

Texas Has a New Statutory Durable Power of Attorney

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Texas House Bill 2918 was passed in 2013's Legislative Session creating a new statutory durable power of attorney. This is the first change to the statutory power of attorney form since 1997. Beginning January 1, 2014, Texas' old form goes away and is replaced by an entirely new form.

There are several elements one should take note of in regard to understanding a financial power of attorney. First, a financial power of attorney and a statutory durable power of attorney are the same thing and a financial power of attorney generally grants powers related only to one's personal and financial matters. Second, the power of attorney can cover all aspects of one's personal and financial affairs, or may be limited to specific activities and situations. Third, the person signing the power of attorney is called the Principal and the person being given the power of attorney over the Principal is called the Agent. The word "durable" in a power of attorney means that the power of attorney is effective even after the Principal's future incapacity. The power of attorney must specifically state that it is a durable power of attorney. And, finally, the power of attorney can either go into effect immediately, or go into effect upon the Principal's future incapacity. When the power of attorney goes into effect upon future incapacity it is called a "springing" power of attorney.

Texas' new Statutory Durable Power of Attorney form differs from the old power of attorney in three significant ways. Texas' old form was an opt-out form because the Principal had to strike out the specific statutory provided powers that the Principal did not want to grant to the Agent. The new Statutory Durable Power of Attorney form requires the Principal to affirmatively initial next to each of the powers to be granted to the Agent.

Additionally, the new form begins with a special notice to the Principal warning him or her to choose a trustworthy Agent and that the form is durable in nature which means it will continue until the Principal dies unless the Principal revokes it, the Agent resigns or a guardianship over the Principal is established.

Finally, the new form ends with a section called "Important Information for Agent." This section includes supplemental language warning the Agent that a fiduciary relationship is established when he or she accepts the authority granted under the power of attorney. A fiduciary relationship can be described as one in which one person places complete confidence in another in regard to a particular transaction or in regard to the Principal's general, including financial, affairs. When an agent is appointed under a durable power of attorney the fiduciary relationship is established. A fiduciary relationship puts personal responsibility and liability on the Agent acting on behalf of the Principal.

Generally, the Agent has the following duties in regard to actions on behalf of his Principal: to act in good faith, to act loyally for the benefit of the Principal, to not overreach beyond the authority granted in the power of attorney, to avoid conflicts that would impair the Agent's ability to act in the best interest of the principal, and to disclose his or her identity as agent in dealings with third parties.

There is one trap for the unwary. The new Statutory Durable Power of Attorney form requires initialing powers specifically detailed on the form for authority to be granted. Regrettably, sometimes these forms are not executed properly. If the new statutory power of attorney is signed without initialing specific powers then presumably no powers are granted. The new year is a good time to have your estate planning documents, including your power of attorney, reviewed by a capable attorney familiar with the changes in the law.