

TX Supplement – Power of Attorney

During the 2013 Texas legislative session a new Statutory Durable Power of Attorney form was established. The new form was effective January 1, 2014 and codified at Section 752 of the new Texas Estates Code (see form below). It is a business and property power of attorney form and is not applicable to health care or termination of life issues. **For real estate transactions and issuance of title insurance, it is the preferred form.**

Section 752.001(b), Texas Estates Code, states that any form that is “substantially” the same as the statutory form is afforded the same statutory meaning and guarantees as the actual promulgated form. Unfortunately, there is no definition of or suggested guidelines to determine whether another form is “substantially” the same as the statutory form. Contact underwriting if the form differs from the statutory form in any substantive way.

Unlike the old form, this new form requires the maker to specifically **initial** on the line in front of a chosen power in order to grant that power to the Attorney in Fact. NITIC requires that the form indicate that “A. Real property transactions” is a selected power by principal **initialing** that power, or “N” which activates all the listed powers. An “X” or check mark on the line in front of a power is not accurate or effective. **It must be the maker’s initials.**

If the POA is being used in a purchase or borrowing transaction, then besides selection of “(A)” Real property transactions”, section “(E) Banking and other financial institution transactions” must be initialed by the maker of the POA. The maker of the POA also may select all the stated powers by initialing “N. ALL OF THE POWERS LISTED IN (A) THROUGH (M). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INTIAL LINE (N).”

Also the maker must decide whether the power is effective at the time of signature or not until the maker is determined (diagnosed) to be disabled or incapacitated. The terms of the form say, if the power is not effective until maker is disabled or incapacitated, then either maker should have defined how disability or incapacity is to be verified or if no such special instruction was included, then by physician certification in writing, after examination of maker, at a date later than the date of the POA is executed, that maker is incapacitated by reason of being incapable of managing his/her financial affairs.

UNDERWRITING GUIDELINES – POA

1. Powers of Attorney are inherently risky. While they are an excellent estate planning tool, they are also the potential subject of fraud and duress. They are not acceptable for mere convenience purposes. Foreign travel or medical or military status are primary and acceptable reasons for use of a POA in a real estate transaction. Remember it is always better to have the actual person sign the document instead of an attorney-in-fact when possible. With various overnight courier services and/or electronic transmission of documents, there are fewer reasons to accept the use a POA in a real estate transaction.
2. The POA, whether it is the “Statutory” form or one drafted for maker by attorney or other source, must be carefully reviewed by the title agent to verify that:
 - a. the form is acceptable,
 - b. it is filled out properly and completely,
 - c. it is properly executed and notarized (remember that the POA is not acceptable if there is any question about the **capacity or competency of the maker at the time the POA was signed**. If the signature of maker is not on the signature line or does not look anything like a signature, then further inquiry as to the maker’s capacity at the time the POA was made is definitely warranted, including contacting the Notary and inquiring whether he/she can and will testify to maker’s capacity at the time of signing the POA.),
 - d. the attorney in fact appointed in the POA is the same person that will be signing the documents,
 - e. the form is “durable” meaning that it has language that clearly says that the effectiveness of the POA shall survive the incapacity of the maker or that the power becomes effective when the principal becomes incapacitated. The selection of when the form becomes effective continues to have an “automatic” selection feature of the prior form, so that if maker doesn’t choose either “(A) This power of attorney is not affected by my subsequent disability or incapacity, or (B) This power of attorney becomes effective upon my disability or incapacity” then it is assumed that the principal chose (A),
 - f. under “SPECIAL INSTRUCTIONS” that there are no specific limitations of powers that affect the current transaction, and
 - g. if there is a specific termination date for the POA, and that it is still currently effective.
3. If the statutory form is used, it is not necessary that the POA be specific. It does not need to specifically reference the subject real estate transaction and/or the sales price. If it does, that is certainly acceptable, but not required.

4. In Texas there is no defined or required format that must be used for the attorney in fact to sign for the POA maker. The most common format is for the attorney in fact to actually sign the principal's name and that it is signed by the attorney in fact and show attorney in fact's name. See example:

John Smith by attorney in fact, Robert Thomas

The most important concern with a signature under a POA is for the Notary Certificate to accurately reflect and track the format of the actual signature line and that the attorney in fact is shown as having appeared before the notary and acted on behalf of the POA maker. It should not say that the maker appeared before the notary, because he/she didn't.

