

By: Farrar

H.B. No. 3847

A BILL TO BE ENTITLED

1 AN ACT
2 relating to guardianships, substitutes for guardianships, and
3 durable powers of attorney for persons with disabilities or who are
4 incapacitated.

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

6 SECTION 1. Section 751.052, Estates Code, is amended to
7 read as follows:

8 Sec. 751.052. RELATION OF ATTORNEY IN FACT OR AGENT TO
9 COURT-APPOINTED GUARDIAN OF ESTATE. (a) If, after execution of a
10 durable power of attorney, a court [~~of the principal's domicile~~]
11 appoints a temporary or permanent guardian of the estate for a ward
12 who is [of] the principal who executed the power of attorney, the
13 powers and authority granted to [of] the attorney in fact or agent
14 named in the power of attorney are automatically revoked on the
15 qualification of the guardian unless the court enters an order
16 that:

17 (1) affirms and states the effectiveness of the power
18 of attorney; and

19 (2) confirms the validity of the appointment of the
20 named attorney in fact or agent [~~terminate on the qualification of~~
21 ~~the guardian of the estate~~].

22 (b) If the powers and authority of an [The] attorney in fact
23 or agent are revoked as provided by Subsection (a), the attorney in
24 fact or agent shall:

1 (1) deliver to the guardian of the estate all assets of
2 the ward's estate that are in the possession of the attorney in fact
3 or agent; and

4 (2) account to the guardian of the estate as the
5 attorney in fact or agent would account to the principal if the
6 principal had terminated the powers of the attorney in fact or
7 agent.

8 ~~[(b) If, after execution of a durable power of attorney, a
9 court of the principal's domicile appoints a temporary guardian of
10 the estate of the principal, the court may suspend the powers of the
11 attorney in fact or agent on the qualification of the temporary
12 guardian of the estate until the date the term of the temporary
13 guardian expires. This subsection may not be construed to prohibit
14 the application for or issuance of a temporary restraining order
15 under applicable law.]~~

16 SECTION 2. Section 751.054(a), Estates Code, is amended to
17 read as follows:

18 (a) The revocation by, the death of, or the qualification of
19 a temporary or permanent guardian of the estate of a principal who
20 has executed a durable power of attorney or the removal of an
21 attorney in fact or agent under Chapter 753 does not revoke or
22 terminate the agency as to the attorney in fact, agent, or other
23 person who acts in good faith under or in reliance on the power
24 without actual knowledge of the termination of the power by:

25 (1) the revocation;

26 (2) the principal's death; ~~[or]~~

27 (3) the qualification of a guardian of the estate of

1 the principal; or

2 (4) the attorney in fact's or agent's removal.

3 SECTION 3. Section 751.055(a), Estates Code, is amended to
4 read as follows:

5 (a) As to an act undertaken in good-faith reliance on a
6 durable power of attorney, an affidavit executed by the attorney in
7 fact or agent under the durable power of attorney stating that the
8 attorney in fact or agent did not have, at the time the power was
9 exercised, actual knowledge of the termination of the power by
10 revocation, the principal's death, the principal's divorce or the
11 annulment of the principal's marriage if the attorney in fact or
12 agent was the principal's spouse, [~~or~~] the qualification of a
13 temporary or permanent guardian of the estate of the principal, or
14 the attorney in fact's or agent's removal, is conclusive proof as
15 between the attorney in fact or agent and a person other than the
16 principal or the principal's personal representative dealing with
17 the attorney in fact or agent of the nonrevocation or
18 nontermination of the power at that time.

19 SECTION 4. Section 752.051, Estates Code, is amended to
20 read as follows:

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

23 STATUTORY DURABLE POWER OF ATTORNEY
24 NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING.
25 THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P,
26 TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE
27 POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT

1 AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS
2 FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO
3 DO SO.

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, is removed
9 by court order, or is 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 TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN
16 FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS
17 LISTED IN (A) THROUGH (M).

