidavit in Lieu that the Affidavit is in lieu of *filing* the Inventory, not preparation of an Inventory. Frequently, in the authors’ experience filing an Affidavit in Lieu has been seen as a way to avoid preparing the Inventory, even without waivers by all beneficiaries. Accordingly, a penalty has been added for misrepresentation made in the affidavit.

Sec. 309.0575. PENALTY FOR MISREPRESENTATION IN AFFIDAVIT IN LIEU OF INVENTORY, APPRAISEMENT, AND LIST OF CLAIMS.

(a) The court, on its own motion or on motion of any person interested in the estate, and after an independent executor has been cited to answer at a time and



place fixed in the notice, may fine an independent executor in an amount not to exceed \$1,000 if the court finds that the executor misrepresented in an affidavit in lieu of the inventory, appraisal, and list of claims filed by the executor that all beneficiaries, other than those described by Section 309.056(b-1), received a verified, full, and detailed inventory and appraisal as required by Section 309.056(b).

(b) The independent executor and the executor's sureties, if any, are liable for any fine imposed under this section and for all damages and costs sustained by the executor's misrepresentation. The fine, damages, and costs may be recovered in any court of competent jurisdiction.

The lesson: prepare an Inventory in every estate, even if an Affidavit in Lieu is filed. It is the authors' opinion that the Inventory should be generally filed for record purposes, for a number of reasons, including for income tax basis, with respect to real property for chain of title, for a determination of what property is subject to claims, and, if multiple beneficiaries are named, to allow them to determine property in the estate. There have been many instances that an Inventory filed in a several generation ago estate has allowed a determination of the interest of a beneficiary in real property that was not clearly allocated through Executor's Deeds. Even if the choice is made to file an Affidavit in Lieu, an Inventory will provide helpful if questions arise in the future, or if a person entitled to be provided the Inventory under Sec. 309.056(c) makes a demand.

### **Broadened Decanting Under the Trust Code**

A number of changes were made by Senate Bill 617 to Subchapter D of the Trust Code governing decanting of trusts. The full text of this bill is available at <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=SB617>, and provided as an appendix to this article.

"Decanting" provisions have been added to our Trust Code and those of other jurisdictions as many irrevocable trusts implemented primarily for tax planning purposes have become increasingly irrelevant for that purpose, and sometimes inappropriate for the situation of the beneficiaries. Traditional trust law doctrine requires that all purposes of a trust be accomplished prior to a Court authorizing early termination. Decanting provisions have been created in order to modify (or defeat) that doctrine.

Obviously, there are questions associated with the ability to change the recipients or terms of a beneficial interest, or terminate a trust prior to its purposes having been accomplished, with a potential shift of beneficial interest from those who would have been entitled had the trust run to its conclusion by its terms. A well-drafted trust will provide needed flexibility through powers held in both a fiduciary and non-fiduciary capacity. Many trusts do not have such provisions, however. The changes made during the last legislature significantly broaden the power to terminate a trust early or shift beneficial interest unless the trust agreement expressly provides otherwise. Serious consideration should be given to incorporating such an express prohibition into every trust agreement.

At the very least, it is important that clients understand that it may be possible for the trustee to change the beneficiaries or protections they have incorporated into the trust they are creating. While we attempt to limit the scope of discussion of technical provisions that are difficult to understand without sufficient legal context, failing to fully discuss the implications of not prohibiting decanting can be affirmatively misleading to

a lay reader. The traditional rules reflect how people expect trusts to work; changes such as the decanting provisions defeat those expectations. Settlers deserve to be able to make informed decisions on whether and not those rules should be changed.

SECTION 7. Sections 112.071(5), (6), and (7), Property Code, are amended to read as follows:

(5) "Full discretion" means a ~~the~~ power to distribute principal to or for the benefit of one or more of the beneficiaries of a trust that is not a trust with limited discretion ~~[limited or modified by the terms of the trust in any way, including by restrictions that limit distributions to purposes such as the best interests, welfare, or happiness of the beneficiaries].~~

(6) "Limited discretion" means:

(A) a power to distribute principal according to **mandatory distribution** provisions under which the trustee has no discretion; or

(B) a ~~limited or modified~~ power to distribute principal to or for the benefit of one or more beneficiaries of a trust that is limited by an **ascertainable standard**, including the health, education, support, or maintenance of the beneficiary.

Comment: Note that only two limitations avoid characterization of a trust as granting "full discretion" to a trustee and therefore subject to distribution: mandatory distribution requirements or discretion limited by an ascertainable standard. Discretion that would traditionally have been deemed as less than full and limited by a standard, such as limiting distributions by requiring that a trustee take into account other resources of a beneficiary, do not meet this definition. This change greatly broadens the circumstances under which distributions might be available. It is important to note that these changes flip the default to a trust being "full discretion" rather than defaulting to "limited discretion." These kinds of default classifications can have rippling effects in our documents, and the practitioner should review his or her documents with a careful eye to determine if the effects are preferable.

(7) "Presumptive remainder beneficiary," with respect to a particular date, means a beneficiary of a trust on that date who, in the absence of notice to the trustee of the exercise of the power of appointment and assuming that any other powers of appointment under the trust are not exercised, would be eligible to receive a distribution from the trust if:

(A) the trust terminated on that date; or

(B) the interests of all current beneficiaries ~~[currently eligible to receive income or principal from the trust]~~ ended on that date without causing the trust to terminate.

SECTION 8. Section 112.072(a), Property Code, is amended to read as follows:

(a) **An authorized trustee who has the full discretion to distribute the principal of a trust may distribute all or part of the principal of that trust in favor of a trustee of a second trust for the benefit of one, [or] more than one, or all of the current beneficiaries of the first trust [who are eligible to receive income or principal from the trust] and for the benefit of one, [or] more than one, or all of the successor or presumptive remainder beneficiaries of the first trust [who are eligible to receive income or principal from the trust].**

Comment: While this section on first reading apparently allows reallocation of the benefits of a trust with respect to both recipients and timing, watch out for the next section!

SECTION 10. Section 112.078, Property Code, is amended by adding Subsection (f) to read as follows:

**(f) This section does not limit a beneficiary's right to bring an action against a trustee for a breach of trust.**

Comment: Caution! Any exercise of power is still subject to the Trustee's fiduciary duty to the beneficiaries.

Query: Can an exercise of an apparent power to shift beneficial interest exercised in a way that does not strictly accord with beneficial interests as contemplated by the trust not be a breach of trust, unless specific trust language provides a standard for exercise? If not, would it not be better to simply incorporate appropriate language expressing the settlor's intent with respect to such flexibility?

SECTION 11. Section 112.085, Property Code, is amended to read as follows:

Sec. 112.085. EXCEPTIONS TO POWER OF DISTRIBUTION. An authorized trustee may not exercise a power to distribute principal of a trust under Section 112.072 or 112.073 to:

- (1) reduce, limit, or modify a beneficiary's current, vested right to:
  - (A) receive a mandatory distribution of income or principal;
  - (B) receive a mandatory annuity or unitrust interest;
  - (C) withdraw a percentage of the value of the trust; or
  - (D) withdraw a specified dollar amount from the trust;
- (2) materially impair the rights of any beneficiary of the trust;**

Comment: Again, the changes significantly narrow the prohibitions on the exercise of powers granted. The deleted prohibition essentially echoes the traditional bound of early termination or modification of the trust.

- ~~(3)~~ materially limit a trustee's fiduciary duty:
  - (A) under the terms of the trust; or
  - (B) in a manner that would be prohibited [~~as described~~] by Section 111.0035;
- (3) [~~(4)~~] decrease or indemnify against a trustee's liability;
- (4) add a provision exonerating [~~or exonerate~~] a trustee from liability for failure to exercise reasonable care, diligence, and prudence;
- (5) eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the distribution power under Section 112.072 or 112.073; or
- (6) reduce, limit, or modify in the second trust a perpetuities provision included in the first trust, unless expressly permitted by the terms of the first trust.

Sec. 112.084. CERTAIN DISTRIBUTIONS PROHIBITED.

(a) Except as provided by Subsection (b), an authorized trustee may not exercise a power to distribute principal of a trust otherwise provided by Section 112.072 or 112.073 if the distribution is **expressly prohibited by the terms of the governing instrument of the trust.**

(b) **A general prohibition** of the amendment or revocation of a trust or a provision that constitutes a spendthrift clause **does not preclude the exercise of a power to distribute principal of a trust under Section 112.072 or 112.073.**

Comment: The decanting provisions of the Trust Code can be modified or prohibited by the trust document, but note the specificity required of such a provision in the trust agreement. While subsection (a) requires only that it be “expressly prohibited” subsection (b) in effect requires that the express prohibition directly reference the decanting provisions of the Trust Code.

Possible language:

The State of Texas shall be the situs of this Trust, and the Trustee shall have the power to choose a different situs for this Trust only with the written joinder of all current and identifiable contingent beneficiaries in existence. Regardless of choice of law rules, Texas law shall govern the interpretation and administration of this Trust unless all current and identifiable contingent beneficiaries in existence agree to the contrary in writing. It is Grantor’s intent that this Trust continue according to its terms until its termination as set out in this Trust agreement and that no distributions be made under the provisions of Subchapter D of the Texas Trust Code, Trust Code Sections 112.072 or 112.073, except as otherwise expressly provided in this Agreement.

### **Conclusion — “Danger, Will Robinson!”**

While additional flexibility in planning tools can allow clients to achieve their goals with less expense and inconvenience, they also present an enhanced opportunity for those who would abuse such flexibility to do so. In working with clients, it is essential that the client understand the surrounding context of the documents they are preparing.

Most clients will assume that the person named as their agent under a durable power of attorney will execute their duties faithfully, and most will. Some however, will not. Most grantors will assume that the provisions of the trust, once created, will govern the disposition of the property held in trust. Given the changes to the decanting provisions, without careful drafting this may not true.

Accordingly, it is essential that the attorney advising the client not simply treat a document such as a statutory durable power of attorney as an immutable form to be used without careful understanding of the implications by the client. In addition, it is essential that the attorney carefully consider whether the default law applicable to durable powers of attorney after the amendments made by the last legislature should be left unchanged by specific language incorporated into the document.

As statutory law continues to broaden the flexibility built into the law itself, we as practitioners must look to our documents, not as forms, but as specifically tailored vehicles for our clients. Long gone are the days that we can rely on a lack of flexibility being the “worse case” outcome.

AN ACT

relating to durable powers of attorney.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter A, Chapter 751, Estates Code, is amended by adding Section 751.0015 to read as follows:

Sec. 751.0015. APPLICABILITY OF SUBTITLE. This subtitle applies to all durable powers of attorney except:

(1) a power of attorney to the extent it is coupled with an interest in the subject of the power, including a power of attorney given to or for the benefit of a creditor in connection with a credit transaction;

(2) a medical power of attorney, as defined by Section 166.002, Health and Safety Code;

(3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; or

(4) a power of attorney created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

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

Sec. 751.002. DEFINITIONS [~~DEFINITION OF DURABLE POWER OF ATTORNEY~~]. In this subtitle:

1           (1) "Actual knowledge" means the knowledge of a person  
2 without that person making any due inquiry, and without any imputed  
3 knowledge, except as expressly set forth in Section 751.211(c).

4           (2) "Affiliate" means a business entity that directly  
5 or indirectly controls, is controlled by, or is under common  
6 control with another business entity.

7           (3) "Agent" includes:

8                   (A) an attorney in fact; and

9                   (B) a co-agent, successor agent, or successor  
10 co-agent.

11           (4) "Durable power of attorney" means a writing or  
12 other record that complies with the requirements of Section  
13 751.0021(a) or is described by Section 751.0021(b).

14           (5) "Principal" means an adult person who signs or  
15 directs the signing of the person's name on a power of attorney that  
16 designates an agent to act on the person's behalf.

17           (6) "Record" means information that is inscribed on a  
18 tangible medium or that is stored in an electronic or other medium  
19 and is retrievable in perceivable form.

20           Sec. 751.00201. MEANING OF DISABLED OR INCAPACITATED FOR  
21 PURPOSES OF DURABLE POWER OF ATTORNEY. Unless otherwise defined by  
22 a durable power of attorney, a person is considered disabled or  
23 incapacitated for purposes of the durable power of attorney if a  
24 physician certifies in writing at a date later than the date the  
25 durable power of attorney is executed that, based on the  
26 physician's medical examination of the person, the person is  
27 determined to be mentally incapable of managing the person's

1 financial affairs.

