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This analysis looks at the "raw" statutory durable power of attorney to point out its flaws and reasons it should not be used.

STATUTORY DURABLE POWER OF ATTORNEY

The explanation is short and fails to address many vital issues.

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, \_\_\_\_\_  
(insert your name and address)

There is no option for appointing Co-Agents or for controlling how multiple agents might work together.

appoint \_\_\_\_\_  
(insert the name and address of the person appointed)

as my agent (attorney-in-fact) to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out below.

*TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD.*

Real property transactions;

There is no explanation of what these short phrases mean. What exactly is covered? In fact, the law behind these phrases leaves out many important tasks that you might want your agent to do for you.

Tangible personal property transactions;

Stock and bond transactions;

Commodity and option transactions;

Banking and other financial institution transactions;

Do you want your agent to be able to change the beneficiary of your life insurance or annuities? It is allowed, but may contradict your prior wishes.

Business operating transactions;

The Texas courts have rules that this does NOT include authority to CREATE a trust for your benefit. If you want to authorize the flexibility of a trust in the future, you'll have to go beyond this statutory raw form.

Insurance and annuity transactions;

Estate, trust, and other beneficiary transactions;

Some authority may be much broader than you intend. This "family maintenance" allows your agent to pay for all the living expenses of your children (even your adult children who you may not have seen for years, or who may be at odds with you).

Claims and litigation;

Personal and family maintenance;

Often, federal programs refuse to honor powers of attorney based on state law. You need your agent to be recognized as your representative payee, but the statutory wording ignores that issue.

Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;

Retirement plan transactions;

Tax matters.

The statutory form is NOT A GENERAL POWER OF ATTORNEY. That means that it covers only the items listed above, but DOES NOT cover "any and all" issues that might arise in the future. Thus, the Statutory Form is too limited! For instance: can the agent access ONLINE records? Can the agent spend money to provide vet car for pets? Does the Agent have HIPAA authority to access medical records?

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY AND MY AGENT (ATTORNEY IN FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT.

**SPECIAL INSTRUCTIONS:**

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

People often forget to initial here.

\_\_\_\_\_ I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

Do you want to allow "self-dealing" where the agent can give a gift to him/herself? It is not addressed in the statutory form.

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

What should you say here? No guidance is given... but the law recognizes that you may need to give special instructions. In fact, there are a number of special instructions that should be included.

One example: if your agent is paying your medical bills, will the doctor's billing office release information needed to decide if a bill is valid (and should be paid) or if it is inaccurate (and should not be paid). HIPAA bars release of that information unless you specifically authorize its release, which should be included as a special instruction.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

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

- (A) This power of attorney is not affected by my subsequent disability or incapacity.
- (B) This power of attorney becomes effective upon my disability or incapacity.

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

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

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental

This option requires the Agent to prove you are incapacitated before acting on your behalf. It is necessary? Will it slow down the process? Does the person you have appointed need this type of delay?

condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

The clear definition of "legally disabled" requires a court to rule that the agent is disabled. This can be modified to use a standard similar to the one typed out above to decide if YOU are disabled.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor(s) to that agent:

But what if you want two co-agents to act together -- two of your kids, for instance? Statutory form does not allow it.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(your signature)

State of Texas

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

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

(Seal of notary)

\_\_\_\_\_  
(Signature of notarial officer)

\_\_\_\_\_  
(Printed name)

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

THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

Other issues to consider, which are not covered by the raw Statutory form: 1) Does this revoke prior powers of attorney? If you are fighting with the IRS, you don't want it to revoke the appointment of your representative. Otherwise you do want to revoke prior POAs. 2) What if your Agent's power is challenged or refused? Perhaps you need a clause allowing the agent to enforce the authority, or a clause allowing the Agent to confirm the validity of the powers granted. 3) To whom must the agent report? Must you be kept informed? Must anyone else? 4) Should the Agent be paid a fee for providing these services? Should the Agent be reimbursed for out-of-pocket expenses?