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# Practical Issues Concerning DPOAs

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# Introduction

- Historically, in Texas, financial institutions and others did not have to accept a power of attorney document.
- Now, financial institutions generally have to accept DPOA transactions.
- Due to that, financial institutions should be aware of the many common issues that arise in DPOA transactions.

# Valid DPOAs

- To be a DPOA, the document must be in writing or other record that designates a person as an agent and grants authority to act in place of the principal, signed by the principal or another at the principal's direction, be acknowledged, and contain words that: 1) the power of attorney document is not affected by the subsequent disability or incapacity of the principal, 2) the power of attorney becomes effective on the disability or incapacity of the principal, or 3) other similar words that clearly indicate that the authority conferred on the agent shall be exercised notwithstanding the principal's subsequent disability or incapacity.
- The power of attorney document can be signed by another person that the principal directs to sign for him or her.

## Valid DPOA

- The Legislature has a form for a statutory durable power of attorney.
- A statutory durable power of attorney is legally sufficient if: (1) the wording of the form complies substantially with the wording of the form prescribed by Section 752.051; (2) the form is properly completed; and (3) the signature of the principal is acknowledged.

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# DPOA Rights

- Agent has the power to:
- Mortgage real property and do home equity loans;
- Pledge real or personal property as collateral for loans;
- Establish, continue, modify, or terminate an account or other banking arrangement;
- Rent a safe deposit box or space in a vault;
- Contract to procure other services available;
- Withdraw by check, order, or otherwise money or property of the principal;
- Receive and act on bank statements, vouchers, notices, or similar documents;

# DPOA Rights

- Enter a safe deposit box or vault and withdraw from or add to its contents;
- Borrow money and pledge as security the principal's property;
- Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, bills of exchange, checks, drafts, or other negotiable or nonnegotiable paper, to receive the cash or other proceeds of those transactions, to accept a draft drawn by a person on the principal, and to pay the principal when due;
- Receive and act on a sight draft, warehouse receipt, or other negotiable or nonnegotiable instrument;
- Apply for and receive letters of credit, credit cards, and traveler's checks and give an indemnity or other agreement in connection with letters of credit; and
- Consent to an extension of the time of payment.

# DPOA Rights

- Operate, buy, sell, enlarge, reduce, or terminate a business interest;
- Subject to the terms of a partnership agreement: perform a duty, discharge a liability, or exercise a right, power, privilege, or option that the principal has, may have, or claims to have under the partnership agreement, whether or not the principal is a general or limited partner and enforce rights and terms of agreement;
- Broad powers for a solely owned business of the principal; and
- Other business operation transactions.



# DPOA Rights

- Act for the principal in all matters that affect a trust, probate estate, guardianship, conservatorship, life estate, escrow, custodianship, or other fund from which the principal is, may become, or claims to be entitled, as a beneficiary.
- Can a trustee's DPOA act for the trustee in that capacity?

# DPOA Rights

- The Act provides that an agent can, under certain circumstances, change or create a beneficiary designation on certain accounts.
- However, “[u]nless the durable power of attorney otherwise provides” an agent who is not “an ancestor, spouse, or descendant of the principal may not ... create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal’s property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.”
- So, if the power of attorney document expressly allows the agent to name himself or herself as a beneficiary, the agent can do so.
- If the agent is the principal’s ancestor, spouse, or descendant, then the agent can name himself or herself as a beneficiary.

# Co-Agents

- The principal can appoint co-agents, and unless the power of attorney document provides otherwise, each co-agent can exercise authority independently of the other.
- If the DPOA requires consent of co-agents, then a financial institution should not execute a transaction without the appropriate approvals.

# Springing DPOAs

- A DPOA contain words that: 1) the power of attorney document is not affected by the subsequent disability or incapacity of the principal or 2) the power of attorney becomes effective on the disability or incapacity of the principal.
- So, a DPOA can become effective only upon the disability or incapacity of the principal.
- The financial institution should not execute a transaction until the triggering event has occurred.
- The DPOA can provide its own test for disability or incapacity.