2 Sec. 751.0021. REQUIREMENTS OF DURABLE POWER OF ATTORNEY.

3 (a) An instrument is a durable power of attorney for purposes of  
4 this subtitle if the [A "durable power of attorney" means a written]  
5 instrument [~~that~~]:

6 (1) is a writing or other record that designates  
7 another person as [~~attorney in fact or~~] agent and grants authority  
8 to that agent to act in the place of the principal, regardless of  
9 whether the term "power of attorney" is used;

10 (2) is signed by an adult principal or in the adult  
11 principal's conscious presence by another adult directed by the  
12 principal to sign the principal's name on the instrument;

13 (3) contains:

14 (A) the words:

15 (i) "This power of attorney is not affected  
16 by subsequent disability or incapacity of the principal"; or

17 (ii) "This power of attorney becomes  
18 effective on the disability or incapacity of the principal"; or

19 (B) words similar to those of Paragraph (A) that  
20 clearly indicate [~~show the principal's intent~~] that the authority  
21 conferred on the [~~attorney in fact or~~] agent shall be exercised  
22 notwithstanding the principal's subsequent disability or  
23 incapacity; and

24 (4) is acknowledged by the principal or another adult  
25 directed by the principal as authorized by Subdivision (2) before  
26 an officer authorized under the laws of this state or another state  
27 to:

1 (A) take acknowledgments to deeds of conveyance;  
2 and

3 (B) administer oaths.

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

12 Sec. 751.0022. PRESUMPTION OF GENUINE SIGNATURE. A  
13 signature on a durable power of attorney that purports to be the  
14 signature of the principal or of another adult directed by the  
15 principal as authorized by Section 751.0021(a)(2) is presumed to be  
16 genuine, and the durable power of attorney is presumed to have been  
17 executed under Section 751.0021(a) if the officer taking the  
18 acknowledgment has complied with the requirements of Section  
19 121.004(b), Civil Practice and Remedies Code.

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

23 (b) A durable power of attorney executed in a jurisdiction  
24 other than this state is valid in this state if, when executed, the  
25 execution of the durable power of attorney complied with:

26 (1) the law of the jurisdiction that determines the  
27 meaning and effect of the durable power of attorney as provided by



1 Section 751.0024; or

2 (2) the requirements for a military power of attorney  
3 as provided by 10 U.S.C. Section 1044b.

4 (c) Except as otherwise provided by statute other than this  
5 subtitle or by the durable power of attorney, a photocopy or  
6 electronically transmitted copy of an original durable power of  
7 attorney has the same effect as the original instrument and may be  
8 relied on, without liability, by a person who is asked to accept the  
9 durable power of attorney to the same extent as the original.

10 Sec. 751.0024. MEANING AND EFFECT OF DURABLE POWER OF  
11 ATTORNEY. The meaning and effect of a durable power of attorney is  
12 determined by the law of the jurisdiction indicated in the durable  
13 power of attorney and, in the absence of an indication of  
14 jurisdiction, by:

15 (1) the law of the jurisdiction of the principal's  
16 domicile, if the principal's domicile is indicated in the power of  
17 attorney; or

18 (2) the law of the jurisdiction in which the durable  
19 power of attorney was executed, if the principal's domicile is not  
20 indicated in the power of attorney.

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

26 Sec. 751.006. REMEDIES UNDER OTHER LAW [~~RIGHTS CUMULATIVE~~].  
27 The remedies [~~rights set out~~] under this chapter [~~subtitle~~] are not

1 exclusive and do not abrogate any right or remedy under any law of  
2 this state other than this chapter [~~cumulative of any other rights~~  
3 ~~or remedies the principal may have at common law or other applicable~~  
4 ~~statutes and are not in derogation of those rights~~].

5 Sec. 751.007. CONFLICT WITH OR EFFECT ON OTHER LAW. This  
6 subtitle does not:

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

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

15 SECTION 3. Chapter 751, Estates Code, is amended by adding  
16 Subchapters A-1 and A-2 to read as follows:

17 SUBCHAPTER A-1. APPOINTMENT OF AGENTS

18 Sec. 751.021. CO-AGENTS. A principal may designate in a  
19 durable power of attorney two or more persons to act as co-agents.  
20 Unless the durable power of attorney otherwise provides, each  
21 co-agent may exercise authority independently of the other  
22 co-agent.

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

1 appointment.

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

6 (b) A principal may grant authority to designate one or more  
7 successor agents to an agent or other person designated by name,  
8 office, or function.

9 (c) Unless the durable power of attorney otherwise  
10 provides, a successor agent:

11 (1) has the same authority as the authority granted to  
12 the predecessor agent; and

13 (2) is not considered an agent under this subtitle and  
14 may not act until all predecessor agents, including co-agents, to  
15 the successor agent have resigned, died, or become incapacitated,  
16 are not qualified to serve, or have declined to serve.

17 Sec. 751.024. REIMBURSEMENT AND COMPENSATION OF AGENT.  
18 Unless the durable power of attorney otherwise provides, an agent  
19 is entitled to:

20 (1) reimbursement of reasonable expenses incurred on  
21 the principal's behalf; and

22 (2) compensation that is reasonable under the  
23 circumstances.

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

25 Sec. 751.031. GRANTS OF AUTHORITY IN GENERAL AND CERTAIN  
26 LIMITATIONS. (a) Subject to Subsections (b), (c), and (d) and  
27 Section 751.032, if a durable power of attorney grants to an agent

1 the authority to perform all acts that the principal could perform,  
2 the agent has the general authority conferred by Subchapter C,  
3 Chapter 752.

4 (b) An agent may take the following actions on the  
5 principal's behalf or with respect to the principal's property only  
6 if the durable power of attorney designating the agent expressly  
7 grants the agent the authority and the exercise of the authority is  
8 not otherwise prohibited by another agreement or instrument to  
9 which the authority or property is subject:

10 (1) create, amend, revoke, or terminate an inter vivos  
11 trust;

12 (2) make a gift;

13 (3) create or change rights of survivorship;

14 (4) create or change a beneficiary designation; or

15 (5) delegate authority granted under the power of  
16 attorney.

17 (c) Notwithstanding a grant of authority to perform an act  
18 described by Subsection (b), unless the durable power of attorney  
19 otherwise provides, an agent who is not an ancestor, spouse, or  
20 descendant of the principal may not exercise authority under the  
21 power of attorney to create in the agent, or in an individual to  
22 whom the agent owes a legal obligation of support, an interest in  
23 the principal's property, whether by gift, right of survivorship,  
24 beneficiary designation, disclaimer, or otherwise.

25 (d) Subject to Subsections (b) and (c) and Section 751.032,  
26 if the subjects over which authority is granted in a durable power  
27 of attorney are similar or overlap, the broadest authority

1 controls.

2 (e) Authority granted in a durable power of attorney is  
3 exercisable with respect to property that the principal has when  
4 the power of attorney is executed or acquires later, regardless of  
5 whether:

6 (1) the property is located in this state; and

7 (2) the authority is exercised in this state or the  
8 power of attorney is executed in this state.

9 Sec. 751.032. GIFT AUTHORITY. (a) In this section, a gift  
10 for the benefit of a person includes a gift to:

11 (1) a trust;

12 (2) an account under the Texas Uniform Transfers to  
13 Minors Act (Chapter 141, Property Code) or a similar law of another  
14 state; and

15 (3) a qualified tuition program of any state that  
16 meets the requirements of Section 529, Internal Revenue Code of  
17 1986.

18 (b) Unless the durable power of attorney otherwise  
19 provides, a grant of authority to make a gift is subject to the  
20 limitations prescribed by this section.

21 (c) Language in a durable power of attorney granting general  
22 authority with respect to gifts authorizes the agent to only:

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

27 (A) the annual dollar limits of the federal gift

1 tax exclusion under Section 2503(b), Internal Revenue Code of 1986,  
2 regardless of whether the federal gift tax exclusion applies to the  
3 gift; or

4 (B) if the principal's spouse agrees to consent  
5 to a split gift as provided by Section 2513, Internal Revenue Code  
6 of 1986, twice the annual federal gift tax exclusion limit; and

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

11 (d) An agent may make a gift of the principal's property  
12 only as the agent determines is consistent with the principal's  
13 objectives if the agent actually knows those objectives. If the  
14 agent does not know the principal's objectives, the agent may make a  
15 gift of the principal's property only as the agent determines is  
16 consistent with the principal's best interest based on all relevant  
17 factors, including the factors listed in Section 751.122 and the  
18 principal's personal history of making or joining in making gifts.

19 Sec. 751.033. AUTHORITY TO CREATE OR CHANGE CERTAIN  
20 BENEFICIARY DESIGNATIONS. (a) Unless the durable power of  
21 attorney otherwise provides, and except as provided by Section  
22 751.031(c), authority granted to an agent under Section  
23 751.031(b)(4) empowers the agent to:

24 (1) create or change a beneficiary designation under  
25 an account, contract, or another arrangement that authorizes the  
26 principal to designate a beneficiary, including an insurance or  
27 annuity contract, a qualified or nonqualified retirement plan,

1 including a retirement plan as defined by Section 752.113, an  
2 employment agreement, including a deferred compensation agreement,  
3 and a residency agreement;

4 (2) enter into or change a P.O.D. account or trust  
5 account under Chapter 113; or

6 (3) create or change a nontestamentary payment or  
7 transfer under Chapter 111.

8 (b) If an agent is granted authority under Section  
9 751.031(b)(4) and the durable power of attorney grants the  
10 authority to the agent described in Section 752.108 or 752.113,  
11 then, unless the power of attorney otherwise provides, the  
12 authority of the agent to designate the agent as a beneficiary is  
13 not subject to the limitations prescribed by Sections 752.108(b)  
14 and 752.113(c).

15 (c) If an agent is not granted authority under Section  
16 751.031(b)(4) but the durable power of attorney grants the  
17 authority to the agent described in Section 752.108 or 752.113,  
18 then, unless the power of attorney otherwise provides and  
19 notwithstanding Section 751.031, the agent's authority to  
20 designate the agent as a beneficiary is subject to the limitations  
21 prescribed by Sections 752.108(b) and 752.113(c).

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

27 (b) A reference in a durable power of attorney to general

1 authority with respect to the descriptive term for a subject in  
2 Chapter 752 or a citation to one of those sections incorporates the  
3 entire section as if the section were set out in its entirety in the  
4 power of attorney.

5 (c) A principal may modify authority incorporated by  
6 reference.

7 SECTION 4. Sections 751.051, 751.057, 751.101, 751.102,  
8 751.103, 751.104, 751.105, and 751.106, Estates Code, are amended  
9 to read as follows:

10 Sec. 751.051. EFFECT OF ACTS PERFORMED BY [~~ATTORNEY IN FACT~~  
11 ~~OR~~] AGENT [~~DURING PRINCIPAL'S DISABILITY OR INCAPACITY~~]. An [Each]  
12 act performed by an [attorney in fact or] agent under a durable  
13 power of attorney [during a period of the principal's disability or  
14 incapacity] has the same effect[7] and inures to the benefit of and  
15 binds the principal and the principal's successors in interest[7]  
16 as if the principal had performed the act [were not disabled or  
17 incapacitated].

18 Sec. 751.057. EFFECT OF BANKRUPTCY PROCEEDING. (a) The  
19 filing of a voluntary or involuntary petition in bankruptcy in  
20 connection with the debts of a principal who has executed a durable  
21 power of attorney does not revoke or terminate the agency as to the  
22 principal's [~~attorney in fact or~~] agent.

23 (b) Any act the [~~attorney in fact or~~] agent may undertake  
24 with respect to the principal's property is subject to the  
25 limitations and requirements of the United States Bankruptcy Code  
26 (11 U.S.C. Section 101 et seq.) until a final determination is made  
27 in the bankruptcy proceeding.



1           Sec. 751.101. FIDUCIARY DUTIES. A person who accepts  
2 appointment as an agent under a durable power of attorney as  
3 provided by Section 751.022 [~~An attorney in fact or agent~~] is a  
4 fiduciary as to the principal only when acting as an agent under the  
5 power of attorney and has a duty to inform and to account for  
6 actions taken under the power of attorney.

7           Sec. 751.102. DUTY TO TIMELY INFORM PRINCIPAL. (a) The  
8 [~~attorney in fact or~~] agent shall timely inform the principal of  
9 each action taken under a durable [~~the~~] power of attorney.

10           (b) Failure of an [~~attorney in fact or~~] agent to timely  
11 inform, as to third parties, does not invalidate any action of the  
12 [~~attorney in fact or~~] agent.

13           Sec. 751.103. MAINTENANCE OF RECORDS. (a) The [~~attorney~~  
14 ~~in fact or~~] agent shall maintain records of each action taken or  
15 decision made by the [~~attorney in fact or~~] agent.

16           (b) The [~~attorney in fact or~~] agent shall maintain all  
17 records until delivered to the principal, released by the  
18 principal, or discharged by a court.

19           Sec. 751.104. ACCOUNTING. (a) The principal may demand an  
20 accounting by the [~~attorney in fact or~~] agent.

21           (b) Unless otherwise directed by the principal, an  
22 accounting under Subsection (a) must include:

23                   (1) the property belonging to the principal that has  
24 come to the [~~attorney in fact's or~~] agent's knowledge or into the  
25 [~~attorney in fact's or~~] agent's possession;

26                   (2) each action taken or decision made by the  
27 [~~attorney in fact or~~] agent;

1           (3) a complete account of receipts, disbursements, and  
2 other actions of the [~~attorney in fact or~~] agent that includes  
3 the source and nature of each receipt, disbursement, or action,  
4 with receipts of principal and income shown separately;

5           (4) a listing of all property over which the [~~attorney~~  
6 ~~in fact or~~] agent has exercised control that includes:

7                   (A) an adequate description of each asset; and

8                   (B) the asset's current value, if the value is  
9 known to the [~~attorney in fact or~~] agent;

10          (5) the cash balance on hand and the name and location  
11 of the depository at which the cash balance is kept;

12          (6) each known liability; and

13          (7) any other information and facts known to the  
14 [~~attorney in fact or~~] agent as necessary for a full and definite  
15 understanding of the exact condition of the property belonging to  
16 the principal.

