

By: Smithee

H.B. No. 3562

A BILL TO BE ENTITLED

AN ACT

relating to durable powers of attorney and the construction of certain powers conferred in those durable powers of attorney.

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

SECTION 1. Section 751.002(5), Estates Code, is amended to read as follows:

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

SECTION 2. Section 751.00201, Estates Code, is amended to read as follows:

Sec. 751.00201. MEANING OF DISABLED OR INCAPACITATED FOR PURPOSES OF DURABLE POWER OF ATTORNEY. Unless otherwise defined by a durable power of attorney, an individual [~~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 individual [~~person~~], the individual [~~person~~] is determined to be mentally incapable of managing the individual's [~~person's~~] financial affairs.

SECTION 3. Section 751.133, Estates Code, is amended by amending Subsection (a) and adding Subsection (a-1) to read as follows:

1 (a) If, after execution of a durable power of attorney, a
2 court ~~[of the principal's domicile]~~ appoints a:

3 (1) permanent guardian of the estate for a ward who is
4 ~~[of]~~ the principal who executed the power of attorney, on the
5 qualification of the guardian the powers and authority granted to
6 ~~[of]~~ the agent named in the power of attorney are automatically
7 revoked unless the court enters an order that the powers of the
8 agent be suspended during the pendency of the guardianship of the
9 estate; or

10 (2) temporary guardian of the estate for a ward who is
11 the principal who executed the power of attorney, on the
12 qualification of the guardian the powers and authority granted to
13 the agent named in the power of attorney are automatically
14 suspended for the duration of the guardianship unless the court
15 enters an order that:

16 (A) affirms and states the effectiveness of the
17 power of attorney; and

18 (B) confirms the validity of the appointment of
19 the named agent ~~[terminate on the qualification of the guardian of~~
20 ~~the estate].~~

21 (a-1) If the powers and authority of an [The] agent are
22 revoked as provided by Subsection (a), the agent shall:

23 (1) deliver to the guardian of the estate all assets of
24 the ward's ~~[incapacitated person's]~~ estate that are in the
25 possession of the agent; and

26 (2) account to the guardian of the estate as the agent
27 would account to the principal if the principal had terminated the

1 powers of the agent.

2 SECTION 4. Section 751.251, Estates Code, is amended by
3 amending Subsection (a) and adding Subsection (d) to read as
4 follows:

5 (a) The following may bring an action requesting a court to
6 construe, or determine the validity or enforceability of, a durable
7 power of attorney, or to review an agent's conduct under a durable
8 power of attorney and grant appropriate relief:

9 (1) the principal or the agent;

10 (2) a guardian, conservator, or other fiduciary acting
11 for the principal;

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

15 (4) a governmental agency with ~~[regulatory]~~ authority
16 to provide protective services to the principal ~~[protect the~~
17 ~~principal's welfare]~~; and

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

20 (d) In an action brought under this section, the court may
21 award costs and reasonable and necessary attorney's fees in an
22 amount the court considers equitable and just.

23 SECTION 5. Section 752.001(a), Estates Code, is amended to
24 read as follows:

25 (a) An individual ~~[A person]~~ may use a statutory durable
26 power of attorney to grant an ~~[attorney in fact or]~~ agent powers
27 with respect to an individual's ~~[a person's]~~ property and financial

1 matters.

2 SECTION 6. Section 752.107, Estates Code, is amended to
3 read as follows:

4 Sec. 752.107. BUSINESS OPERATION TRANSACTIONS. Subject to
5 the terms of an agreement or other document governing or relating to
6 an entity or entity ownership interest, to the extent the agent is
7 permitted by law to act for the principal and unless the power of
8 attorney provides otherwise, the [The] language conferring
9 authority with respect to business operating transactions in a
10 statutory durable power of attorney empowers the [attorney in fact
11 ~~or~~] agent to:

12 (1) operate, buy, sell, enlarge, reduce, or terminate
13 an ownership [a business] interest;

14 (2) ~~[do the following, to the extent that an attorney~~
15 ~~in fact or agent is permitted by law to act for a principal and~~
16 ~~subject to the terms of a partnership agreement.~~

17 [(A)] perform a duty or [7] discharge a liability,
18 or exercise in person or by proxy a right, power, privilege, or
19 option that the principal has, may have, or claims to have [~~under~~
20 ~~the partnership agreement, whether or not the principal is a~~
21 ~~general or limited partner~~];

22 (3) [(B)] enforce the terms of an agreement or other
23 document governing or relating to an entity or entity ownership
24 interest [~~the partnership agreement by litigation, action, or~~
25 ~~otherwise~~]; [and]

26 (4) [(C)] defend, submit to arbitration, settle, or
27 compromise litigation or an action to which the principal is a party

1 because of an entity ownership interest [~~membership in the~~
2 ~~partnership~~];

3 (5) [~~(3)~~] exercise in person or by proxy, or enforce
4 by litigation, action, or otherwise, a right, power, privilege, or
5 option the principal has or claims to have as the holder of a
6 certificated or uncertificated ownership interest;

