

HOW TO GET AWAY WITH MURDER  
BREACHING YOUR FIDUCIARY DUTIES:  
*Powers of Attorney Edition*

T. Aaron Dobbs  
*Ford + Bergner LLP*  
700 Louisiana Street, 48th Floor  
Houston, Texas 77002  
Tel: (713) 260-3926  
Fax: (713) 260-3903  
adobbs@fordbergner.com

T. AARON DOBBS  
Ford + Bergner LLP  
adobbs@fordbergner.com

Education:

B.S., Texas A&M University (2001)  
Recipient, *Buck Weirus Spirit Award*  
J.D., South Texas College of Law (2005)  
Associate Editor, *Corporate Counsel Review*

Description of Practice:

Mr. Dobbs is an attorney with Ford + Bergner LLP where his practice focuses on trust and estate administration, fiduciary litigation, probate litigation, uncontested and contested guardianships, and estate planning. Mr. Dobbs has assisted clients in all aspects of estate and trust administration, probate and trust litigation, and guardianship disputes before trial and appellate courts across the state of Texas, and is admitted to practice before the United States District Court, Southern District of Texas.

Mr. Dobbs previously worked as a Legislative Counsel for the Texas Legislative Council. During his tenure with the Texas Legislature, Mr. Dobbs was a member of the team of lawyers responsible for drafting the first installment of the new Estates Code, which replaced the Texas Probate Code on January 1, 2014.

Mr. Dobbs was recognized as a "Rising Star" in Estate & Trust Litigation in *Texas Monthly Magazine's* 2014 Texas Super Lawyers Rising Stars edition. *H Texas Magazine* named Mr. Dobbs as a "Top Lawyer" for Wills, Trusts & Estates in its Summer 2014 publication.

Professional and Community Involvement:

Member, Real Estate, Probate and Trust Law Section, State Bar of Texas  
Member, Houston Estate and Financial Forum  
Member, Probate, Trusts and Estates Section, Houston Bar Association  
Board member, Attorneys in Tax and Probate (2014-2015)  
Board member, Disability and Elder Law Attorneys Association (2014-2015)  
Board member, South Texas College of Law Alumni Association  
Member, Greater Houston Rowing Club

Publications and Presentations:

*Navigating the Estates Code*, Presenter, 29<sup>th</sup> Annual Wills and Probate Institute, South Texas College of Law  
*It's Going to Be OK: Transition to the New Estates Code*, Author and Presenter, 28<sup>th</sup> Annual Wills and Probate Institute, South Texas College of Law  
*Powers of Attorney: Licenses to Steal*, Author and Presenter, 27<sup>th</sup> Annual Wills and Probate Institute, South Texas College of Law  
*Powers of Attorney: Licenses to Steal*, Author and Presenter, RIA Trust Education Session, BOKF, NA

## TABLE OF CONTENTS

I.	A CAUTIONARY TALE .....	1
II.	THE WEAPON .....	1
A.	General Power of Attorney (Non-Durable) .....	1
B.	Durable Power of Attorney .....	1
1.	Incapacity does not Affect Duration .....	1
2.	Incapacity does not Affect Agent's Actions .....	1
3.	Statutory Form .....	2
a.	"Opt In" Powers .....	2
b.	Specific "Opt In" Power .....	2
4.	Termination of Power of Attorney .....	3
a.	On Specific Date .....	3
b.	On Death of Principal .....	3
c.	On Qualification of Permanent Guardian of the Estate .....	3
d.	On Qualification of Temporary Guardian of the Estate .....	3
e.	<u>NOT</u> on the Qualification of Guardian of the Person .....	3
f.	On Divorce of Principal .....	3
g.	On Agent's Breach of Fiduciary Duty .....	3
h.	Notifying Third Parties of Termination .....	4
III.	THE SUSPECT.....	4
A.	Generally .....	4
B.	Specifically .....	4
1.	Duty to Timely Inform .....	4
2.	Duty to Maintain Records .....	4
3.	Duty to Account .....	4
a.	Suit to Compel Accounting .....	5
b.	Standing to Demand Accounting .....	5
IV.	THE ROOM.....	5
A.	Powers Relating to Stock and Bond Transactions and Commodity and Option Transactions .....	5
B.	Powers Relating to Estate, Trust, and Other Beneficiary Transactions .....	6
C.	Powers Relating to Insurance Contracts .....	6