17          (c) Unless directed otherwise by the principal, the  
18 [~~attorney in fact or~~] agent shall also provide to the principal all  
19 documentation regarding the principal's property.

20          Sec. 751.105. EFFECT OF FAILURE TO COMPLY; SUIT. If the  
21 [~~attorney in fact or~~] agent fails or refuses to inform the  
22 principal, provide documentation, or deliver an accounting under  
23 Section [751.104](#) within 60 days of a demand under that section, or a  
24 longer or shorter period as demanded by the principal or ordered by  
25 a court, the principal may file suit to:

26               (1) compel the [~~attorney in fact or~~] agent to deliver  
27 the accounting or the assets; or

1 (2) terminate the durable power of attorney.

2 Sec. 751.106. EFFECT OF SUBCHAPTER ON PRINCIPAL'S  
3 RIGHTS. This subchapter does not limit the right of the principal  
4 to terminate the durable power of attorney or to make additional  
5 requirements of or to give additional instructions to the [~~attorney~~  
6 ~~in fact or~~] agent.

7 SECTION 5. Chapter 751, Estates Code, is amended by adding  
8 Subchapters C-1 and C-2 to read as follows:

9 SUBCHAPTER C-1. OTHER DUTIES OF AGENT

10 Sec. 751.121. DUTY TO NOTIFY OF BREACH OF FIDUCIARY DUTY BY  
11 OTHER AGENT. (a) An agent who has actual knowledge of a breach or  
12 imminent breach of fiduciary duty by another agent shall notify the  
13 principal and, if the principal is incapacitated, take any action  
14 reasonably appropriate under the circumstances to safeguard the  
15 principal's best interest. An agent who fails to notify the  
16 principal or take action as required by this subsection is liable  
17 for the reasonably foreseeable damages that could have been avoided  
18 if the agent had notified the principal or taken the action.

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

24 Sec. 751.122. DUTY TO PRESERVE PRINCIPAL'S ESTATE PLAN. An  
25 agent shall preserve to the extent reasonably possible the  
26 principal's estate plan to the extent the agent has actual  
27 knowledge of the plan if preserving the plan is consistent with the

1 principal's best interest based on all relevant factors, including:

2 (1) the value and nature of the principal's property;

3 (2) the principal's foreseeable obligations and need  
4 for maintenance;

5 (3) minimization of taxes, including income, estate,  
6 inheritance, generation-skipping transfer, and gift taxes; and

7 (4) eligibility for a benefit, a program, or  
8 assistance under a statute or regulation.

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

10 AUTHORITY

11 Sec. 751.131. TERMINATION OF DURABLE POWER OF ATTORNEY. A  
12 durable power of attorney terminates when:

13 (1) the principal dies;

14 (2) the principal revokes the power of attorney;

15 (3) the power of attorney provides that it terminates;

16 (4) the purpose of the power of attorney is  
17 accomplished;

18 (5) one of the circumstances with respect to an agent  
19 described by Section 751.132(a)(1), (2), or (3) arises and the  
20 power of attorney does not provide for another agent to act under  
21 the power of attorney; or

22 (6) a permanent guardian of the estate of the  
23 principal has qualified to serve in that capacity as provided by  
24 Section 751.133.

25 Sec. 751.132. TERMINATION OF AGENT'S AUTHORITY. (a) An  
26 agent's authority under a durable power of attorney terminates  
27 when:

1           (1) the principal revokes the authority;

2           (2) the agent dies, becomes incapacitated, is no  
3 longer qualified, or resigns;

4           (3) the agent's marriage to the principal is dissolved  
5 by court decree of divorce or annulment or is declared void by a  
6 court, unless the power of attorney otherwise provides; or

7           (4) the power of attorney terminates.

8           (b) Unless the durable power of attorney otherwise  
9 provides, an agent's authority may be exercised until the agent's  
10 authority terminates under Subsection (a), notwithstanding a lapse  
11 of time since the execution of the power of attorney.

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

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

26           SECTION 6. Section 751.052, Estates Code, is transferred to  
27 Subchapter C-2, Chapter 751, Estates Code, as added by this Act,

1 redesignated as Section 751.133, Estates Code, and amended to read  
2 as follows:

3       Sec. 751.133 [~~751.052~~]. RELATION OF [~~ATTORNEY IN FACT OR~~]  
4 AGENT TO COURT-APPOINTED GUARDIAN OF ESTATE. (a) If, after  
5 execution of a durable power of attorney, a court of the principal's  
6 domicile appoints a permanent guardian of the estate of the  
7 principal, the powers of the [~~attorney in fact or~~] agent terminate  
8 on the qualification of the guardian of the estate. The [~~attorney~~  
9 ~~in fact or~~] agent shall:

10               (1) deliver to the guardian of the estate all assets of  
11 the incapacitated person's [~~ward's~~] estate that are in the  
12 possession of the [~~attorney in fact or~~] agent; and

13               (2) account to the guardian of the estate as the  
14 [~~attorney in fact or~~] agent would account to the principal if the  
15 principal had terminated the powers of the [~~attorney in fact or~~]  
16 agent.

17       (b) If, after execution of a durable power of attorney, a  
18 court of the principal's domicile appoints a temporary guardian of  
19 the estate of the principal, the court may suspend the powers of the  
20 [~~attorney in fact or~~] agent on the qualification of the temporary  
21 guardian of the estate until the date the term of the temporary  
22 guardian expires. This subsection may not be construed to prohibit  
23 the application for or issuance of a temporary restraining order  
24 under applicable law.

25       SECTION 7. Section 751.151, Estates Code, is amended to  
26 read as follows:

27       Sec. 751.151. RECORDING FOR REAL PROPERTY TRANSACTIONS

1 REQUIRING EXECUTION AND DELIVERY OF INSTRUMENTS. A durable power  
2 of attorney for a real property transaction requiring the execution  
3 and delivery of an instrument that is to be recorded, including a  
4 release, assignment, satisfaction, mortgage, including a reverse  
5 mortgage, security agreement, deed of trust, encumbrance, deed of  
6 conveyance, oil, gas, or other mineral lease, memorandum of a  
7 lease, lien, including a home equity lien, or other claim or right  
8 to real property, must be recorded in the office of the county clerk  
9 of the county in which the property is located not later than the  
10 30th day after the date the instrument is filed for recording.

11 SECTION 8. Chapter 751, Estates Code, is amended by adding  
12 Subchapters E and F to read as follows:

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

15 Sec. 751.201. ACCEPTANCE OF DURABLE POWER OF ATTORNEY  
16 REQUIRED; EXCEPTIONS. (a) Unless one or more grounds for refusal  
17 under Section 751.206 exist, a person who is presented with and  
18 asked to accept a durable power of attorney by an agent with  
19 authority to act under the power of attorney shall:

20 (1) accept the power of attorney; or

21 (2) before accepting the power of attorney:

22 (A) request an agent's certification under  
23 Section 751.203 or an opinion of counsel under Section 751.204 not  
24 later than the 10th business day after the date the power of  
25 attorney is presented, except as provided by Subsection (c); or

26 (B) if applicable, request an English  
27 translation under Section 751.205 not later than the fifth business

1 day after the date the power of attorney is presented, except as  
2 provided by Subsection (c).

3 (b) Unless one or more grounds for refusal under Section  
4 751.206 exist and except as provided by Subsection (c), a person who  
5 requests:

6 (1) an agent's certification must accept the durable  
7 power of attorney not later than the seventh business day after the  
8 date the person receives the requested certification; and

9 (2) an opinion of counsel must accept the durable  
10 power of attorney not later than the seventh business day after the  
11 date the person receives the requested opinion.

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

15 (d) If an English translation of a durable power of attorney  
16 is requested as authorized by Subsection (a)(2)(B), the power of  
17 attorney is not considered presented for acceptance under  
18 Subsection (a) until the date the requestor receives the  
19 translation. On and after that date, the power of attorney shall be  
20 treated as a power of attorney originally prepared in English for  
21 all the purposes of this subchapter.

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

26 Sec. 751.202. OTHER FORM OR RECORDING OF DURABLE POWER OF  
27 ATTORNEY AS CONDITION OF ACCEPTANCE PROHIBITED. A person who is



1 asked to accept a durable power of attorney under Section 751.201  
2 may not require that:

3 (1) an additional or different form of the power of  
4 attorney be presented for authority that is granted in the power of  
5 attorney presented to the person; or

6 (2) the power of attorney be recorded in the office of  
7 a county clerk unless the recording of the instrument is required by  
8 Section 751.151 or another law of this state.

9 Sec. 751.203. AGENT'S CERTIFICATION. (a) Before accepting  
10 a durable power of attorney under Section 751.201, the person to  
11 whom the power of attorney is presented may request that the agent  
12 presenting the power of attorney provide to the person an agent's  
13 certification, under penalty of perjury, of any factual matter  
14 concerning the principal, agent, or power of attorney. If under its  
15 terms the power of attorney becomes effective on the disability or  
16 incapacity of the principal, the person to whom the power of  
17 attorney is presented may request that the certification include a  
18 written statement from a physician attending the principal that  
19 states that the principal is presently disabled or incapacitated.

20 (b) A certification described by Subsection (a) may be in  
21 the following form:

22 CERTIFICATION OF DURABLE POWER OF ATTORNEY BY AGENT

23 I, \_\_\_\_\_ (agent), certify under penalty of perjury  
24 that:

25 1. I am the agent named in the power of attorney validly  
26 executed by \_\_\_\_\_ (principal) ("principal") on \_\_\_\_\_  
27 (date), and the power of attorney is now in full force and effect.

1        2. The principal is not deceased and is presently domiciled  
2 in \_\_\_\_\_ (city and state/territory or foreign country).

3        3. To the best of my knowledge after diligent search and  
4 inquiry:

5            a. The power of attorney has not been revoked by the  
6 principal or suspended or terminated by the occurrence of any  
7 event, whether or not referenced in the power of attorney;

8            b. At the time the power of attorney was executed, the  
9 principal was mentally competent to transact legal matters and was  
10 not acting under the undue influence of any other person;

11           c. A permanent guardian of the estate of the principal  
12 has not qualified to serve in that capacity;

13           d. My powers under the power of attorney have not been  
14 suspended by a court in a temporary guardianship or other  
15 proceeding;

16           e. If I am (or was) the principal's spouse, my marriage  
17 to the principal has not been dissolved by court decree of divorce  
18 or annulment or declared void by a court, or the power of attorney  
19 provides specifically that my appointment as the agent for the  
20 principal does not terminate if my marriage to the principal has  
21 been dissolved by court decree of divorce or annulment or declared  
22 void by a court;

23           f. No proceeding has been commenced for a temporary or  
24 permanent guardianship of the person or estate, or both, of the  
25 principal; and

26           g. The exercise of my authority is not prohibited by  
27 another agreement or instrument.

1       4. If under its terms the power of attorney becomes  
2 effective on the disability or incapacity of the principal or at a  
3 future time or on the occurrence of a contingency, the principal now  
4 has a disability or is incapacitated or the specified future time or  
5 contingency has occurred.

6       5. I am acting within the scope of my authority under the  
7 power of attorney, and my authority has not been altered or  
8 terminated.

9       6. If applicable, I am the successor to \_\_\_\_\_  
10 (predecessor agent), who has resigned, died, or become  
11 incapacitated, is not qualified to serve or has declined to serve as  
12 agent, or is otherwise unable to act. There are no unsatisfied  
13 conditions remaining under the power of attorney that preclude my  
14 acting as successor agent.

15       7. I agree not to:

16           a. Exercise any powers granted by the power of  
17 attorney if I attain knowledge that the power of attorney has been  
18 revoked, suspended, or terminated; or

19           b. Exercise any specific powers that have been  
20 revoked, suspended, or terminated.

21       8. A true and correct copy of the power of attorney is  
22 attached to this document.

23       9. If used in connection with an extension of credit under  
24 Section 50(a)(6), Article XVI, Texas Constitution, the power of  
25 attorney was executed in the office of the lender, the office of a  
26 title company, or the law office of \_\_\_\_\_.

27 Date: \_\_\_\_\_, 20\_\_.



1 requested under this section must be provided by the principal or  
2 agent, at the principal's expense. If, without an extension, the  
3 requestor requests the translation later than the fifth business  
4 day after the date the durable power of attorney is presented to the  
5 requestor, the principal or agent may, but is not required to,  
6 provide the translation, at the requestor's expense.

