

BILL ANALYSIS

Senate Research Center
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S.B. 1650
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Jurisprudence
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Last session, Senator Hughes filed S.B. 1932. The Real Estate, Probate & Trust Law section of the State Bar of Texas ("REPTL") supported the bill. The House passed the House version of the bill out unanimously, and it was sent to the local calendar in the Senate, where it died the last day.

S.B. 1650 is an updated version of that bill, which contains a few new provisions. The Texas Real Estate & Probate Institute ("T-REP") supports S.B. 1650. T-REP is a spin-off of REPTL.

Firstly, S.B. 1650 changes the definition of "person" to "individual" because the definition of "person" could include more than an individual. Other conforming changes are made throughout the bill.

Section 3 of S.B. 1650 cleans up an issue that arose when different bills on similar subjects passed in a previous session, causing the Estates Code to contain an orphaned provision that needs to be moved. S.B. 1650 moves the orphaned provision to the section where it belongs.

Also in Section 3, S.B. 1650 authorizes a court to suspend rather than revoke the durable power of attorney (DPOA) during a permanent guardianship. Currently, if a permanent guardian of an incapacitated person's estate is appointed, the DPOA is automatically revoked. However, it may be beneficial to merely suspend the DPOA during the permanent guardianship, with the option of reinstating the DPOA as a lesser restrictive alternative to guardianship in the future. The bill enables this.

Section 4 of S.B. 1650 authorizes the Texas Department of Family and Protective Services to file an action questioning the actions of an agent under a DPOA, which is what the statute intended to do, but used an incorrect reference. Also in Section 4, S.B. 1650 authorizes the court to award costs and attorneys' fees as deemed equitable and just when a person files an action questioning the actions of an agent under a DPOA. Though these actions questioning agents can be a good tool to stop financial abuse, they can also be used as a tool to harass family members who are an agent under a DPOA. The potential for the court to adjust the fee allocation is intended to disincentivize the filing of harassing or frivolous suits by such persons.

In Section 6, S.B. 1650 expands the definition of the grant of authority to an agent over "business operation transactions" to transactions beyond just those in a partnership, to include transactions related to a limited liability company.

In Section 7, S.B. 1650 provides that a court does not have to approve an agent executing a disclaimer if the agent is given the power to execute such a disclaimer in the DPOA.

As proposed, S.B. 1650 amends current law relating to durable powers of attorney and the construction of certain powers conferred in those durable powers of attorney.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 751.002(5), Estates Code, to redefine "principal."

SECTION 2. Amends Section 751.00201, Estates Code, as follows:

Sec. 751.00201. MEANING OF DISABLED OR INCAPACITATED FOR PURPOSES OF DURABLE POWER OF ATTORNEY. Provides that an individual, rather than a person, is considered disabled or incapacitated for purposes of the durable power of attorney, unless otherwise defined by a 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, the individual is determined to be mentally incapable of managing the individual's financial affairs. Makes conforming changes.

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

(a) Provides that, if, after execution of a durable power of attorney, a court appoints a:

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

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

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

(B) confirms the validity of the appointment of the named agent.

Deletes existing text providing that, if, after execution of a durable power of attorney, a court of the principal's domicile appoints a permanent guardian of the estate of the principal, the powers of the agent terminate on the qualification of the guardian of the estate.

(a-1) Requires the agent, if the powers and authority of an agent are revoked as provided by Subsection (a), to:

(1) deliver to the guardian of the estate all assets of the ward's, rather than incapacitated person's, estate that are in the possession of the agent; and

(2) makes no changes to this subdivision;

SECTION 4. Amends Section 751.251, Estates Code, by amending Subsection (a) and adding Subsection (d), as follows:

(a) Authorizes the following 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:

(1)-(3) makes no changes to these subdivisions;

(4) a governmental agency with authority to provide protective services to the principal, rather than a governmental agency with regulatory authority to protect the principal's welfare; and

(5) makes no changes to this subdivision.

(d) Authorizes the court, in an action brought under Section 751.251 (Judicial Relief), to award costs and reasonable and necessary attorney's fees in an amount the court considers equitable and just.

SECTION 5. Amends Section 752.001(a), Estates Code, as follows:

(a) Authorizes an individual to use a statutory durable power of attorney to grant an agent powers with respect to an individual's property and financial matters. Deletes existing text authorizing a person to use a statutory durable power of attorney to grant an attorney in fact or agent powers with respect to a person's property and financial matters.

SECTION 6. Amends Section 752.107, Estates Code, as follows:

Sec. 752.107. BUSINESS OPERATION TRANSACTIONS. Provides that the language conferring authority with respect to business operating transactions in a statutory durable power of attorney empowers the agent, subject to the terms of an agreement or other document governing or relating to an entity or entity ownership interest, to the extent the agent is permitted by law to act for the principal and unless the power of attorney provides otherwise, to:

(1) operate, buy, sell, enlarge, reduce, or terminate an ownership, rather than a business, interest;

(2) perform a duty or discharge a liability, or exercise in person or by proxy a right, power, privilege, or option that the principal has, is authorized to have, or claims to have;

(3) enforce the terms of an agreement or other document governing or relating to an entity or entity ownership interest;

(4) defend, submit to arbitration, settle, or compromise litigation or an action to which the principal is a party because of an entity ownership interest;

(5) 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 a certificated or uncertificated ownership interest;

(6) defend, submit to alternative dispute resolution, settle, or compromise litigation to which the principal is a party concerning a certificated or uncertificated ownership interest;

(7) with respect to a business or entity owned solely by the principal:

(A) continue, modify, renegotiate, extend, and terminate a contract made by or on behalf of the principal with respect to the business or entity;

(B) determine:

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

(ii) makes no changes to this subparagraph;

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

(iv) makes no changes to this subparagraph; and

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

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

(D) makes conforming changes to this paragraph;

(8) makes a nonsubstantive and conforming change to this subdivision;

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

(10) sell or liquidate a business or entity or all or part of the assets of the business or entity;

(11) makes a nonsubstantive and conforming change to this subdivision;

(12) prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to a business or entity and make related payments; and

(13) pay, compromise, or contest taxes or assessments and perform any other act to protect the principal from illegal or unnecessary taxation, fines, penalties, or assessments with respect to a business or entity, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

Deletes existing text providing that the language conferring authority with respect to business operating transactions in a statutory durable power of attorney empowers the attorney in fact or agent to take certain actions.

SECTION 7. Amends Section 240.008, Property Code, by amending Subsection (c) and adding Subsection (c-1), as follows:

(c) Creates an exception under Subsection (c-1).

(c-1) Provides that a disclaimer described by Subsection (c)(4) (relating to a disclaimer that would result in an interest in or power over property passing to the person making the disclaimer) does not require court approval if the disclaimer is authorized under Subtitle P (Durable Power of Attorney), Title 2, Estates Code.

SECTION 8. Repealers: Sections 751.052 (Relation of Attorney in Fact or Agent to Court-Appointed Guardian of Estate) and 751.133(b) (relating to authorizing a court to suspend the powers of an agent on the qualification of the temporary guardian of the estate until the date the term of the temporary guardian expires), Estates Code.

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

SECTION 10. Makes application of Section 752.107, Estates Code, as amended by this Act, prospective.

SECTION 11. Makes application of Section 240.008, Property Code, as amended by this Act, prospective.

SECTION 12. Effective date: September 1, 2023.