D.	Powers Relating to Retirement Plan Transactions .....	6
E.	Powers Relating to Banking and Other Financial Institutions Transactions .....	6
F.	Gifts .....	7
V.	THE MORAL OF THE STORY .....	7
APPENDIX A: Statutory Durable Power of Attorney Form		

# HOW TO GET AWAY WITH MURDER BREACHING YOUR FIDUCIARY DUTIES: *Powers of Attorney* Edition

## I. A CAUTIONARY TALE

It is often said that financial powers of attorney can be useful and inexpensive tools by which third parties are allowed to carry on the financial affairs of incapacitated persons. While the prior statement is true, powers of attorney also grant broad and sweeping powers that can be misused. Accordingly, this paper broadly examines: (1) the basic law surrounding powers of attorney; (2) the fiduciary duties that arise under a power of attorney; and (3) practical problems in the use of powers of attorney (or, in other words, why powers of attorney are the perfect weapon to help you get away with breaching your fiduciary duties).

## II. THE WEAPON

A power of attorney is a document executed by an individual (the principal) that establishes an agency relationship with another person (the agent) wherein the principal authorizes the agent to act on the principal's behalf with respect to property and financial matters. There are two types of powers of attorney relating to a principal's property and financial matters: (1) general powers of attorney (also known as non-durable powers of attorney), and (2) statutory durable powers of attorney.

### A. General Power of Attorney (Non-Durable).

A non-durable power of attorney terminates on the disability or incapacity of the principal. Because non-durable powers of attorney are rarely useful and by their nature, terminate at the time when a person most needs a power of attorney,

this paper focuses solely on statutory durable powers of attorney. However, it is important to understand the difference between the types of powers of attorney and to not assume that all powers of attorney are equal.

### B. Durable Power of Attorney.

#### 1. Incapacity does not Affect Duration.

A durable power of attorney is distinguished from a general power of attorney because the word "durable" means that the agency relationship does not terminate on the principal's incapacity. Subtitle P of the Estates Code is the *Durable Power of Attorney Act*. Section 751.002 of the Estates Code defines "durable power of attorney" to be a written instrument that, among other aspects, contains the words "This power of attorney is not affected by subsequent disability or incapacity of the principal," or "This power of attorney becomes effective on the disability or incapacity of the principal," or other similar words conveying this intent. Accordingly, a principal may provide that the power of attorney is effective immediately or upon the principal's incapacity.

#### 2. Incapacity does not Affect Agent's Actions.

Although incapacity does not affect the duration of a durable power of attorney, a durable power of attorney can specifically state a time limitation. *Tex. Estates Code §751.004*. Regardless of the power of attorney's duration, all acts taken by an agent during any period of the principal's incapacity have the same effect and inure to the benefit of and bind the principal as if the principal were not incapacitated. *Tex. Estates Code §751.051*.

### 3. Statutory Form.

The Texas Legislature has adopted a statutory form known as the “statutory durable power of attorney.” The form is prescribed by Section 752.051 of the Estates Code, but the form is not exclusive and other forms may be used as long as the wording of the form complies substantially with the wording of the statutory form. *Tex. Estates Code §§752.003 and 752.004.* The form prescribed by statute is attached to this paper as Exhibit A.

#### a. “Opt in” Powers.

The statutory form lists 13 “powers” that a principal may grant to an agent. Using the method prescribed by the statute, a principal must initial before every power he or she wishes to grant an agent. Unless the principal initials before a power, that particular power will not be granted. Accordingly, should the principal wish to limited the powers granted to an agent, the principal should refrain from initialing in front of the powers he or she wishes to withhold.

Practice tip: In order to avoid forgery allegations, in addition to having the principal initial before the powers he or she wishes to grant, you should also consider instructing a principal to cross through each power he or she wishes to withhold. The reasoning is simple – it is more difficult for a bad apple to “uncross” a withheld power than to forge the principal’s initials before a power intended to be withheld.

Some of powers will be specifically addressed further down this paper, but the following is a complete list of the 13 powers:

- Real property transactions;
- Tangible personal property transactions;
- Stock and bond transactions;
- Commodity and option transactions;
- Banking and other financial institution transactions;
- Business operating transactions;
- Insurance and annuity transactions;
- Estate, trust, and other beneficiary transactions;
- Claims and litigation;
- Personal and family maintenance;
- Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;
- Retirement plan transactions; and
- Tax matters.