7 Sec. 751.206. GROUNDS FOR REFUSING ACCEPTANCE. A person is  
8 not required to accept a durable power of attorney under this  
9 subchapter if:

10 (1) the person would not otherwise be required to  
11 engage in a transaction with the principal under the same  
12 circumstances, including a circumstance in which the agent seeks  
13 to:

14 (A) establish a customer relationship with the  
15 person under the power of attorney when the principal is not already  
16 a customer of the person or expand an existing customer  
17 relationship with the person under the power of attorney; or

18 (B) acquire a product or service under the power  
19 of attorney that the person does not offer;

20 (2) the person's engaging in the transaction with the  
21 agent or with the principal under the same circumstances would be  
22 inconsistent with:

23 (A) another law of this state or a federal  
24 statute, rule, or regulation;

25 (B) a request from a law enforcement agency; or

26 (C) a policy adopted by the person in good faith  
27 that is necessary to comply with another law of this state or a

1 federal statute, rule, regulation, regulatory directive, guidance,  
2 or executive order applicable to the person;

3 (3) the person would not engage in a similar  
4 transaction with the agent because the person or an affiliate of the  
5 person:

6 (A) has filed a suspicious activity report as  
7 described by 31 U.S.C. Section 5318(g) with respect to the  
8 principal or agent;

9 (B) believes in good faith that the principal or  
10 agent has a prior criminal history involving financial crimes; or

11 (C) has had a previous, unsatisfactory business  
12 relationship with the agent due to or resulting in:

13 (i) material loss to the person;

14 (ii) financial mismanagement by the agent;

15 (iii) litigation between the person and the  
16 agent alleging substantial damages; or

17 (iv) multiple nuisance lawsuits filed by  
18 the agent;

19 (4) the person has actual knowledge of the termination  
20 of the agent's authority or of the power of attorney before an  
21 agent's exercise of authority under the power of attorney;

22 (5) the agent refuses to comply with a request for a  
23 certification, opinion of counsel, or translation under Section  
24 751.201 or, if the agent complies with one or more of those  
25 requests, the requestor in good faith is unable to determine the  
26 validity of the power of attorney or the agent's authority to act  
27 under the power of attorney because the certification, opinion, or

1 translation is incorrect, incomplete, unclear, limited, qualified,  
2 or otherwise deficient in a manner that makes the certification,  
3 opinion, or translation ineffective for its intended purpose, as  
4 determined in good faith by the requestor;

5 (6) regardless of whether an agent's certification,  
6 opinion of counsel, or translation has been requested or received  
7 by the person under this subchapter, the person believes in good  
8 faith that:

9 (A) the power of attorney is not valid;

10 (B) the agent does not have the authority to act  
11 as attempted; or

12 (C) the performance of the requested act would  
13 violate the terms of:

14 (i) a business entity's governing  
15 documents; or

16 (ii) an agreement affecting a business  
17 entity, including how the entity's business is conducted;

18 (7) the person commenced, or has actual knowledge that  
19 another person commenced, a judicial proceeding to construe the  
20 power of attorney or review the agent's conduct and that proceeding  
21 is pending;

22 (8) the person commenced, or has actual knowledge that  
23 another person commenced, a judicial proceeding for which a final  
24 determination was made that found:

25 (A) the power of attorney invalid with respect to  
26 a purpose for which the power of attorney is being presented for  
27 acceptance; or

1           (B) the agent lacked the authority to act in the  
2 same manner in which the agent is attempting to act under the power  
3 of attorney;

4           (9) the person makes, has made, or has actual  
5 knowledge that another person has made a report to a law enforcement  
6 agency or other federal or state agency, including the Department  
7 of Family and Protective Services, stating a good faith belief that  
8 the principal may be subject to physical or financial abuse,  
9 neglect, exploitation, or abandonment by the agent or a person  
10 acting with or on behalf of the agent;

11           (10) the person receives conflicting instructions or  
12 communications with regard to a matter from co-agents acting under  
13 the same power of attorney or from agents acting under different  
14 powers of attorney signed by the same principal or another adult  
15 acting for the principal as authorized by Section 751.0021,  
16 provided that the person may refuse to accept the power of attorney  
17 only with respect to that matter; or

18           (11) the person is not required to accept the durable  
19 power of attorney by the law of the jurisdiction that applies in  
20 determining the power of attorney's meaning and effect, or the  
21 powers conferred under the durable power of attorney that the agent  
22 is attempting to exercise are not included within the scope of  
23 activities to which the law of that jurisdiction applies.

24           Sec. 751.207. WRITTEN STATEMENT OF REFUSAL OF ACCEPTANCE  
25 REQUIRED. (a) Except as provided by Subsection (b), a person who  
26 refuses to accept a durable power of attorney under this subchapter  
27 shall provide to the agent presenting the power of attorney for



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

3 (b) If the reason a person is refusing to accept a durable  
4 power of attorney is a reason described by Section 751.206(2) or  
5 (3):

6 (1) the person shall provide to the agent presenting  
7 the power of attorney for acceptance a written statement signed by  
8 the person under penalty of perjury stating that the reason for the  
9 refusal is a reason described by Section 751.206(2) or (3); and

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

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

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

21 Sec. 751.209. GOOD FAITH RELIANCE ON DURABLE POWER OF  
22 ATTORNEY. (a) A person who in good faith accepts a durable power of  
23 attorney without actual knowledge that the signature of the  
24 principal or of another adult directed by the principal to sign the  
25 principal's name as authorized by Section 751.0021 is not genuine  
26 may rely on the presumption under Section 751.0022 that the  
27 signature is genuine and that the power of attorney was properly

1 executed.

2 (b) A person who in good faith accepts a durable power of  
3 attorney without actual knowledge that the power of attorney is  
4 void, invalid, or terminated, that the purported agent's authority  
5 is void, invalid, or terminated, or that the agent is exceeding or  
6 improperly exercising the agent's authority may rely on the power  
7 of attorney as if:

8 (1) the power of attorney were genuine, valid, and  
9 still in effect;

10 (2) the agent's authority were genuine, valid, and  
11 still in effect; and

12 (3) the agent had not exceeded and had properly  
13 exercised the authority.

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

19 Sec. 751.211. ACTUAL KNOWLEDGE OF PERSON WHEN TRANSACTIONS  
20 CONDUCTED THROUGH EMPLOYEES. (a) This section applies to a person  
21 who conducts a transaction or activity through an employee of the  
22 person.

23 (b) For purposes of this chapter, a person is not considered  
24 to have actual knowledge of a fact relating to a durable power of  
25 attorney, principal, or agent if the employee conducting the  
26 transaction or activity involving the power of attorney does not  
27 have actual knowledge of the fact.

1        (c) For purposes of this chapter, a person is considered to  
2 have actual knowledge of a fact relating to a durable power of  
3 attorney, principal, or agent if the employee conducting the  
4 transaction or activity involving the power of attorney has actual  
5 knowledge of the fact.

6        Sec. 751.212. CAUSE OF ACTION FOR REFUSAL TO ACCEPT DURABLE  
7 POWER OF ATTORNEY. (a) The principal or an agent acting on the  
8 principal's behalf may bring an action against a person who refuses  
9 to accept a durable power of attorney in violation of this  
10 subchapter.

11        (b) An action under Subsection (a) may not be commenced  
12 against a person until after the date the person is required to  
13 accept the durable power of attorney under Section 751.201.

14        (c) If the court finds that the person refused to accept the  
15 durable power of attorney in violation of this subchapter, the  
16 court, as the exclusive remedy under this chapter:

17                (1) shall order the person to accept the power of  
18 attorney; and

19                (2) may award the plaintiff court costs and reasonable  
20 and necessary attorney's fees.

21        (d) The court shall dismiss an action under this section  
22 that was commenced after the date a written statement described by  
23 Section 751.207(b) was provided to the agent.

24        (e) Notwithstanding Subsection (c), if the agent receives a  
25 written statement described by Section 751.207(b) after the date a  
26 timely action is commenced under this section, the court may not  
27 order the person to accept the durable power of attorney, but

1 instead may award the plaintiff court costs and reasonable and  
2 necessary attorney's fees as the exclusive remedy under this  
3 chapter.

4 Sec. 751.213. LIABILITY OF PRINCIPAL. (a) Subsection (b)  
5 applies to an action brought under Section 751.212 if:

6 (1) the court finds that the action was commenced  
7 after the date the written statement described by Section  
8 751.207(b) was timely provided to the agent;

9 (2) the court expressly finds that the refusal of the  
10 person against whom the action was brought to accept the durable  
11 power of attorney was permitted under this chapter; or

12 (3) Section 751.212(e) does not apply and the court  
13 does not issue an order ordering the person to accept the power of  
14 attorney.

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

20 SUBCHAPTER F. CIVIL REMEDIES

21 Sec. 751.251. JUDICIAL RELIEF. (a) The following may bring  
22 an action requesting a court to construe, or determine the validity  
23 or enforceability of, a durable power of attorney, or to review an  
24 agent's conduct under a durable power of attorney and grant  
25 appropriate relief:

26 (1) the principal or the agent;

27 (2) a guardian, conservator, or other fiduciary acting

1 for the principal;

2 (3) a person named as a beneficiary to receive  
3 property, a benefit, or a contractual right on the principal's  
4 death;

5 (4) a governmental agency with regulatory authority to  
6 protect the principal's welfare; and

7 (5) a person who demonstrates to the court sufficient  
8 interest in the principal's welfare or estate.

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

12 (c) On the principal's motion, the court shall dismiss an  
13 action under Subsection (a) unless the court finds that the  
14 principal lacks capacity to revoke the agent's authority or the  
15 durable power of attorney.

16 SECTION 9. Section 752.051, Estates Code, is amended to  
17 read as follows:

18 Sec. 752.051. FORM. The following form is known as a  
19 "statutory durable power of attorney":

20 STATUTORY DURABLE POWER OF ATTORNEY  
21 NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING.  
22 THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P,  
23 TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE  
24 POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT  
25 AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS  
26 FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO  
27 DO SO. IF YOU WANT YOUR AGENT TO HAVE THE AUTHORITY TO SIGN HOME

1 EQUITY LOAN DOCUMENTS ON YOUR BEHALF, THIS POWER OF ATTORNEY MUST BE  
2 SIGNED BY YOU AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A  
3 TITLE COMPANY.

4 You should select someone you trust to serve as your agent  
5 [~~attorney in fact~~]. Unless you specify otherwise, generally the  
6 agent's [~~attorney in fact's~~] authority will continue until:

- 7 (1) you die or revoke the power of attorney;  
8 (2) your agent [~~attorney in fact~~] resigns or is  
9 unable to act for you; or  
10 (3) a guardian is appointed for your estate.

11 I, \_\_\_\_\_ (insert your name and address), appoint  
12 \_\_\_\_\_ (insert the name and address of the person appointed) as  
13 my agent [~~attorney in fact~~] to act for me in any lawful way with  
14 respect to all of the following powers that I have initialed below.  
15 (YOU MAY APPOINT CO-AGENTS. UNLESS YOU PROVIDE OTHERWISE,  
16 CO-AGENTS MAY ACT INDEPENDENTLY.)

17 TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN  
18 FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS  
19 LISTED IN (A) THROUGH (M).

20 TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE  
21 POWER YOU ARE GRANTING.

22 TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE  
23 POWER. YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD.

- 24 \_\_\_\_ (A) Real property transactions;  
25 \_\_\_\_ (B) Tangible personal property transactions;  
26 \_\_\_\_ (C) Stock and bond transactions;  
27 \_\_\_\_ (D) Commodity and option transactions;



1 sentences to have it apply; if no selection is made, each agent will  
2 be entitled to act independently):

3       Each of my co-agents may act independently for me.

4       My co-agents may act for me only if the co-agents act  
5 jointly.

6       My co-agents may act for me only if a majority of the  
7 co-agents act jointly.

8 Special instructions applicable to gifts (initial in front of  
9 the following sentence to have it apply):

10 \_\_\_\_ I grant my agent [~~(attorney in fact)~~] the power to apply my  
11 property to make gifts outright to or for the benefit of a person,  
12 including by the exercise of a presently exercisable general power  
13 of appointment held by me, except that the amount of a gift to an  
14 individual may not exceed the amount of annual exclusions allowed  
15 from the federal gift tax for the calendar year of the gift.

16 ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS  
17 LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

18 \_\_\_\_\_  
19 \_\_\_\_\_  
20 \_\_\_\_\_  
21 \_\_\_\_\_  
22 \_\_\_\_\_  
23 \_\_\_\_\_  
24 \_\_\_\_\_  
25 \_\_\_\_\_  
26 \_\_\_\_\_

27 UNLESS YOU DIRECT OTHERWISE BELOW [~~ABOVE~~], THIS POWER OF



1 ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT  
2 TERMINATES [~~IS REVOKED~~].

3 CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE  
4 ALTERNATIVE NOT CHOSEN:

5 (A) This power of attorney is not affected by my subsequent  
6 disability or incapacity.

7 (B) This power of attorney becomes effective upon my  
8 disability or incapacity.