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

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

- 22 ____ (A) Real property transactions;
23 ____ (B) Tangible personal property transactions;
24 ____ (C) Stock and bond transactions;
25 ____ (D) Commodity and option transactions;
26 ____ (E) Banking and other financial institution
27 transactions;

- 1 ___ (F) Business operating transactions;
- 2 ___ (G) Insurance and annuity transactions;
- 3 ___ (H) Estate, trust, and other beneficiary transactions;
- 4 ___ (I) Claims and litigation;
- 5 ___ (J) Personal and family maintenance;
- 6 ___ (K) Benefits from social security, Medicare, Medicaid,
- 7 or other governmental programs or civil or military service;
- 8 ___ (L) Retirement plan transactions;
- 9 ___ (M) Tax matters;
- 10 ___ (N) ALL OF THE POWERS LISTED IN (A) THROUGH (M). YOU DO
- 11 NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU
- 12 INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

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

16 ___ I grant my agent (attorney in fact) the power to apply my
17 property to make gifts outright to or for the benefit of a person,
18 including by the exercise of a presently exercisable general power
19 of appointment held by me, except that the amount of a gift to an
20 individual may not exceed the amount of annual exclusions allowed
21 from the federal gift tax for the calendar year of the gift.

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

24 _____

25 _____

26 _____

27 _____

1 _____
2 _____
3 _____
4 _____
5 _____

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

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

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

12 (B) This power of attorney becomes effective upon my
13 disability or incapacity.

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

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

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

1 power of attorney is fully protected from any action taken under
2 this power of attorney that is based on the determination made by a
3 physician of my disability or incapacity.

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

10 If any agent named by me dies, becomes legally disabled,
11 resigns, [~~or~~] refuses to act, or is removed by court order, I name
12 the following (each to act alone and successively, in the order
13 named) as successor(s) to that agent: _____.

14 Signed this _____ day of _____, _____
15 _____

16 (your signature)

17 State of _____

18 County of _____

19 This document was acknowledged before me on _____(date) by
20 _____

21 (name of principal)

22 _____

23 (signature of notarial officer)

24 (Seal, if any, of notary)

25 _____

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 you
6 legal duties that continue until you resign or the power of attorney
7 is terminated or revoked by the principal or by operation of law. A
8 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 fact
10 that includes the source and nature of each receipt, disbursement,
11 or action, with receipts of principal and income shown separately;

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

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

17 (F) each known liability;

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

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

23 Termination of Agent's Authority

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

1 attorney includes:

2 (1) the principal's death;

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

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

7 (4) if you are married to the principal, the
8 dissolution of your marriage by court decree of divorce or
9 annulment;

10 (5) the appointment and qualification of a temporary
11 or permanent guardian of the principal's estate unless a court
12 order provides otherwise; or

13 (6) if ordered by a court, your removal as agent
14 (attorney in fact) under this power of attorney [~~if ordered by a~~
15 ~~court, the suspension of this power of attorney on the appointment~~
16 ~~and qualification of a temporary guardian until the date the term of~~
17 ~~the temporary guardian expires~~].

18 Liability of Agent

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

26 THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER
27 THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL

1 RESPONSIBILITIES OF AN AGENT.

2 SECTION 5. Subtitle P, Title 2, Estates Code, is amended by
3 adding Chapter 753 to read as follows:

4 CHAPTER 753. REMOVAL OF ATTORNEY IN FACT OR AGENT

5 Sec. 753.001. PROCEDURE FOR REMOVAL. (a) The following
6 persons may file a petition under this section:

7 (1) any person named as a successor attorney in fact or
8 agent in a durable power of attorney; or

9 (2) if the person with respect to whom a guardianship
10 proceeding has been commenced is a principal who has executed a
11 durable power of attorney, any person interested in the
12 guardianship proceeding, including an attorney ad litem or guardian
13 ad litem.

14 (b) On the petition of a person described by Subsection (a),
15 a probate court, after a hearing, may enter an order to:

16 (1) remove a person named and serving as an attorney in
17 fact or agent under a durable power of attorney and, subject to
18 Subsection (d), authorize the appointment of a successor attorney
19 in fact or agent who is named in the durable power of attorney; and

20 (2) if compensation is allowed by the terms of the
21 durable power of attorney, deny all or part of the removed attorney
22 in fact's or agent's compensation.

23 (c) A court may enter an order under Subsection (b) if the
24 court finds:

25 (1) that the attorney in fact or agent has breached the
26 attorney in fact's or agent's fiduciary duties to the principal;

27 (2) that the attorney in fact or agent has materially

1 violated or attempted to violate the terms of the durable power of
2 attorney and the violation or attempted violation results in a
3 material financial loss to the principal;

4 (3) that the attorney in fact or agent is
5 incapacitated or is otherwise incapable of properly performing the
6 attorney in fact's or agent's duties;

7 (4) that the attorney in fact or agent has failed to
8 make an accounting:

9 (A) that is required by Section 751.104 or other
10 law or by the terms of the durable power of attorney; or

11 (B) as ordered by the court; or

12 (5) another cause for removal.