#### b. Specific “Opt in” Power.

In addition to the 13 “opt in” powers, the statutory form sets apart one additional power in which the principal must also “opt in” in order to grant the power to the agent. If the principal initials next to the provision, the agent will be authorized to make lifetime gifts from the principal’s estate. If the provision is not initialed by the principal, the power is not granted, and any gifts of the principal’s estate made by the agent will be invalid.

Unless this power is specifically expanded by the principal, this gifting power is limited to gifts that do not exceed the amount of the annual exclusion from the gift tax allowed for the calendar year in which the gift is made. For some principals with estates facing estate tax liability, this power could be effective in reducing the amount of the principal’s estate. However, if an agent makes gifts without authority, such gifts could be still be included in the principal’s estate. See *I.R.C. §2038; Estate of Casey v. Commissioner*, 91-2 U.S.T.C. 60,091 (4<sup>th</sup> Cir. 1991).

As explained later in this paper, this power can be an invitation for misuse and impropriety.

#### 4. Termination of Power of Attorney.

As discussed above, a durable power of attorney may be effective immediately or upon the principal's incapacity and is not necessarily affected by the principal's subsequent incapacity, but when does the durable power of attorney cease to be effective?

##### a. On Specific Date.

The principal may provide that the power of attorney terminates on a specified date listed on the power of attorney.

##### b. On Death of Principal.

Contrary to the beliefs of your potential clients, a durable power of attorney terminates upon the death of the principal. Any attempt by the principal to provide that the power of attorney can remain effective after his or her death will be invalid. Likewise, any attempts by the agent to act under the power of attorney after the principal's death will be improper.

##### c. On Qualification of Permanent Guardian of the Estate.

The powers of the agent terminate on the qualification of a permanent guardian of the estate for the principal. *Tex. Estates Code §751.052(a)*. Upon the guardian's qualification, the agent shall: (1) deliver all assets of the principal's estate to the guardian; and (2) provide an accounting to the guardian. *Id.*

##### d. On Qualification of Temporary Guardian of the Estate.

The powers of the agent terminate on the qualification of a temporary guardian of the estate of the principal and the court suspends the powers of the agent until the date the term of the temporary guardian expires. *Tex. Estates Code §751.052(b)*.

##### e. NOT on the Qualification of a Permanent or Temporary Guardian of the Person Only.

The powers of the agent do not terminate on the qualification of a permanent or temporary guardian of the person only.

##### f. On Divorce of Principal.

Unless the power of attorney specifically provides otherwise, if after the execution of the durable power of attorney the principal is divorced from a person who has been appointed as the principal's agent, the powers of the agent granted to the principal's former spouse terminate on the date the divorce or annulment of marriage is granted by a court. *Tex. Estates Code §751.053*. Note: the power of attorney is not terminated by separation or the filing for divorce, so if the principal still has capacity, the principal will want to consider revoking the power of attorney or else the estranged spouse will be able to transact the agent's business from the date of his incapacity through the date the divorce is granted by the Court. This can create serious headaches for the principal's family.

If no successor agents are named after the former spouse, the power of attorney will terminate and an Application for a Guardian of the Estate may be the only other option for an incapacitated principal.

##### g. On Agent's Breach of Fiduciary Duty.

When an agent takes actions that are

antagonistic to the principal, the breach of fiduciary duty terminates the agency relationship. *Remenchik v. Whittington*, 757 S.W.2d 836 (Tex.App.–Houston [14<sup>th</sup> Dist.] 1988, no writ). Practically, an agent that has committed a breach of fiduciary duty is not likely to cease acting under the power of attorney. However, another interested party may file a declaratory judgment action that the agency relationship has terminated due to the breach of fiduciary duty. Third parties relying on the power of attorney can be put on notice that they should be cautious in honoring the power of attorney pending the outcome of the dec action.

#### h. Notifying Third Parties of Termination.

Anytime a power of attorney is terminated, such a revocation should be provided to every third party who might be asked to honor the power of attorney. The revocation by, death or divorce of, or the qualification of a guardian of the estate of the principal does not terminate the agency relationship as to the innocent third party who, without actual knowledge of the termination, acts in good faith under or in reliance of the power. *Tex. Estates Code §751.054*. If a durable power of attorney is used, a third party who relies in good faith on the acts of an agent performed within the scope of the power of attorney is not liable to the principal. *Tex. Estates Code §751.053*.