9 YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY  
10 IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

11 IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT  
12 YOU CHOSE ALTERNATIVE (A).

13 If Alternative (B) is chosen and a definition of my  
14 disability or incapacity is not contained in this power of  
15 attorney, I shall be considered disabled or incapacitated for  
16 purposes of this power of attorney if a physician certifies in  
17 writing at a date later than the date this power of attorney is  
18 executed that, based on the physician's medical examination of me,  
19 I am mentally incapable of managing my financial affairs. I  
20 authorize the physician who examines me for this purpose to  
21 disclose my physical or mental condition to another person for  
22 purposes of this power of attorney. A third party who accepts this  
23 power of attorney is fully protected from any action taken under  
24 this power of attorney that is based on the determination made by a  
25 physician of my disability or incapacity.

26 I agree that any third party who receives a copy of this  
27 document may act under it. Termination [~~Revocation~~] of this [~~the~~]

1 durable power of attorney is not effective as to a third party until  
2 the third party has actual knowledge [~~receives actual notice~~] of  
3 the termination [~~revocation~~]. I agree to indemnify the third party  
4 for any claims that arise against the third party because of  
5 reliance on this power of attorney. The meaning and effect of this  
6 durable power of attorney is determined by Texas law.

7 If any agent named by me dies, becomes incapacitated [~~legally~~  
8 ~~disabled~~], resigns, or refuses to act, or if my marriage to an agent  
9 named by me is dissolved by a court decree of divorce or annulment  
10 or is declared void by a court (unless I provided in this document  
11 that the dissolution or declaration does not terminate the agent's  
12 authority to act under this power of attorney), I name the following  
13 (each to act alone and successively, in the order named) as  
14 successor(s) to that agent: \_\_\_\_\_.

15 Signed this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_  
16 \_\_\_\_\_  
17 (your signature)

18 State of \_\_\_\_\_  
19 County of \_\_\_\_\_

20 This document was acknowledged before me on \_\_\_\_\_ (date) by  
21 \_\_\_\_\_  
22 (name of principal)

23 \_\_\_\_\_  
24 (signature of notarial officer)  
25 (Seal, if any, of notary) \_\_\_\_\_  
26 (printed name)

27 My commission expires: \_\_\_\_\_

1           IMPORTANT INFORMATION FOR AGENT [~~(ATTORNEY IN FACT)~~]

2   Agent's Duties

3           When you accept the authority granted under this power of  
4 attorney, you establish a "fiduciary" relationship with the  
5 principal. This is a special legal relationship that imposes on  
6 you legal duties that continue until you resign or the power of  
7 attorney is terminated or revoked by the principal or by operation  
8 of law. A fiduciary duty generally includes the duty to:

9           (1) act in good faith;

10          (2) do nothing beyond the authority granted in this  
11 power of attorney;

12          (3) act loyally for the principal's benefit;

13          (4) avoid conflicts that would impair your ability to  
14 act in the principal's best interest; and

15          (5) disclose your identity as an agent [~~or attorney in~~  
16 ~~fact~~] when you act for the principal by writing or printing the name  
17 of the principal and signing your own name as "agent" [~~or "attorney~~  
18 ~~in fact~~"] in the following manner:

19           (Principal's Name) by (Your Signature) as Agent [~~(or as~~  
20 ~~Attorney in Fact)~~]

21           In addition, the Durable Power of Attorney Act (Subtitle P,  
22 Title 2, Estates Code) requires you to:

23           (1) maintain records of each action taken or decision  
24 made on behalf of the principal;

25           (2) maintain all records until delivered to the  
26 principal, released by the principal, or discharged by a court; and

27           (3) if requested by the principal, provide an

1 accounting to the principal that, unless otherwise directed by the  
2 principal or otherwise provided in the Special Instructions, must  
3 include:

4 (A) the property belonging to the principal that  
5 has come to your knowledge or into your possession;

6 (B) each action taken or decision made by you as  
7 agent [~~or attorney in fact~~];

8 (C) a complete account of receipts,  
9 disbursements, and other actions of you as agent [~~or attorney in~~  
10 ~~fact~~] that includes the source and nature of each receipt,  
11 disbursement, or action, with receipts of principal and income  
12 shown separately;

13 (D) a listing of all property over which you have  
14 exercised control that includes an adequate description of each  
15 asset and the asset's current value, if known to you;

16 (E) the cash balance on hand and the name and  
17 location of the depository at which the cash balance is kept;

18 (F) each known liability;

19 (G) any other information and facts known to you  
20 as necessary for a full and definite understanding of the exact  
21 condition of the property belonging to the principal; and

22 (H) all documentation regarding the principal's  
23 property.

#### 24 Termination of Agent's Authority

25 You must stop acting on behalf of the principal if you learn  
26 of any event that terminates this power of attorney or your  
27 authority under this power of attorney. An event that terminates

1 this power of attorney or your authority to act under this power of  
2 attorney includes:

3 (1) the principal's death;

4 (2) the principal's revocation of this power of  
5 attorney or your authority;

6 (3) the occurrence of a termination event stated in  
7 this power of attorney;

8 (4) if you are married to the principal, the  
9 dissolution of your marriage by a court decree of divorce or  
10 annulment or declaration that your marriage is void, unless  
11 otherwise provided in this power of attorney;

12 (5) the appointment and qualification of a permanent  
13 guardian of the principal's estate; or

14 (6) if ordered by a court, the suspension of this power  
15 of attorney on the appointment and qualification of a temporary  
16 guardian until the date the term of the temporary guardian expires.

#### 17 Liability of Agent

18 The authority granted to you under this power of attorney is  
19 specified in the Durable Power of Attorney Act (Subtitle P, Title 2,  
20 Estates Code). If you violate the Durable Power of Attorney Act or  
21 act beyond the authority granted, you may be liable for any damages  
22 caused by the violation or subject to prosecution for  
23 misapplication of property by a fiduciary under Chapter 32 of the  
24 Texas Penal Code.

25 THE [~~ATTORNEY IN FACT OR~~] AGENT, BY ACCEPTING OR ACTING UNDER  
26 THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL  
27 RESPONSIBILITIES OF AN AGENT.

1 SECTION 10. Subchapter B, Chapter 752, Estates Code, is  
2 amended by adding Section 752.052 to read as follows:

3 Sec. 752.052. MODIFYING STATUTORY FORM TO GRANT SPECIFIC  
4 AUTHORITY. The statutory durable power of attorney may be modified  
5 to allow the principal to grant the agent the specific authority  
6 described by Section 751.031(b) by including the following  
7 language:

8 "GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

9 My agent MAY NOT do any of the following specific acts for me  
10 UNLESS I have INITIALED the specific authority listed below:

11 (CAUTION: Granting any of the following will give your agent the  
12 authority to take actions that could significantly reduce your  
13 property or change how your property is distributed at your death.

14 INITIAL ONLY the specific authority you WANT to give your agent. If  
15 you DO NOT want to grant your agent one or more of the following  
16 powers, you may also CROSS OUT a power you DO NOT want to grant.)

17 \_\_\_\_\_ Create, amend, revoke, or terminate an inter vivos  
18 trust

19 \_\_\_\_\_ Make a gift, subject to the limitations of Section  
20 751.032 of the Durable Power of Attorney Act (Section 751.032,  
21 Estates Code) and any special instructions in this power of  
22 attorney

23 \_\_\_\_\_ Create or change rights of survivorship

24 \_\_\_\_\_ Create or change a beneficiary designation

25 \_\_\_\_\_ Authorize another person to exercise the authority  
26 granted under this power of attorney".

27 SECTION 11. Section 752.102, Estates Code, is amended to

1 read as follows:

2           Sec. 752.102. REAL PROPERTY TRANSACTIONS.   (a)    The  
3 language conferring authority with respect to real property  
4 transactions in a statutory durable power of attorney empowers the  
5 [~~attorney in fact or~~] agent, without further reference to a  
6 specific description of the real property, to:

7           (1) accept as a gift or as security for a loan or  
8 reject, demand, buy, lease, receive, or otherwise acquire an  
9 interest in real property or a right incident to real property;

10           (2) sell, exchange, convey with or without covenants,  
11 quitclaim, release, surrender, mortgage, encumber, partition or  
12 consent to partitioning, subdivide, apply for zoning, rezoning, or  
13 other governmental permits, plat or consent to platting, develop,  
14 grant options concerning, lease or sublet, or otherwise dispose of  
15 an estate or interest in real property or a right incident to real  
16 property;

17           (3) release, assign, satisfy, and enforce by  
18 litigation, action, or otherwise a mortgage, deed of trust,  
19 encumbrance, lien, or other claim to real property that exists or is  
20 claimed to exist;

21           (4) perform any act of management or of conservation  
22 with respect to an interest in real property, or a right incident to  
23 real property, owned or claimed to be owned by the principal,  
24 including the authority to:

25                   (A) insure against a casualty, liability, or  
26 loss;

27                   (B) obtain or regain possession or protect the

1 interest or right by litigation, action, or otherwise;

2 (C) pay, compromise, or contest taxes or  
3 assessments or apply for and receive refunds in connection with the  
4 taxes or assessments;

5 (D) purchase supplies, hire assistance or labor,  
6 or make repairs or alterations to the real property; and

7 (E) manage and supervise an interest in real  
8 property, including the mineral estate~~[, by, for example:~~

9 ~~[(i) entering into a lease for oil, gas, and  
10 mineral purposes;~~

11 ~~[(ii) making contracts for development of  
12 the mineral estate; or~~

13 ~~[(iii) making pooling and unitization  
14 agreements];~~

15 (5) use, develop, alter, replace, remove, erect, or  
16 install structures or other improvements on real property in which  
17 the principal has or claims to have an estate, interest, or right;

18 (6) participate in a reorganization with respect to  
19 real property or a legal entity that owns an interest in or right  
20 incident to real property, receive and hold shares of stock or  
21 obligations received in a plan or reorganization, and act with  
22 respect to the shares or obligations, including:

23 (A) selling or otherwise disposing of the shares  
24 or obligations;

25 (B) exercising or selling an option, conversion,  
26 or similar right with respect to the shares or obligations; and

27 (C) voting the shares or obligations in person or



1 by proxy;

2 (7) change the form of title of an interest in or right  
3 incident to real property; ~~and~~

4 (8) dedicate easements or other real property in which  
5 the principal has or claims to have an interest to public use, with  
6 or without consideration;

7 (9) enter into mineral transactions, including:

8 (A) negotiating and making oil, gas, and other  
9 mineral leases covering any land, mineral, or royalty interest in  
10 which the principal has or claims to have an interest;

11 (B) pooling and unitizing all or part of the  
12 principal's land, mineral leasehold, mineral, royalty, or other  
13 interest with land, mineral leasehold, mineral, royalty, or other  
14 interest of one or more persons for the purpose of developing and  
15 producing oil, gas, or other minerals, and making leases or  
16 assignments granting the right to pool and unitize;

17 (C) entering into contracts and agreements  
18 concerning the installation and operation of plants or other  
19 facilities for the cycling, repressuring, processing, or other  
20 treating or handling of oil, gas, or other minerals;

21 (D) conducting or contracting for the conducting  
22 of seismic evaluation operations;

23 (E) drilling or contracting for the drilling of  
24 wells for oil, gas, or other minerals;

25 (F) contracting for and making "dry hole" and  
26 "bottom hole" contributions of cash, leasehold interests, or other  
27 interests toward the drilling of wells;

1           (G) using or contracting for the use of any  
2 method of secondary or tertiary recovery of any mineral, including  
3 the injection of water, gas, air, or other substances;

4           (H) purchasing oil, gas, or other mineral leases,  
5 leasehold interests, or other interests for any type of  
6 consideration, including farmout agreements requiring the drilling  
7 or reworking of wells or participation in the drilling or reworking  
8 of wells;

9           (I) entering into farmout agreements committing  
10 the principal to assign oil, gas, or other mineral leases or  
11 interests in consideration for the drilling of wells or other oil,  
12 gas, or mineral operations;

13           (J) negotiating the transfer of and transferring  
14 oil, gas, or other mineral leases or interests for any  
15 consideration, such as retained overriding royalty interests of any  
16 nature, drilling or reworking commitments, or production  
17 interests;

18           (K) executing and entering into contracts,  
19 conveyances, and other agreements or transfers considered  
20 necessary or desirable to carry out the powers granted in this  
21 section, including entering into and executing division orders,  
22 oil, gas, or other mineral sales contracts, exploration agreements,  
23 processing agreements, and other contracts relating to the  
24 processing, handling, treating, transporting, and marketing of  
25 oil, gas, or other mineral production from or accruing to the  
26 principal and receiving and receipting for the proceeds of those  
27 contracts, conveyances, and other agreements and transfers on

1 behalf of the principal; and

2 (L) taking an action described by Paragraph (K)  
3 regardless of whether the action is, at the time the action is taken  
4 or subsequently, recognized or considered as a common or proper  
5 practice by those engaged in the business of prospecting for,  
6 developing, producing, processing, transporting, or marketing  
7 minerals; and

8 (10) designate the property that constitutes the  
9 principal's homestead.