13 (d) The court may not authorize the appointment of a
14 successor attorney in fact or agent who is named in the durable
15 power of attorney under Subsection (b) unless the court enters a
16 finding that the person is qualified and capable of properly
17 performing the duties owed by the person to the principal under the
18 terms of the durable power of attorney and other applicable law.

19 Sec. 753.002. NOTICE TO THIRD PARTIES. Not later than the
20 21st day after the date the court enters an order removing an
21 attorney in fact or agent and authorizing the appointment of a
22 successor under Section 753.001, the successor attorney in fact or
23 agent shall provide actual notice of the order to each third party
24 that the attorney in fact or agent has reason to believe relied on
25 or may rely on the durable power of attorney.

26 SECTION 6. Section 1055.003, Estates Code, is amended by
27 adding Subsection (d) to read as follows:

1 (d) This section does not apply to a person who is entitled
2 to receive notice under Section 1051.104.

3 SECTION 7. Section 1101.002, Estates Code, is amended to
4 read as follows:

5 Sec. 1101.002. CONTENTS OF APPLICATION; CONFIDENTIALITY OF
6 CERTAIN ADDRESSES. An application filed under Section 1101.001 may
7 omit the address of a person named in the application if:

8 (1) the application states that the person is or was
9 protected by a protective order issued under Chapter 85, Family
10 Code;

11 (2) a copy of the protective order is attached to the
12 application as an exhibit;

13 (3) the application states the county in which the
14 person resides;

15 (4) the application indicates the place where notice
16 to or the issuance and service of citation on the person may be made
17 or sent; and

18 (5) the application is accompanied by a request for an
19 order under Section 1051.201 specifying the manner of issuance,
20 service, and return of citation or notice on the person.

21 SECTION 8. Section 1357.052, Estates Code, is amended to
22 read as follows:

23 Sec. 1357.052. AUTHORITY AND DUTIES OF SUPPORTER. (a) A
24 supporter may exercise the authority granted to the supporter in
25 the supported decision-making agreement.

26 (b) A supporter is in a fiduciary relationship with the
27 adult with a disability with whom the supporter enters into a

1 supported decision-making agreement. The supporter owes to the
2 adult with a disability the duties listed in the form provided by
3 Section 1357.056(a), regardless of whether that form is used for
4 the supported decision-making agreement.

5 SECTION 9. Section 1357.053(b), Estates Code, is amended to
6 read as follows:

7 (b) The supported decision-making agreement is terminated
8 if:

9 (1) the Department of Family and Protective Services
10 finds that the adult with a disability has been abused, neglected,
11 or exploited by the supporter; ~~or~~

12 (2) the supporter is found criminally liable for
13 conduct described by Subdivision (1); or

14 (3) a guardian of the person or estate appointed for
15 the adult with a disability qualifies.

16 SECTION 10. Section 1357.056(a), Estates Code, is amended
17 to read as follows:

18 (a) Subject to Subsection (b), a supported decision-making
19 agreement is valid only if it is in substantially the following
20 form:

21 SUPPORTED DECISION-MAKING AGREEMENT

22 Important Information For Supporter: Duties

23 When you accept the authority granted to a supporter under
24 this supported decision-making agreement, you establish a
25 "fiduciary" relationship with the adult with a disability. This is
26 a special legal relationship that imposes on you legal duties that
27 continue until the agreement is terminated by either party, by the

1 terms of the agreement, or by operation of law. A fiduciary duty
2 generally includes the duty to:

3 (1) act in good faith;

4 (2) do nothing beyond the authority granted in this
5 agreement;

6 (3) act loyally for the benefit of the adult with a
7 disability;

8 (4) disclose to the adult with a disability pertinent
9 information affecting that person; and

10 (5) avoid conflicts that would impair your ability to
11 act in the best interest of the adult with a disability.

12 Important Information For Supporter: Termination of Authority

13 You must stop acting as a supporter on behalf of the adult
14 with a disability if you learn of any event that terminates this
15 agreement or your authority to act under it. An event that
16 terminates this agreement or your authority to act under it
17 includes:

18 (1) the termination of the agreement by either you or
19 the adult with a disability;

20 (2) the appointment and qualification of a guardian of
21 the person or estate for the adult with a disability;

22 (3) a finding by the Department of Family and
23 Protective Services that the adult with a disability has been
24 abused, neglected, or exploited by you; or

25 (4) a finding that you are criminally liable for
26 abusing, neglecting, or exploiting the adult with a disability.