### III. THE SUSPECT

#### A. Generally.

An agent under a power of attorney is a fiduciary. *Tex. Estates Code §751.101*. "A power of attorney creates an agency relationship, and an agent owes a fiduciary duty to its principal with respect to matters

within the scope of its agency." *Plummer v. Estate of Plummer*, 51 S.W.3d 840, 842 (Tex. App.–Texarkana 2001, pet. denied). "A fiduciary owes the principal a high duty of good faith, fair dealing, honest performance, and strict accountability." *Sassen v. Tanglegrove Townhouse Condominuum Ass'n*, 877 S.W.2d 489, 492 (Tex.App.–Texarkana 1994, writ denied).

#### B. Specifically.

An agent's fiduciary duties are many, but the Texas Probate Code provides guidance about a few these duties.

##### 1. Duty to Timely Inform.

The agent shall timely inform the principal of each action taken under the power of attorney. *Tex. Estates Code §751.102(a)*. However, the failure of an agent to timely inform, as to third parties, does not invalidate any action of the agent. *Tex. Estates Code §751.102(b)*.

##### 2. Duty to Maintain Records.

The agent shall maintain records of each action taken or decision made by the attorney in fact or agent. *Tex. Estates Code §751.103(a)*. The agent shall maintain all records until delivered to the principal, released by the principal, or discharged by a court. *Tex. Estates Code §751.056*.

##### 3. Duty to Account.

An agent has a duty to account for actions taken under the power of attorney. *Tex. Estates Code §751.101*. The principal may demand an accounting by the agent, and such accounting must include all material facts known to the agent that might affect the principal's rights. *Tex. Estates Code §751.104(a)*. The accounting must

including:

- All property of the principal coming into the agent's knowledge or possession;
- All actions taken or decisions made by the agent;
- A complete account of receipts, disbursements, and other actions of the agent;
- A listing of all property over which the agent has exercised control;
- The cash balance on hand and the name and location of the depository where the funds are kept;
- Each known liability; and
- Any other information that may be necessary to provide a full and definite understanding of the exact condition of the property belonging to the principal.

*Section 751.104(b) of the Texas Estates Code.*

In addition to the information that must be disclosed in an accounting, the agent shall also provide to the principal all documentation regarding the principal's property. *Tex. Estates Code §751.104(c).*

a. Suit to Compel Accounting.

The agent must provide the accounting within 60 days of the date of the demand for the accounting. If the agent fails or refuses to provide a complete accounting within the 60 days, the principal may file suit to: (1) compel the agent to deliver the accounting; or (2) terminate the power of attorney. *Tex. Estates Code §751.105.*

b. Standing to Demand Accounting.

The principal, any person designated by the principal, a guardian of the estate of the principal, or the personal representative of the estate of the principal

has standing to demand an accounting of the agent's actions. *Tex. Estates Code §751.005.*

Although a personal representative of the principal's estate may demand an accounting of the agent's actions taken under the principal's power of attorney, what happens if the agent is also requesting to be appointed as the personal representative? This situation may result in the agent being disqualified from serving as the personal representative. See *Tex. Estates Code §304.003.*

#### IV. THE ROOM

Although a power of attorney is an important document in an individual's estate plan, an agent may utilize this document as a license to engage in self-dealing. The following is a discussion of how some of the powers granted through a power of attorney can be misused by an agent.

##### A. Powers Relating to Stock and Bond Transactions and Commodity and Option Transactions.

An agent may be empowered with the authority to buy, sell, and exchange stocks, bonds, mutual funds, and all other types of securities and financial instruments, receive certificates and other evidences of ownership with respect to securities, exercise voting rights with respect to securities in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote. *Tex. Estates Code §752.104.* In addition, an agent may be empowered with the authority to buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call and put options on stocks and stock indexes traded on a regulated options exchange

and establish, continue, modify, or terminate option accounts with a broker. *Tex. Estates Code §752.105.*

From a practical perspective, an agent who is also a beneficiary under the principal's Will must walk a fine line when it comes to the agent's investment decisions on behalf of the principal. An agent may have to make decisions regarding allocations between growth investments (an investment decision which stands to benefit the agent, perhaps to the detriment of the principal) and income-producing investments (an investment decision which may stand to benefit the principal, which could mean a smaller inheritance for the agent). However, the agent has a duty of loyalty to the principal, and must put the principal's interests before those of the agent's. "The fiduciary relationship casts upon the profiting fiduciary the burden of showing the fairness of the transactions." *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 509 (Tex. 1980).