10 (b) The power to mortgage and encumber real property  
11 provided by this section includes the power to execute documents  
12 necessary to create a lien against the principal's homestead as  
13 provided by Section 50, Article XVI, Texas Constitution, and to  
14 consent to the creation of a lien against property owned by the  
15 principal's spouse in which the principal has a homestead interest.

16 SECTION 12. Section 752.108(b), Estates Code, is amended to  
17 read as follows:

18 (b) Unless the principal has granted the authority to create  
19 or change a beneficiary designation expressly as required by  
20 Section 751.031(b)(4), an [An attorney in fact or] agent may be  
21 named a beneficiary of an insurance contract or an extension,  
22 renewal, or substitute for the contract only to the extent the  
23 [attorney in fact or] agent was named as a beneficiary [under a  
24 contract procured] by the principal [before executing the power of  
25 attorney].

26 SECTION 13. Sections 752.109 and 752.111, Estates Code, are  
27 amended to read as follows:

1           Sec. 752.109. ESTATE, TRUST, AND OTHER BENEFICIARY  
2 TRANSACTIONS. The language conferring authority with respect to  
3 estate, trust, and other beneficiary transactions in a statutory  
4 durable power of attorney empowers the [~~attorney in fact or~~] agent  
5 to act for the principal in all matters that affect a trust, probate  
6 estate, guardianship, conservatorship, life estate, escrow,  
7 custodianship, or other fund from which the principal is, may  
8 become, or claims to be entitled, as a beneficiary, to a share or  
9 payment, including to:

10           (1) accept, reject, disclaim, receive, receipt for,  
11 sell, assign, release, pledge, exchange, or consent to a reduction  
12 in or modification of a share in or payment from the fund;

13           (2) demand or obtain by litigation, action, or  
14 otherwise money or any other thing of value to which the principal  
15 is, may become, or claims to be entitled because of the fund;

16           (3) initiate, participate in, or oppose a legal or  
17 judicial proceeding to:

18           (A) ascertain the meaning, validity, or effect of  
19 a deed, will, declaration of trust, or other instrument or  
20 transaction affecting the interest of the principal; or

21           (B) remove, substitute, or surcharge a  
22 fiduciary;

23           (4) conserve, invest, disburse, or use anything  
24 received for an authorized purpose; and

25           (5) transfer all or part of the principal's interest in  
26 real property, stocks, bonds, accounts with financial  
27 institutions, insurance, and other property to the trustee of a

1 revocable trust created by the principal as settlor.

2           Sec. 752.111. PERSONAL AND FAMILY MAINTENANCE.       The  
3 language conferring authority with respect to personal and family  
4 maintenance in a statutory durable power of attorney empowers the  
5 ~~[attorney in fact or]~~ agent to:

6           (1) perform the acts necessary to maintain the  
7 customary standard of living of the principal, the principal's  
8 spouse and children, and other individuals customarily or legally  
9 entitled to be supported by the principal, including:

10                   (A) providing living quarters by purchase,  
11 lease, or other contract; or

12                   (B) paying the operating costs, including  
13 interest, amortization payments, repairs, and taxes on premises  
14 owned by the principal and occupied by those individuals;

15           (2) provide for the individuals described by  
16 Subdivision (1):

17                   (A) normal domestic help;

18                   (B) usual vacations and travel expenses; and

19                   (C) money for shelter, clothing, food,  
20 appropriate education, and other living costs;

21           (3) pay necessary medical, dental, and surgical care,  
22 hospitalization, and custodial care for the individuals described  
23 by Subdivision (1);

24           (4) continue any provision made by the principal for  
25 the individuals described by Subdivision (1) for automobiles or  
26 other means of transportation, including registering, licensing,  
27 insuring, and replacing the automobiles or other means of

1 transportation;

2 (5) maintain or open charge accounts for the  
3 convenience of the individuals described by Subdivision (1) and  
4 open new accounts the [~~attorney in fact or~~] agent considers  
5 desirable to accomplish a lawful purpose; [~~and~~]

6 (6) continue:

7 (A) payments incidental to the membership or  
8 affiliation of the principal in a church, club, society, order, or  
9 other organization; or

10 (B) contributions to those organizations;

11 (7) perform all acts necessary in relation to the  
12 principal's mail, including:

13 (A) receiving, signing for, opening, reading,  
14 and responding to any mail addressed to the principal, whether  
15 through the United States Postal Service or a private mail service;

16 (B) forwarding the principal's mail to any  
17 address; and

18 (C) representing the principal before the United  
19 States Postal Service in all matters relating to mail service; and

20 (8) subject to the needs of the individuals described  
21 by Subdivision (1), provide for the reasonable care of the  
22 principal's pets.

23 SECTION 14. Sections 752.113(b) and (c), Estates Code, are  
24 amended to read as follows:

25 (b) The language conferring authority with respect to  
26 retirement plan transactions in a statutory durable power of  
27 attorney empowers the [~~attorney in fact or~~] agent to perform any

1 lawful act the principal may perform with respect to a transaction  
2 relating to a retirement plan, including to:

3 (1) apply for service or disability retirement  
4 benefits;

5 (2) select payment options under any retirement plan  
6 in which the principal participates, including plans for  
7 self-employed individuals;

8 (3) designate or change the designation of a  
9 beneficiary or benefits payable by a retirement plan, except as  
10 provided by Subsection (c);

11 (4) make voluntary contributions to retirement plans  
12 if authorized by the plan;

13 (5) exercise the investment powers available under any  
14 self-directed retirement plan;

15 (6) make rollovers of plan benefits into other  
16 retirement plans;

17 (7) borrow from, sell assets to, and purchase assets  
18 from retirement plans if authorized by the plan;

19 (8) waive the principal's right to be a beneficiary of  
20 a joint or survivor annuity if the principal is not the participant  
21 in the retirement plan [~~a spouse who is not employed~~];

22 (9) receive, endorse, and cash payments from a  
23 retirement plan;

24 (10) waive the principal's right to receive all or a  
25 portion of benefits payable by a retirement plan; and

26 (11) request and receive information relating to the  
27 principal from retirement plan records.

1           (c) Unless the principal has granted the authority to create  
2 or change a beneficiary designation expressly as required by  
3 Section 751.031(b)(4), an [~~An attorney in fact or~~] agent may be  
4 named a beneficiary under a retirement plan only to the extent the  
5 [~~attorney in fact or~~] agent was a named a beneficiary by the  
6 principal under the retirement plan, or in the case of a rollover or  
7 trustee-to-trustee transfer, the predecessor retirement plan  
8 [~~before the durable power of attorney was executed~~].

9           SECTION 15. The following sections of the Estates Code are  
10 repealed:

- 11           (1) Section 751.004;
- 12           (2) Section 751.053;
- 13           (3) Section 751.054;
- 14           (4) Section 751.055;
- 15           (5) Section 751.056; and
- 16           (6) Section 751.058.

17           SECTION 16. (a) Except as otherwise provided by this Act,  
18 this Act applies to:

19           (1) a durable power of attorney, including a statutory  
20 durable power of attorney, created before, on, or after the  
21 effective date of this Act; and

22           (2) a judicial proceeding concerning a durable power  
23 of attorney pending on, or commenced on or after, the effective date  
24 of this Act.

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



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

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

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

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

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

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

21           (e) An act performed by a principal or agent with respect to  
22 a durable power of attorney before the effective date of this Act is  
23 not affected by this Act.

24           SECTION 17. This Act takes effect September 1, 2017.

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President of the Senate

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Speaker of the House

I certify that H.B. No. 1974 was passed by the House on May 11, 2017, by the following vote: Yeas 130, Nays 13, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 1974 on May 26, 2017, by the following vote: Yeas 135, Nays 11, 1 present, not voting.

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Chief Clerk of the House

I certify that H.B. No. 1974 was passed by the Senate, with amendments, on May 24, 2017, by the following vote: Yeas 30, Nays 1.

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Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

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Governor

1 AN ACT

2 relating to the form and revocation of medical powers of attorney.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

4 SECTION 1. The heading to Section 166.155, Health and  
5 Safety Code, is amended to read as follows:

6 Sec. 166.155. REVOCATION; EFFECT OF TERMINATION OF  
7 MARRIAGE.

8 SECTION 2. Section 166.155, Health and Safety Code, is  
9 amended by amending Subsection (a) and adding Subsection (a-1) to  
10 read as follows:

11 (a) A medical power of attorney is revoked by:

12 (1) oral or written notification at any time by the  
13 principal to the agent or a licensed or certified health or  
14 residential care provider or by any other act evidencing a specific  
15 intent to revoke the power, without regard to whether the principal  
16 is competent or the principal's mental state; or

17 (2) execution by the principal of a subsequent medical  
18 power of attorney. [~~or~~]

19 (a-1) An agent's authority under a medical power of attorney  
20 is revoked if the agent's marriage to [(3) the divorce of] the  
21 principal is dissolved, annulled, or declared void [and spouse, if  
22 ~~the spouse is the principal's agent,~~ unless the medical power of  
23 attorney provides otherwise.

24 SECTION 3. Section 166.164, Health and Safety Code, is

1 amended to read as follows:

2           Sec. 166.164. FORM OF MEDICAL POWER OF ATTORNEY. The  
3 medical power of attorney must be in substantially the following  
4 form:

5           MEDICAL POWER OF ATTORNEY DESIGNATION OF HEALTH CARE AGENT.

6 I, \_\_\_\_\_ (insert your name) appoint:

7 Name:\_\_\_\_\_

8 Address:\_\_\_\_\_

9 Phone\_\_\_\_\_

10           as my agent to make any and all health care decisions for me,  
11 except to the extent I state otherwise in this document. This  
12 medical power of attorney takes effect if I become unable to make my  
13 own health care decisions and this fact is certified in writing by  
14 my physician.

15           LIMITATIONS ON THE DECISION-MAKING AUTHORITY OF MY AGENT ARE  
16 AS FOLLOWS:\_\_\_\_\_

17 \_\_\_\_\_

18           DESIGNATION OF ALTERNATE AGENT.

19           (You are not required to designate an alternate agent but you  
20 may do so. An alternate agent may make the same health care  
21 decisions as the designated agent if the designated agent is unable  
22 or unwilling to act as your agent. If the agent designated is your  
23 spouse, the designation is automatically revoked by law if your  
24 marriage is dissolved, annulled, or declared void unless this  
25 document provides otherwise.)

26           If the person designated as my agent is unable or unwilling to  
27 make health care decisions for me, I designate the following

1 persons to serve as my agent to make health care decisions for me as  
2 authorized by this document, who serve in the following order:

3 A. First Alternate Agent

4 Name: \_\_\_\_\_

5 Address: \_\_\_\_\_

6 Phone \_\_\_\_\_

7 B. Second Alternate Agent

8 Name: \_\_\_\_\_

9 Address: \_\_\_\_\_

10 Phone \_\_\_\_\_

11 The original of this document is kept at:

12 \_\_\_\_\_

13 \_\_\_\_\_

14 \_\_\_\_\_

15 The following individuals or institutions have signed  
16 copies:

17 Name: \_\_\_\_\_

18 Address: \_\_\_\_\_

19 \_\_\_\_\_

20 Name: \_\_\_\_\_

21 Address: \_\_\_\_\_

22 \_\_\_\_\_

23 DURATION.

24 I understand that this power of attorney exists indefinitely  
25 from the date I execute this document unless I establish a shorter  
26 time or revoke the power of attorney. If I am unable to make health  
27 care decisions for myself when this power of attorney expires, the

1 authority I have granted my agent continues to exist until the time  
2 I become able to make health care decisions for myself.

3 (IF APPLICABLE) This power of attorney ends on the following  
4 date: \_\_\_\_\_

5 PRIOR DESIGNATIONS REVOKED.

6 I revoke any prior medical power of attorney.

7 ~~[ACKNOWLEDGMENT OF]~~ DISCLOSURE STATEMENT.

8 THIS MEDICAL POWER OF ATTORNEY IS AN IMPORTANT LEGAL  
9 DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE  
10 IMPORTANT FACTS:

11 Except to the extent you state otherwise, this document gives  
12 the person you name as your agent the authority to make any and all  
13 health care decisions for you in accordance with your wishes,  
14 including your religious and moral beliefs, when you are unable to  
15 make the decisions for yourself. Because "health care" means any  
16 treatment, service, or procedure to maintain, diagnose, or treat  
17 your physical or mental condition, your agent has the power to make  
18 a broad range of health care decisions for you. Your agent may  
19 consent, refuse to consent, or withdraw consent to medical  
20 treatment and may make decisions about withdrawing or withholding  
21 life-sustaining treatment. Your agent may not consent to voluntary  
22 inpatient mental health services, convulsive treatment,  
23 psychosurgery, or abortion. A physician must comply with your  
24 agent's instructions or allow you to be transferred to another  
25 physician.

26 Your agent's authority is effective when your doctor  
27 certifies that you lack the competence to make health care

1 decisions.

2 Your agent is obligated to follow your instructions when  
3 making decisions on your behalf. Unless you state otherwise, your  
4 agent has the same authority to make decisions about your health  
5 care as you would have if you were able to make health care  
6 decisions for yourself.

