

BILL ANALYSIS

S.B. 1650
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Judiciary & Civil Jurisprudence
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Lawyers who practice probate and estate planning law have suggested that changes are needed to the Durable Power of Attorney Act to clarify its provisions to preclude unnecessary litigation. Specifically, they identify the following as needing clarity under that act:

- conflicting language due to two bills passing in 2017 that impacted the same area of law;
- a "person" can execute a durable power of attorney, however the definition of "person" may change to include more than adult individuals (i.e. partnerships could be included under that term);
- when temporary guardians are appointed, the court can order a durable power of attorney to be suspended during guardianship. However, if a court appoints a permanent guardian of the estate, the power of attorney is automatically revoked and there is no option for the court to be able to merely suspend the agent's authority;
- a governmental agency with regulatory authority can bring an action to question the actions of an agent under a power of attorney, alluding to the Department of Family and Protective Services (DFPS) qualification to do so. However, it has since been determined that DFPS does not have regulatory authority; and
- a grant of authority over business operation transactions to an agent does not include limited liability companies.

S.B. 1650 seeks to provide for the necessary clarifications.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

S.B. 1650 amends the Estates Code to make the following clarifications to the Durable Power of Attorney Act:

- a principal who signs or directs the signing of a durable power of attorney is an adult individual;
- the consideration of whether an actor is disabled or incapacitated applies to an individual; and
- the actor who may empower an agent through a statutory durable power of attorney is an individual.

S.B. 1650 revises provisions regarding the relationship between a ward's named durable power of attorney and a court-appointed guardian for the ward's estate after execution of a durable power of attorney, as follows:

- establishes that if a court appoints a permanent guardian for the ward's estate, on the qualification of the guardian, the powers and authority granted to the named agent are automatically revoked unless the court orders the agent's powers to be suspended during the pendency of the guardianship of the estate;
- establishes that if a court appoints a temporary guardian for the ward's estate, on the qualification of the guardian, the powers and authority granted to the named agent are automatically suspended for the duration of the guardianship unless a court order affirms and states the effectiveness of the power of attorney and confirms the validity of the appointment of the named agent; and
- removes the specification that the appointment of such a guardian is made by a court of the principal's domicile.

S.B. 1650 extends to any government agency authorized to provide protective services to the principal the authority to bring an action requesting a court to construe, or determine the validity or enforceability of, a durable power of attorney, or to review an agent's conduct under a durable power of attorney and grant appropriate relief. The bill authorizes a court with respect to such an action to award costs and reasonable and necessary attorney's fees in an amount the court considers equitable and just. These provisions apply only to a proceeding concerning a durable power of attorney pending on, or commenced on or after, the bill's effective date.

S.B. 1650 expands the applicability of a statutory durable power of attorney, as it relates to authority with respect to business operating transactions, to include powers relating to an entity or entity ownership interest, subject to the terms of an agreement or other document governing or relating to that entity or interest. The bill revises the enumerated powers that may be exercised by the agent with respect to business transactions to reflect this expansion, including as follows:

- by removing language restricting certain powers to actions taken specifically under a partnership agreement;
- with respect to a sole ownership, by specifying that related powers apply to ownership of an entity as well as to ownership of a business; and
- by specifying that the following powers, as revised by the bill, relate to a certificated or uncertificated ownership interest held by the principal:
 - the power to exercise in person or by proxy, or enforce by litigation, action, or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of such an interest; and
 - the power to defend, submit to alternative dispute resolution, settle, or compromise litigation to which the principal is a party concerning such an interest.

These provisions apply only to a durable power of attorney, including a statutory durable power of attorney, executed on or after the bill's effective date.

S.B. 1650 amends the Property Code to exempt a disclaimer made on or after the bill's effective date by a fiduciary acting in a fiduciary capacity that would result in an interest in or power over property passing to the person making the disclaimer from the requirement for the court to approve the disclaimer in order for it to be effective if the disclaimer is authorized instead under the Durable Power of Attorney Act.

S.B. 1650 repeals Sections 751.052 and 751.133(b), Estates Code.

EFFECTIVE DATE

September 1, 2023.