#### B. Powers Relating to Estate, Trust, and Other Beneficiary Transactions.

An agent may transfer all or part of an interest of the principal in real property, stocks, bonds, accounts with financial institutions, insurance, and other property to the trustee of a revocable trust created by the principal as settlor. *Tex. Estates Code §752.109.* Unless the power of attorney provides otherwise, this power is limited to the transfer of property to a revocable trust that has already been created by the principal – the agent may not use this power to create revocable trust to accomplish such a transfer. *Filipp v. Till*, 230 S.W.3d 197 (Tex.App.–Houston [14<sup>th</sup> Dist.] 2006, no pet.). This limitation is imposed on the agent because an agent does not possess the principal's "requisite

intent to create" the trust. *Id.*

Under the same analysis, an agent lacks the requisite intent to change the principal's estate plan.

#### C. Powers Relating to Insurance Contracts.

An agent may designate or change the beneficiary of an insurance or annuity contract, but the agent may not name himself as a beneficiary except to the extent that the agent was named as a beneficiary under the contract procured prior to the principal executing the power of attorney. *Tex. Estates Code §752.108(a) and (b).*

#### D. Powers Relating to Retirement Plan Transactions.

An agent may designate or change the designation of a beneficiary or benefits payable by a retirement plan, except that the agent may be named a beneficiary only to the extent the agent was a named beneficiary under the retirement plan before the durable power of attorney was executed. *Tex. Estates Code §752.113 (b) and (c).*

#### E. Powers Relating to Banking and Other Financial Institutions Transactions.

The *Durable Power of Attorney Act* does not address whether an agent may designate or change beneficiary designations on accounts other than insurance or annuity contracts. However, Sections 113.151 through 113.155 of the Estates Code provides that the original payee (for a P.O.D. account) or a party to a joint account (for a JTWRROS account) must sign a written agreement in order to: (1) designate a beneficiary of an account upon

the original payee's death; or (2) establish that deceased joint owner's interest in the account vests in the surviving owner of the account. Accordingly, an agent under a power of attorney cannot establish or change beneficiary designations.

Although an agent may not change beneficiary designations on bank accounts, the agent may be faced with a situation in which a principal has multiple accounts, some with and some without beneficiary designations. The situation may dictate that multiple accounts need to be utilized, but the agent must be careful to not interfere with the principal's estate plan by depleting an account with a beneficiary designation when an account without a designation could be utilized first. Compare *Plummer v. Estate of Plummer*, 51 S.W.3d 840 (Tex.App.–Texarkana 2001, pet denied), and *Tetens v. Garcia*, 1996 WL 656443 (Tex.App.–Austin 1996, no writ).

#### F. Gifts.

As mentioned above, the principal may authorize the agent to make gifts from the principal's estate, which could result in gifts to third parties or even to the agent himself. This power is ripe for breach of fiduciary duty lawsuits and guardianship of the estate proceedings. Accordingly, the agent should be extremely careful in making gifts under the authority derived from a power of attorney. The gifting power should be limited to specific purposes (i.e. tax planning and qualification for public benefits) and should not be utilized as an estate planning tool. Remember, the agent must be able to prove the fairness of the transaction. The agent may be able to point to the principal's prior gifts to establish the agent's actions are consistent with the principal's pattern of gifting.

#### V. THE MORAL OF THE STORY

Statutory durable powers of attorney can be a useful, inexpensive tool and may help to avoid costly guardianship proceedings. However, powers of attorney grant broad and sweeping powers to individuals that can be misused. While the statutory durable power of attorney can be a powerful and debilitating weapon, the fiduciary litigator should be aware of these pitfalls and understand the remedies available to protect the principal from financial abuse and tools to protect the agent from himself.

APPENDIX A

STATUTORY DURABLE POWER OF ATTORNEY