7 It is important that you discuss this document with your  
8 physician or other health care provider before you sign the  
9 document to ensure that you understand the nature and range of  
10 decisions that may be made on your behalf. If you do not have a  
11 physician, you should talk with someone else who is knowledgeable  
12 about these issues and can answer your questions. You do not need a  
13 lawyer's assistance to complete this document, but if there is  
14 anything in this document that you do not understand, you should ask  
15 a lawyer to explain it to you.

16 The person you appoint as agent should be someone you know and  
17 trust. The person must be 18 years of age or older or a person under  
18 18 years of age who has had the disabilities of minority removed.  
19 If you appoint your health or residential care provider (e.g., your  
20 physician or an employee of a home health agency, hospital, nursing  
21 facility, or residential care facility, other than a relative),  
22 that person has to choose between acting as your agent or as your  
23 health or residential care provider; the law does not allow a person  
24 to serve as both at the same time.

25 You should inform the person you appoint that you want the  
26 person to be your health care agent. You should discuss this  
27 document with your agent and your physician and give each a signed

1 copy. You should indicate on the document itself the people and  
2 institutions that you intend to have signed copies. Your agent is  
3 not liable for health care decisions made in good faith on your  
4 behalf.

5 Once you have signed this document, you have the right to make  
6 health care decisions for yourself as long as you are able to make  
7 those decisions, and treatment cannot be given to you or stopped  
8 over your objection. You have the right to revoke the authority  
9 granted to your agent by informing your agent or your health or  
10 residential care provider orally or in writing or by your execution  
11 of a subsequent medical power of attorney. Unless you state  
12 otherwise in this document, your appointment of a spouse is revoked  
13 if your marriage is dissolved, annulled, or declared void.

14 This document may not be changed or modified. If you want to  
15 make changes in this document, you must execute a new medical power  
16 of attorney.

17 You may wish to designate an alternate agent in the event that  
18 your agent is unwilling, unable, or ineligible to act as your agent.  
19 If you designate an alternate agent, the alternate agent has the  
20 same authority as the agent to make health care decisions for you.

21 THIS POWER OF ATTORNEY IS NOT VALID UNLESS:

22 (1) YOU SIGN IT AND HAVE YOUR SIGNATURE ACKNOWLEDGED  
23 BEFORE A NOTARY PUBLIC; OR

24 (2) YOU SIGN IT IN THE PRESENCE OF TWO COMPETENT ADULT  
25 WITNESSES.

26 THE FOLLOWING PERSONS MAY NOT ACT AS ONE OF THE WITNESSES:

27 (1) the person you have designated as your agent;





1 (Signature)

2 \_\_\_\_\_

3 (Print Name)

4 State of Texas

5 County of \_\_\_\_\_

6 This instrument was acknowledged before me on \_\_\_\_\_ (date) by  
7 \_\_\_\_\_ (name of person acknowledging).

8 \_\_\_\_\_

9 NOTARY PUBLIC, State of Texas

10 Notary's printed name:

11 \_\_\_\_\_

12 My commission expires:

13 \_\_\_\_\_

14 OR

15 SIGNATURE IN PRESENCE OF TWO COMPETENT ADULT WITNESSES

16 I sign my name to this medical power of attorney on \_\_\_\_\_

17 day of \_\_\_\_\_ (month, year) at

18 \_\_\_\_\_

19 (City and State)

20 \_\_\_\_\_

21 (Signature)

22 \_\_\_\_\_

23 (Print Name)

24 STATEMENT OF FIRST WITNESS.

25 I am not the person appointed as agent by this document. I am  
26 not related to the principal by blood or marriage. I would not be  
27 entitled to any portion of the principal's estate on the principal's

1 death. I am not the attending physician of the principal or an  
2 employee of the attending physician. I have no claim against any  
3 portion of the principal's estate on the principal's  
4 death. Furthermore, if I am an employee of a health care facility  
5 in which the principal is a patient, I am not involved in providing  
6 direct patient care to the principal and am not an officer,  
7 director, partner, or business office employee of the health care  
8 facility or of any parent organization of the health care facility.

9 Signature:\_\_\_\_\_

10 Print Name:\_\_\_\_\_ Date:\_\_\_\_\_

11 Address:\_\_\_\_\_

12 SIGNATURE OF SECOND WITNESS.

13 Signature:\_\_\_\_\_

14 Print Name:\_\_\_\_\_ Date:\_\_\_\_\_

15 Address:\_\_\_\_\_

16 SECTION 4. Sections [166.162](#) and [166.163](#), Health and Safety  
17 Code, are repealed.

18 SECTION 5. Not later than December 1, 2017, the executive  
19 commissioner of the Health and Human Services Commission shall  
20 adopt all rules necessary to implement this Act, including the form  
21 necessary to comply with the changes in law made by this Act to  
22 Section [166.164](#), Health and Safety Code.

23 SECTION 6. The change in law made by this Act to Section  
24 [166.164](#), Health and Safety Code, does not affect the validity of a  
25 document executed under that section before January 1, 2018. A  
26 document executed before the effective date of this section is  
27 governed by the law in effect immediately before the effective date

1 of this Act, and the former law continues in effect for that  
2 purpose.

3 SECTION 7. (a) Except as provided by Subsection (b) of this  
4 section, this Act takes effect September 1, 2017.

5 (b) Sections 1, 2, 3, 4, and 6 of this Act take effect  
6 January 1, 2018.

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President of the Senate

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Speaker of the House

I certify that H.B. No. 995 was passed by the House on May 9, 2017, by the following vote: Yeas 145, Nays 0, 2 present, not voting.

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Chief Clerk of the House

I certify that H.B. No. 995 was passed by the Senate on May 24, 2017, by the following vote: Yeas 30, Nays 1.

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Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

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Governor

AN ACT

relating to a penalty for independent executors who misrepresent in an affidavit in lieu of the inventory, appraisement, and list of claims that certain beneficiaries received the inventory and appraisement.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter B, Chapter 309, Estates Code, is amended by adding Section 309.0575 to read as follows:

Sec. 309.0575. PENALTY FOR MISREPRESENTATION IN AFFIDAVIT IN LIEU OF INVENTORY, APPRAISEMENT, AND LIST OF CLAIMS. (a) The court, on its own motion or on motion of any person interested in the estate, and after an independent executor has been cited to answer at a time and place fixed in the notice, may fine an independent executor in an amount not to exceed \$1,000 if the court finds that the executor misrepresented in an affidavit in lieu of the inventory, appraisement, and list of claims filed by the executor that all beneficiaries, other than those described by Section 309.056(b-1), received a verified, full, and detailed inventory and appraisement as required by Section 309.056(b).

(b) The independent executor and the executor's sureties, if any, are liable for any fine imposed under this section and for all damages and costs sustained by the executor's misrepresentation. The fine, damages, and costs may be recovered in any court of competent jurisdiction.

1           SECTION 2. Section 309.0575, Estates Code, as added by this  
2 Act, applies only to the estate of a decedent who dies on or after  
3 the effective date of this Act. The estate of a decedent who dies  
4 before the effective date of this Act is governed by the law in  
5 effect on the date of the decedent's death, and the former law is  
6 continued in effect for that purpose.

7           SECTION 3. This Act takes effect September 1, 2017.

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President of the Senate

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Speaker of the House

I certify that H.B. No. 1877 was passed by the House on May 6, 2017, by the following vote: Yeas 140, Nays 0, 2 present, not voting.

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Chief Clerk of the House

I certify that H.B. No. 1877 was passed by the Senate on May 22, 2017, by the following vote: Yeas 31, Nays 0.

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Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

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Governor



AN ACT

relating to trusts.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 111.0035(b), Property Code, is amended to read as follows:

(b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:

(1) the requirements imposed under Section 112.031;

(2) the applicability of Section 114.007 to an exculpation term of a trust;

(3) the periods of limitation for commencing a judicial proceeding regarding a trust;

(4) a trustee's duty:

(A) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:

(i) is entitled or permitted to receive distributions from the trust; or

(ii) would receive a distribution from the trust if the trust terminated at the time of the demand; and

(B) to act in good faith and in accordance with the purposes of the trust;

(5) the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:

- 1 (A) modify, reform, or terminate a trust or take  
2 other action under Section 112.054;
- 3 (B) remove a trustee under Section 113.082;
- 4 (C) exercise jurisdiction under Section 115.001;
- 5 (D) require, dispense with, modify, or terminate  
6 a trustee's bond; or
- 7 (E) adjust or deny a trustee's compensation if  
8 the trustee commits a breach of trust; or
- 9 (6) the applicability of Section 112.038.

10 SECTION 2. Section 112.035(e), Property Code, is amended to  
11 read as follows:

12 (e) A beneficiary of the trust may not be considered a  
13 settlor merely because of a lapse, waiver, or release of:

- 14 (1) a power described by Subsection (f); or
- 15 (2) the beneficiary's right to withdraw a part of the  
16 trust property to the extent that the value of the property affected  
17 by the lapse, waiver, or release in any calendar year does not  
18 exceed the greater of [~~the amount specified in~~]:

19 (A) the amount specified in Section 2041(b)(2) or  
20 2514(e), Internal Revenue Code of 1986; or

21 (B) the amount specified in Section 2503(b),  
22 Internal Revenue Code of 1986, with respect to the contributions by  
23 each donor.

24 SECTION 3. Section 112.038, Property Code, is amended to  
25 read as follows:

26 Sec. 112.038. FORFEITURE CLAUSE. (a) A provision in a  
27 trust that would cause a forfeiture of or void an interest for

1 bringing any court action, including contesting a trust, is  
2 enforceable unless in a court action determining whether the  
3 forfeiture clause should be enforced, the person who brought the  
4 action contrary to the forfeiture clause establishes by a  
5 preponderance of the evidence that:

- 6           (1) just cause existed for bringing the action; and  
7           (2) the action was brought and maintained in good  
8 faith.

9           (b) This section is not intended to and does not repeal any  
10 law, recognizing that forfeiture clauses generally will not be  
11 construed to prevent a beneficiary from seeking to compel a  
12 fiduciary to perform the fiduciary's duties, seeking redress  
13 against a fiduciary for a breach of the fiduciary's duties, or  
14 seeking a judicial construction of a will or trust.

15           SECTION 4. The heading to Section 112.054, Property Code,  
16 is amended to read as follows:

17           Sec. 112.054. JUDICIAL MODIFICATION, REFORMATION, OR  
18 TERMINATION OF TRUSTS.

19           SECTION 5. Section 112.054, Property Code, is amended by  
20 amending Subsections (a), (b), and (c) and adding Subsections  
21 (b-1), (e), and (f) to read as follows:

22           (a) On the petition of a trustee or a beneficiary, a court  
23 may order that the trustee be changed, that the terms of the trust  
24 be modified, that the trustee be directed or permitted to do acts  
25 that are not authorized or that are forbidden by the terms of the  
26 trust, that the trustee be prohibited from performing acts required  
27 by the terms of the trust, or that the trust be terminated in whole

1 or in part, if:

2 (1) the purposes of the trust have been fulfilled or  
3 have become illegal or impossible to fulfill;

4 (2) because of circumstances not known to or  
5 anticipated by the settlor, the order will further the purposes of  
6 the trust;

7 (3) modification of administrative, nondispositive  
8 terms of the trust is necessary or appropriate to prevent waste or  
9 ~~avoid~~ impairment of the trust's administration;

10 (4) the order is necessary or appropriate to achieve  
11 the settlor's tax objectives or to qualify a distributee for  
12 governmental benefits and is not contrary to the settlor's  
13 intentions; or

14 (5) subject to Subsection (d):

15 (A) continuance of the trust is not necessary to  
16 achieve any material purpose of the trust; or

17 (B) the order is not inconsistent with a material  
18 purpose of the trust.

19 (b) The court shall exercise its discretion to order a  
20 modification or termination under Subsection (a) or reformation  
21 under Subsection (b-1) in the manner that conforms as nearly as  
22 possible to the probable intention of the settlor. The court shall  
23 consider spendthrift provisions as a factor in making its decision  
24 whether to modify, ~~or~~ terminate, or reform, but the court is not  
25 precluded from exercising its discretion to modify, ~~or~~ terminate,  
26 or reform solely because the trust is a spendthrift trust.

27 (b-1) On the petition of a trustee or a beneficiary, a court

1 may order that the terms of the trust be reformed if:

2 (1) reformation of administrative, nondispositive  
3 terms of the trust is necessary or appropriate to prevent waste or  
4 impairment of the trust's administration;

5 (2) reformation is necessary or appropriate to achieve  
6 the settlor's tax objectives or to qualify a distributee for  
7 governmental benefits and is not contrary to the settlor's  
8 intentions; or

9 (3) reformation is necessary to correct a scrivener's  
10 error in the governing document, even if unambiguous, to conform  
11 the terms to the settlor's intent.

12 (c) The court may direct that an order described by  
13 Subsection (a)(4) or (b-1) has retroactive effect.

14 (e) An order described by Subsection (b-1)(3) may be issued  
15 only if the settlor's intent is established by clear and convincing  
16 evidence.