5. In closing a transaction in which a POA is utilized:

- a. Texas law requires that the POA must be recorded in the county where the land is located. Some people are reluctant to give the original POA to the title company for fear of it being lost. If they wish to record it themselves, then closing will have to wait until the recordation of the POA is confirmed. Where available, with eRecording, the original doesn't leave the office and can be handed back to the attorney in fact, solving that problem.
- b. After documents are signed, **but before any disbursement or recording of the transaction documents**, the POA must be confirmed with the maker by direct telephone contact or email or fax statement, wherein the POA maker confirms that he/she is aware of and approves the transaction which the Attorney in fact is signing for maker and that the validity of the POA and the use thereof in this transaction has not been rescinded or revoked. This direct verification is a critical and very necessary step in the proper and acceptable utilization of a POA in a transaction to be insured. Please call underwriting if the POA maker is in the military or otherwise is not available to verify the POA and confirm the actions of the attorney in fact in the particular transaction.

6. Most Military Powers of Attorney are now acceptable. They still must have durability language as discussed above. They often are notarized by non-commissioned officers, but that is acceptable if they were notarized on a US military base and the person notarizing is designated for that purpose by the military. If you have any questions about the acceptability of a Military POA, contact underwriting.

7. Prior “statutory durable power of attorney” forms effective prior to January 1, 2014 are still available on the internet and otherwise, If a prior form is presented and signed prior to January 1, 2014 and it is complete and correct, you may use it for your transaction. However, if you are presented with a form that is entitled “Statutory Durable POA” but not yet signed or is signed after January 1, 2014 but it is not the current (2014) form shown herein, you may not rely on or use that power of attorney. In other words, prior legislatively created “Statutory Durable POA” forms are obsolete for execution after January 1, 2014. At that point only the form effective January 1, 2014 is the “statutory” form.

8. If you are presented with what appears to be a prior “statutory” form but the word “Statutory” has been removed from all parts of the form and the maker has signed that form in 2014 or after, that is probably an acceptable form which the maker has chosen as their form of POA. Proper scrutiny as to form requirements stated herein will be necessary to determine whether it is an acceptable POA.

9. If a POA is presented to be used for a borrower in connection with the closing of a home equity loan or a reverse mortgage loan, the POA must be executed and notarized at a Texas title agent or title company or at the lender making the loan or at an attorney’s office. For this application, if the POA was not signed in your title company, you must have written confirmation from the other title agent/company, lender, or attorney where it was signed and notarized, authenticating that it was signed and notarized at their office to comply with home equity and reverse mortgage loan rules.

Form (effective January 1, 2014)

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES 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.

You should select someone you trust to serve as your agent (attorney in fact). Unless you specify otherwise, generally the agent's (attorney in fact's) authority will continue until:

- (1) you die or revoke the power of attorney;
- (2) your agent (attorney in fact) resigns or is unable to act for you; or
- (3) a guardian is appointed for your estate.

I, _____ (insert your name and address), 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 that I have initialed below.

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (M).

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

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

- ___ (A) Real property transactions;
- ___ (B) Tangible personal property transactions;
- ___ (C) Stock and bond transactions;
- ___ (D) Commodity and option transactions;
- ___ (E) Banking and other financial institution transactions;
- ___ (F) Business operating transactions;
- ___ (G) Insurance and annuity transactions;
- ___ (H) Estate, trust, and other beneficiary transactions;
- ___ (I) Claims and litigation;
- ___ (J) Personal and family maintenance;
- ___ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;
- ___ (L) Retirement plan transactions;
- ___ (M) Tax matters;
- ___ (N) ALL OF THE POWERS LISTED IN (A) THROUGH (M). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

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

____ I grant my agent (attorney in fact) the power to apply my property to make gifts outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me, 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.

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

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 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.

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: _____.

Signed this _____ day of _____, _____

(signature of principal)

State of _____
County of _____

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

(signature of notarial officer)

(Seal, if any, of notary) _____
(printed name)

My commission expires: _____