27 Appointment of Supporter

1 I, (insert your name), make this agreement of my own free
2 will.

3 I agree and designate that: _____

4 Name: _____

5 Address: _____

6 Phone Number: _____

7 E-mail Address: _____

8 is my supporter. My supporter may help me with making everyday
9 life decisions relating to the following:

10 Y/N obtaining food, clothing, and shelter

11 Y/N taking care of my physical health

12 Y/N managing my financial affairs.

13 My supporter is not allowed to make decisions for me. To help
14 me with my decisions, my supporter may:

15 1. Help me access, collect, or obtain information that is
16 relevant to a decision, including medical, psychological,
17 financial, educational, or treatment records;

18 2. Help me understand my options so I can make an informed
19 decision; or

20 3. Help me communicate my decision to appropriate persons.

21 Y/N A release allowing my supporter to see protected
22 health information under the Health Insurance Portability and
23 Accountability Act of 1996 (Pub. L. No. 104-191) is attached.

24 Y/N A release allowing my supporter to see educational
25 records under the Family Educational Rights and Privacy Act of 1974
26 (20 U.S.C. Section 1232g) is attached.

Effective Date of Supported Decision-Making Agreement

This supported decision-making agreement is effective immediately and will continue until (insert date) or until the agreement is terminated by my supporter or me or by operation of law.

Signed this _____ day of _____, 20____

Consent of Supporter

I, (name of supporter), consent to act as a supporter under this agreement.

(signature of supporter) (printed name of supporter)

Signature

(my signature) (my printed name)

(witness 1 signature) (printed name of witness 1)

(witness 2 signature) (printed name of witness 2)

State of _____

County of _____

This document was acknowledged before me

on _____ (date)

by _____ and _____
(name of adult with a disability) (name of supporter)

(signature of notarial officer)

(Seal, if any, of notary) _____

1 (printed name)

2 My commission expires: _____

3 WARNING: PROTECTION FOR THE ADULT WITH A DISABILITY

4 IF A PERSON WHO RECEIVES A COPY OF THIS AGREEMENT OR IS AWARE
5 OF THE EXISTENCE OF THIS AGREEMENT HAS CAUSE TO BELIEVE THAT THE
6 ADULT WITH A DISABILITY IS BEING ABUSED, NEGLECTED, OR EXPLOITED BY
7 THE SUPPORTER, THE PERSON SHALL REPORT THE ALLEGED ABUSE, NEGLECT,
8 OR EXPLOITATION TO THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES
9 BY CALLING THE ABUSE HOTLINE AT 1-800-252-5400 OR ONLINE AT
10 WWW.TXABUSEHOTLINE.ORG.

11 SECTION 11. (a) Sections [751.052](#), [751.054](#)(a), and
12 [751.055](#)(a), Estates Code, as amended by this Act, and Chapter 753,
13 Estates Code, as added by this Act, apply to a durable power of
14 attorney, including a statutory durable power of attorney, executed
15 before, on, or after the effective date of this Act.

16 (b) Section [752.051](#), Estates Code, as amended by this Act,
17 applies to a statutory durable power of attorney executed on or
18 after the effective date of this Act. A statutory durable power of
19 attorney executed before the effective date of this Act is governed
20 by the law as it existed on the date the statutory durable power of
21 attorney was executed, and the former law is continued in effect for
22 that purpose.

23 (c) Section [1055.003](#)(d), Estates Code, as added by this Act,
24 applies to a guardianship proceeding that is pending or commenced
25 on or after the effective date of this Act.

26 (d) Section [1101.002](#), Estates Code, as amended by this Act,
27 applies to an application for a guardianship filed on or after the

1 effective date of this Act.

2 (e) Sections 1357.052 and 1357.053(b), Estates Code, as
3 amended by this Act, apply to a supported decision-making agreement
4 entered into before, on, or after the effective date of this Act.

5 (f) Section 1357.056(a), Estates Code, as amended by this
6 Act, applies to a supported decision-making agreement entered into
7 on or after the effective date of this Act. A supported
8 decision-making agreement entered into before the effective date of
9 this Act is governed by the law as it existed on the date the
10 supported decision-making agreement was entered into, and the
11 former law is continued in effect for that purpose.

12 SECTION 12. This Act takes effect September 1, 2017.