7 (6) [~~bond, share, or other similar instrument and~~
8 defend, submit to alternative dispute resolution [~~arbitration~~],
9 settle, or compromise litigation [~~a legal proceeding~~] to which the
10 principal is a party concerning a certificated or uncertificated
11 ownership interest [~~because of a bond, share, or similar~~
12 ~~instrument~~];

13 (7) [~~(4)~~] with respect to a business or entity owned
14 solely by the principal:

15 (A) continue, modify, renegotiate, extend, and
16 terminate a contract made by or on behalf of the principal with
17 respect to the business or entity [~~before execution of the power of~~
18 ~~attorney with an individual, legal entity, firm, association, or~~
19 ~~corporation by or on behalf of the principal with respect to the~~
20 ~~business~~];

21 (B) determine:

22 (i) the location of the business's or
23 entity's operation;

24 (ii) the nature and extent of the business;

25 (iii) the methods of manufacturing,
26 selling, merchandising, financing, accounting, and advertising
27 employed in the business's or entity's operation;

(iv) the amount and types of insurance carried; and

(v) the method of engaging, compensating, and dealing with the business's or entity's employees and accountants, attorneys, or ~~[and]~~ other agents ~~[and employees]~~;

(C) change the name or form of organization under which the business or entity is operated and enter into an ~~[a partnership]~~ agreement with other persons ~~[or organize a corporation]~~ to take over all or part of the operation of the business or entity; and

(D) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the business or entity and control and disburse the money in the operation of the business or entity;

(8) ~~[(5)]~~ put additional capital into a business or entity in which the principal has an interest;

(9) ~~[(6)]~~ join in a plan of reorganization, consolidation, interest exchange, conversion, or merger of the business or entity;

(10) ~~[(7)]~~ sell or liquidate a business or entity or all or part of the assets of the business or entity ~~[at the time and on the terms that the attorney in fact or agent considers desirable]~~;

(11) ~~[(8)]~~ establish the value of a business or entity under a buy-out agreement to which the principal is a party;

(12) ~~[(9) do the following:]~~

~~[(A)]~~ prepare, sign, file, and deliver reports,

1 compilations of information, returns, or other papers with respect
2 to a business or entity and~~+~~

3 ~~[(i) that are required by a governmental~~
4 ~~agency, department, or instrumentality, or~~

5 ~~[(ii) that the attorney in fact or agent~~
6 ~~considers desirable, and~~

7 ~~[(B)]~~ make related payments; and

8 (13) ~~[(10)]~~ pay, compromise, or contest taxes or
9 assessments and perform any other act ~~[that the attorney in fact or~~
10 ~~agent considers desirable]~~ to protect the principal from illegal or
11 unnecessary taxation, fines, penalties, or assessments with
12 respect to a business or entity, including attempts to recover, in
13 any manner permitted by law, money paid before or after the
14 execution of the power of attorney.

15 SECTION 7. Section 240.008, Property Code, is amended by
16 amending Subsection (c) and adding Subsection (c-1) to read as
17 follows:

18 (c) Except as provided by Subsection (c-1), the ~~[The]~~
19 following disclaimers by a fiduciary acting in a fiduciary capacity
20 are not effective unless approved by a court of competent
21 jurisdiction:

22 (1) a disclaimer by a personal representative who is
23 not an independent administrator or independent executor;

24 (2) a disclaimer by the trustee of a management trust
25 created under Chapter 1301, Estates Code;

26 (3) a disclaimer by the trustee of a trust created
27 under Section 142.005; or

1 (4) a disclaimer that would result in an interest in or
2 power over property passing to the person making the disclaimer.

3 (c-1) A disclaimer described by Subsection (c)(4) does not
4 require court approval if the disclaimer is authorized under
5 Subtitle P, Title 2, Estates Code.

6 SECTION 8. The following sections of the Estates Code are
7 repealed:

8 (1) Section 751.052; and

9 (2) Section 751.133(b).

10 SECTION 9. Section 751.251, Estates Code, as amended by
11 this Act, applies to a proceeding concerning a durable power of
12 attorney pending on, or commenced on or after, the effective date of
13 this Act.

14 SECTION 10. Section 752.107, Estates Code, as amended by
15 this Act, applies only to a durable power of attorney, including a
16 statutory durable power of attorney, executed on or after the
17 effective date of this Act. A durable power of attorney, including a
18 statutory durable power of attorney, executed before the effective
19 date of this Act is governed by the law in effect on the date the
20 durable power of attorney was executed, and the former law is
21 continued in effect for that purpose.

22 SECTION 11. Section 240.008, Property Code, as amended by
23 this Act, applies only to a disclaimer made on or after the
24 effective date of this Act. A disclaimer made before the effective
25 date of this Act is governed by the law in effect at the time the
26 disclaimer was made, and the former law is continued in effect for
27 that purpose.

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1 SECTION 12. This Act takes effect September 1, 2023.