# Springing DPOA

- The person may request that the certification include a written statement from a physician that states that the principal is presently disabled or incapacitated.
- Unless otherwise defined in the power of attorney document, a person is considered disabled or incapacitated if a physician certifies in writing at a date later than the date of the power of attorney document that, based on the physician's medical examination of the person, the person is determined to be mentally incapable of managing the person's financial affairs.
- HIPAA issues?

# DPOA From Other States

- A power of attorney document that is executed in a different jurisdiction is valid in Texas if, when executed, the execution complied with: “(1) the law of the jurisdiction that determines the meaning and effect of the durable power of attorney as provided by Section 751.0024; or (2) the requirements for a military power of attorney as provided by 10 U.S.C. Section 1044b.”
- Section 751.0024 provides that the meaning and effect of a durable power of attorney is determined by the law of the jurisdiction indicated in the document.
- If the document does not designate the controlling law, then it is controlled by the law of the jurisdiction of the principal’s domicile if the principal’s domicile is indicated in the document.
- If the domicile is not indicated, then the document is controlled by law of the jurisdiction in which the principal executed the document.

# DPOA Termination

- A principal can always terminate a DPOA at any time if he or she has capacity.
- A guardianship will also terminate a DPOA.
- Temporary guardianships will suspend a DPOA unless the court orders affirms the agent's powers.
- Bankruptcy of principal does not terminate the DPOA.
- Should seek agent's certification.

# DPOA Statute: Duty To Accept

- A person who is presented with and asked to accept a durable power of attorney by an agent shall: (1) accept the power of attorney; or (2) before accepting the power of attorney: (A) request an agent's certification or an opinion of counsel not later than the 10th business day after the date the power of attorney is presented; or (B) request an English translation not later than the fifth business day after the date the power of attorney is presented.
- A person who requests an agent's certification or an opinion of counsel must accept the DPOA not later than the seventh business day after the date the person receives the requested certification or opinion.
- These periods can be extended by agreement.



# Triggering Event

- The event that triggers a person's time period to accept the power of attorney document is the presentment of the document and a request to accept it by an agent.
- An agent may bring such a document in before the principal is incapacitated because they live in another location and want to simply keep it "on file" in case it is needed in the future.
- Should that count to start the clock?

# Require Different Forms?

- The new statutory changes now state that a person who is asked to accept a durable power of attorney that meets the statutory requirements set forth above and includes the appropriate authority for the transaction cannot request “an additional or different form of the power of attorney.”
- Person cannot require filing of the DPOA unless real estate transaction.
- Person cannot require original DPOA.

# Agent's Certification

- The person to whom the power of attorney is presented may request that the agent provide an agent's certification, under penalty of perjury, of any factual matter concerning the principal, agent, or power of attorney.
- The statute provides a form for the certification for parties to use.
- Provides protections for the person.

# Opinion of Counsel

- Before accepting a power of attorney, the person may request from the agent an opinion of counsel regarding any matter of law concerning the power of attorney so long as the person provides to the agent the reason for the request in a writing or other record.
- If timely sought (within 10 days), this opinion will be prepared by the principal or agent, at the principal's expense.

# English Translation

- The person may request from the agent presenting the power of attorney document that the agent provide an English translation of the power of attorney document if some or all of the power of attorney document is not written in English.
- If timely requested (within five days of getting the power of attorney document), the translation must be provided by the principal or agent at the principal's expense.
- If the person asks for an English translation, then the power of attorney is not considered presented until the date the person receives the translation.

# DPOA Statute: Rejecting DPOA

- If a person refuses to accept a DPOA, then it should provide a written statement setting forth the reason for the refusal.
- However, if the person is refusing the DPOA due to a reason set forth in Section 751.206(2) or (3), then the person shall provide a written statement signed by the person under penalty of perjury stating that the reason for the refusal is a reason described by Section 751.206(2) or (3), and the person is not required to provide any additional explanation.
- Are SAR reports to be kept confidential under federal law?
- This response must be provided to the agent on or before the date the person would otherwise be required to accept the DPOA.

# DPOA Statute: Rejecting DPOA

- A person is not required to accept a power of attorney if: “... the person filed a SAR regarding the principal or agent or the principal or agent has prior criminal activity; ...the person has knowledge that a complaint has been raised to the proper authorities that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting with or on behalf of the agent...”