17 (f) Subsection (b-1) is not intended to state the exclusive  
18 basis for reformation of trusts, and the bases for reformation of  
19 trusts in equity or common law are not affected by this section.

20 SECTION 6. Section [112.058](#)(a)(2), Property Code, is amended  
21 to read as follows:

22 (2) "Community trust" means a community trust as  
23 described by 26 C.F.R. Section [1.170A-9](#) (2008) [~~1.170A-9(e)(11)~~  
24 ~~(1999)~~], including subsequent amendments.

25 SECTION 7. Sections [112.071](#)(5), (6), and (7), Property  
26 Code, are amended to read as follows:

27 (5) "Full discretion" means a ~~[the]~~ power to

1 distribute principal to or for the benefit of one or more of the  
2 beneficiaries of a trust that is not a trust with limited discretion  
3 [~~limited or modified by the terms of the trust in any way, including~~  
4 ~~by restrictions that limit distributions to purposes such as the~~  
5 ~~best interests, welfare, or happiness of the beneficiaries~~].

6 (6) "Limited discretion" means:

7 (A) a power to distribute principal according to  
8 mandatory distribution provisions under which the trustee has no  
9 discretion; or

10 (B) a [~~limited or modified~~] power to distribute  
11 principal to or for the benefit of one or more beneficiaries of a  
12 trust that is limited by an ascertainable standard, including the  
13 health, education, support, or maintenance of the beneficiary.

14 (7) "Presumptive remainder beneficiary," with respect  
15 to a particular date, means a beneficiary of a trust on that date  
16 who, in the absence of notice to the trustee of the exercise of the  
17 power of appointment and assuming that any other powers of  
18 appointment under the trust are not exercised, would be eligible to  
19 receive a distribution from the trust if:

20 (A) the trust terminated on that date; or

21 (B) the interests of all current beneficiaries  
22 [~~currently eligible to receive income or principal from the trust~~]  
23 ended on that date without causing the trust to terminate.

24 SECTION 8. Section [112.072\(a\)](#), Property Code, is amended to  
25 read as follows:

26 (a) An authorized trustee who has the full discretion to  
27 distribute the principal of a trust may distribute all or part of

1 the principal of that trust in favor of a trustee of a second trust  
2 for the benefit of one, ~~[or]~~ more than one, or all of the current  
3 beneficiaries of the first trust ~~[who are eligible to receive~~  
4 ~~income or principal from the trust]~~ and for the benefit of one, ~~[or]~~  
5 more than one, or all of the successor or presumptive remainder  
6 beneficiaries of the first trust ~~[who are eligible to receive~~  
7 ~~income or principal from the trust]~~.

8 SECTION 9. Section [112.074](#), Property Code, is amended by  
9 amending Subsection (c) and adding Subsections (e-1) and (e-2) to  
10 read as follows:

11 (c) Except as provided by Subsection (e-1), in ~~[In]~~ addition  
12 to the notice required under Subsection (a), the authorized trustee  
13 shall give written notice of the trustee's decision to the attorney  
14 general if:

- 15 (1) a charity is entitled to notice;
- 16 (2) a charity entitled to notice is no longer in  
17 existence;
- 18 (3) the trustee has the authority to distribute trust  
19 assets to one or more charities that are not named in the trust  
20 instrument; or
- 21 (4) the trustee has the authority to make  
22 distributions for a charitable purpose described in the trust  
23 instrument, but no charity is named as a beneficiary for that  
24 purpose.

25 (e-1) The trustee is not required to give notice to the  
26 attorney general under Subsection (c) if the attorney general  
27 waives that requirement in writing.

1        (e-2) For purposes of Subsection (e)(3), a beneficiary is  
2 considered to have waived the requirement that notice be given  
3 under this section if a person to whom notice is required to be  
4 given with respect to that beneficiary under Subsection (d) waives  
5 the requirement that notice be given under this section.

6        SECTION 10. Section 112.078, Property Code, is amended by  
7 adding Subsection (f) to read as follows:

8        (f) This section does not limit a beneficiary's right to  
9 bring an action against a trustee for a breach of trust.

10        SECTION 11. Section 112.085, Property Code, is amended to  
11 read as follows:

12        Sec. 112.085. EXCEPTIONS TO POWER OF DISTRIBUTION. An  
13 authorized trustee may not exercise a power to distribute principal  
14 of a trust under Section 112.072 or 112.073 to:

15            (1) reduce, limit, or modify a beneficiary's current,  
16 vested right to:

17                    (A) receive a mandatory distribution of income or  
18 principal;

19                    (B) receive a mandatory annuity or unitrust  
20 interest;

21                    (C) withdraw a percentage of the value of the  
22 trust; or

23                    (D) withdraw a specified dollar amount from the  
24 trust;

25            (2) ~~materially impair the rights of any beneficiary~~  
26 ~~of the trust,~~

27            ~~[(3)]~~ materially limit a trustee's fiduciary duty:



- 1           (A) under the terms of the trust; or  
2           (B) in a manner that would be prohibited [~~as~~  
3 ~~described~~] by Section 111.0035;  
4           (3) [~~(4)~~] decrease or indemnify against a trustee's  
5 liability;  
6           (4) add a provision exonerating [~~or exonerate~~] a  
7 trustee from liability for failure to exercise reasonable care,  
8 diligence, and prudence;  
9           (5) eliminate a provision granting another person the  
10 right to remove or replace the authorized trustee exercising the  
11 distribution power under Section 112.072 or 112.073; or  
12           (6) reduce, limit, or modify in the second trust a  
13 perpetuities provision included in the first trust, unless  
14 expressly permitted by the terms of the first trust.

15           SECTION 12. Section 113.018, Property Code, is amended to  
16 read as follows:

17           Sec. 113.018. EMPLOYMENT AND APPOINTMENT OF AGENTS. (a) A  
18 trustee may employ attorneys, accountants, agents, including  
19 investment agents, and brokers reasonably necessary in the  
20 administration of the trust estate.

21           (b) Without limiting the trustee's discretion under  
22 Subsection (a), a trustee may grant an agent powers with respect to  
23 property of the trust to act for the trustee in any lawful manner  
24 for purposes of real property transactions.

25           (c) A trustee acting under Subsection (b) may delegate any  
26 or all of the duties and powers to:

27           (1) execute and deliver any legal instruments relating

1 to the sale and conveyance of the property, including affidavits,  
2 notices, disclosures, waivers, or designations or general or  
3 special warranty deeds binding the trustee with vendor's liens  
4 retained or disclaimed, as applicable, or transferred to a  
5 third-party lender;

6 (2) accept notes, deeds of trust, or other legal  
7 instruments;

8 (3) approve closing statements authorizing deductions  
9 from the sale price;

10 (4) receive trustee's net sales proceeds by check  
11 payable to the trustee;

12 (5) indemnify and hold harmless any third party who  
13 accepts and acts under a power of attorney with respect to the sale;

14 (6) take any action, including signing any document,  
15 necessary or appropriate to sell the property and accomplish the  
16 delegated powers;

17 (7) contract to purchase the property for any price on  
18 any terms;

19 (8) execute, deliver, or accept any legal instruments  
20 relating to the purchase of the property or to any financing of the  
21 purchase, including deeds, notes, deeds of trust, guaranties, or  
22 closing statements;

23 (9) approve closing statements authorizing payment of  
24 prorations and expenses;

25 (10) pay the trustee's net purchase price from funds  
26 provided by the trustee;

27 (11) indemnify and hold harmless any third party who

1 accepts and acts under a power of attorney with respect to the  
2 purchase; or

3 (12) take any action, including signing any document,  
4 necessary or appropriate to purchase the property and accomplish  
5 the delegated powers.

6 (d) A trustee who delegates a power under Subsection (b) is  
7 liable to the beneficiaries or to the trust for an action of the  
8 agent to whom the power was delegated.

9 (e) A delegation by the trustee under Subsection (b) must be  
10 documented in a written instrument acknowledged by the trustee  
11 before an officer authorized under the law of this state or another  
12 state to take acknowledgments to deeds of conveyance and administer  
13 oaths. A signature on a delegation by a trustee for purposes of  
14 this subsection is presumed to be genuine if the trustee  
15 acknowledges the signature in accordance with Chapter 121, Civil  
16 Practice and Remedies Code.

17 (f) A delegation to an agent under Subsection (b) terminates  
18 six months from the date of the acknowledgment of the written  
19 delegation unless terminated earlier by:

- 20 (1) the death or incapacity of the trustee;  
21 (2) the resignation or removal of the trustee; or  
22 (3) a date specified in the written delegation.

23 (g) A person who in good faith accepts a delegation under  
24 Subsection (b) without actual knowledge that the delegation is  
25 void, invalid, or terminated, that the purported agent's authority  
26 is void, invalid, or terminated, or that the agent is exceeding or  
27 improperly exercising the agent's authority may rely on the

1 delegation as if:

2 (1) the delegation were genuine, valid, and still in  
3 effect;

4 (2) the agent's authority were genuine, valid, and  
5 still in effect; and

6 (3) the agent had not exceeded and had properly  
7 exercised the authority.

8 (h) A trustee may delegate powers under Subsection (b) if  
9 the governing instrument does not affirmatively permit the trustee  
10 to hire agents or expressly prohibit the trustee from hiring  
11 agents.

12 SECTION 13. Sections 115.002(b-1) and (b-2), Property Code,  
13 are amended to read as follows:

14 (b-1) If there are multiple [~~noncorporate~~] trustees none of  
15 whom is a corporate trustee and the trustees maintain a principal  
16 office in this state, an action shall be brought in the county in  
17 which:

18 (1) the situs of administration of the trust is  
19 maintained or has been maintained at any time during the four-year  
20 period preceding the date the action is filed; or

21 (2) the trustees maintain the principal office.

22 (b-2) If there are multiple [~~noncorporate~~] trustees none of  
23 whom is a corporate trustee and the trustees do not maintain a  
24 principal office in this state, an action shall be brought in the  
25 county in which:

26 (1) the situs of administration of the trust is  
27 maintained or has been maintained at any time during the four-year

1 period preceding the date the action is filed; or

2 (2) any trustee resides or has resided at any time  
3 during the four-year period preceding the date the action is filed.

4 SECTION 14. Section 163.011, Property Code, is amended to  
5 read as follows:

6 Sec. 163.011. APPLICABILITY OF OTHER PARTS OF CODE.  
7 Chapters 116 and 117 do [~~Subtitle B, Title 9 (the Texas Trust Code),~~  
8 ~~does~~] not apply to any institutional fund subject to this chapter.

9 SECTION 15. Section 240.002, Property Code, is amended by  
10 amending Subdivision (1) and adding Subdivision (1-a) to read as  
11 follows:

12 (1) "Charity" means a charitable entity or a  
13 charitable trust, as those terms are defined by Section 123.001.

14 (1-a) "Current beneficiary" and "presumptive remainder  
15 beneficiary" have the meanings assigned by Section 112.071.

16 SECTION 16. Section 240.0081, Property Code, is amended by  
17 amending Subsection (c) and adding Subsections (e-1) and (e-2) to  
18 read as follows:

19 (c) Except as provided by Subsection (e-1), in [~~In~~] addition  
20 to the notice required under Subsection (a), the trustee shall give  
21 written notice of the trustee's disclaimer to the attorney general  
22 if:

23 (1) a charity is entitled to notice;

24 (2) a charity entitled to notice is no longer in  
25 existence;

26 (3) the trustee has the authority to distribute trust  
27 assets to one or more charities that are not named in the trust

1 instrument; or

2 (4) the trustee has the authority to make  
3 distributions for a charitable purpose described in the trust  
4 instrument, but no charity is named as a beneficiary for that  
5 purpose.

6 (e-1) The trustee is not required to give notice to the  
7 attorney general under Subsection (c) if the attorney general  
8 waives that requirement in writing.

9 (e-2) For purposes of Subsection (e)(3), a beneficiary is  
10 considered to have waived the requirement that notice be given  
11 under this section if a person to whom notice is required to be  
12 given with respect to that beneficiary under Subsection (d) waives  
13 the requirement that notice be given under this section.

14 SECTION 17. (a) Except as otherwise expressly provided by  
15 a trust, a will creating a trust, or this section, the changes in  
16 law made by this Act apply to a trust existing on or created on or  
17 after September 1, 2017.

18 (b) For a trust existing on September 1, 2017, that was  
19 created before that date, the changes in law made by this Act apply  
20 only to an act or omission relating to the trust that occurs on or  
21 after September 1, 2017.

22 SECTION 18. This Act takes effect September 1, 2017.

S.B. No. 617

\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Speaker of the House

I hereby certify that S.B. No. 617 passed the Senate on April 25, 2017, by the following vote: Yeas 31, Nays 0.

\_\_\_\_\_  
Secretary of the Senate

I hereby certify that S.B. No. 617 passed the House on May 9, 2017, by the following vote: Yeas 145, Nays 0, two present not voting.

\_\_\_\_\_  
Chief Clerk of the House

Approved:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Governor