# Exploitation Statute: Definitions

- A “vulnerable adult” means someone who is sixty-five (65) years or older or a person with a disability.
- “Financial exploitation” means: “(A) the wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or other property or the identifying information of a person; or (B) an act or omission by a person, including through the use of a power of attorney on behalf of, or as the conservator or guardian of, another person, to: (i) obtain control, through deception, intimidation, fraud, or undue influence, over the other person’s money, assets, or other property to deprive the other person of the ownership, use, benefit, or possession of the property; or (ii) convert the money, assets, or other property of the other person to deprive the other person of the ownership, use, benefit, or possession of the property.



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# Exploitation Statute: Employee Reporting Obligation

- If an employee has cause to believe that financial exploitation of a vulnerable adult who is an account holder has occurred, is occurring, or has been attempted, the employee shall notify the employer of the suspected financial exploitation.
- From a practical perspective, this requires employers to educate and train employees about financial exploitation so that they know when to suspect that is occurring.

# Exploitation Statute: Employer Reporting Obligation

- If an employee makes such a report or the employer otherwise has cause to believe a reportable event has occurred, then the employer shall (1) assess the suspected financial exploitation and (2) submit a report to the Department.
- The employer should submit the report not later than the earlier of: (1) the date it completes an assessment; or (2) the fifth business day after the date the employer is notified of the suspected financial exploitation or otherwise has cause to believe that the suspected financial exploitation has occurred, is occurring, or has been attempted.
- May also report to a disinterested third party reasonably associated with the vulnerable person.

# Exploitation Statute: Holds

- If an employer submits a report, it (1) may place a hold on any transaction that: (A) involves an account of the vulnerable adult; and (B) the employer has cause to believe is related to the suspected financial exploitation; and (2) must place a hold on any transaction involving an account of the vulnerable adult if the hold is requested by the Department or a law enforcement agency.
- This hold generally expires ten business days after the report was submitted and the employer may extend a hold for an additional thirty business days “if requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation.” *Id.*
- The employer may also petition a court to extend a hold.

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# Exploitation Statute: Related Issues

- Employers should be aware of another provision that dictates when a financial institution has notice of a breach of fiduciary duty: Texas Business and Commerce Code Section 3.307.
- There are several theories in Texas that allow a plaintiff to sue a third party for the exploiter's bad conduct: aiding and abetting breach of fiduciary duty, knowing participation in breach of fiduciary duty, and conspiracy.

# Texas Human Resources Code

- The Texas Human Resources Code has a general provision that requires the reporting of the exploitation of elderly or disabled individuals.
- Section 48.051 states: “a person having cause to believe that an elderly person, a person with a disability, ... is in the state of abuse, neglect, or exploitation shall report the information ... immediately to the department.”

# Texas Human Resources Code

- In the Texas Human Resources Code, the term “exploitation” means “the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly person or person with a disability that involves using, or attempting to use, the resources of the elderly person or person with a disability, including the person’s social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the person.”
- Importantly, the Texas Human Resources Code provides a criminal penalty for not reporting the exploitation.

# SARs

- The federal banking agencies have each issued regulations setting forth the circumstances under which a financial institution must file a suspicious activity report ("SAR").
- An institution must file the SAR no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a SAR.
- SARs are filed electronically with the Treasury Department's Financial Crimes Enforcement Network (FinCEN), through the BSA E-Filing System.
- The failure to file reports can lead to supervisory action (e.g., civil money penalties).

# SARs

- SARs continue to be a valuable avenue for financial institutions to report elder financial exploitation.
- If a financial institution knows, suspects, or has reason to suspect that a transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the financial institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction, the financial institution should then file a Suspicious Activity Report.



# Conclusion

- Regarding the use of powers of attorneys, it is a whole new world for financial institutions.
- Financial institutions should know what a DPOA agent can and cannot do.
- There are onerous statutes that create duties to investigate and report financial exploitation.
- Financial institutions should seek out legal advice concerning transactions where there are doubts.