

Date: August 30, 2017
To: All Texas Agents
From: FNTI Underwriting Staff
RE: Significant Legislation – 85th Legislative Session

Major Over-Haul of the Statutory Durable Power of Attorney Act (HB 1974)

This is a lengthy bill with many convoluted twists and turns. It makes many changes to Chapters 751 and 752 of the Texas Estates Code, adding statutes, while amending and repealing others. It will necessitate that we establish new procedures in many important respects. The new requirements imposed by this legislation are somewhat mind-numbing when viewed in the context of our business due to the large volume of POAs utilized in real estate transactions and the rigid timetables imposed on accepting the POA. There is no way to make the new statutory requirements simple. Note that the statutes now refer to the attorney in fact as the “agent.” When that term is used in this bulletin, it is referring to the agent under the POA, not the title agent.

New §751.201 provides that a person who is presented with and asked to accept a durable POA by an agent must accept the POA or request an agent’s certification (new statutory certification form was also adopted) or an opinion of counsel no later than the 10th business day after the POA is presented. If the POA becomes effective upon on the disability or incapacity of the principal, the person being asked to accept the POA may request the certification include a written statement from a physician stating the principal is incapacitated. The person requesting the agent certification must accept the POA for use no later than the 7th business day after the certification is received.

The good news is that a certification made by the agent in compliance with §751.202 is conclusive proof of the factual matters stated in the certification.

In new §751.206, the allowable grounds for refusing to accept a POA are spelled out. One of the grounds is the refusal of the agent to provide the certification as requested, or if the certification provided is incomplete, unclear, or deficient. Many other grounds for refusal are set out in the laundry list. A title company can still decline to accept a POA if they have valid concerns about whether the POA is genuine, valid and still in effect, whether the agent’s authority is still in effect, whether the agent has exceeded his/her authority and if they have actual knowledge that the POA has been revoked.

The reason the allowable grounds for refusing to accept a POA have become so important is because new §751.207 requires that a person who refuses to accept a Durable POA shall provide the agent with a written statement advising the agent of the reason for the refusal to accept the POA by the date the person was otherwise required to accept the POA. The statute prescribes the content of the written statement if the grounds for refusal are related to certain events; otherwise, the statement should include an explanation.

§751.212 creates a cause of action against the person refusing to accept a durable POA for use in a transaction and authorizes a court to order the person to accept the POA and awarding the agent/principal their attorney’s fees and court costs.

The statutory durable POA form has also been amended in various respects and the new form becomes effective Sept 1, 2017. The form now contains new provisions that the principal can initial that relate to co-agents and certain actions of the agent to make a gift, change rights of survivorship or beneficiary designations, change an inter vivos trust, etc.

Some of the other changes implemented by the new law include authority for a principal to designate two or more persons to act as co-agents with each having authority to act independently of the other(s). ***For insuring purposes, FNTI will require that a written consent from the other co-agents be obtained and furnished to the title agent.*** Also, the statute and the statutory durable POA form now incorporate provisions for use of a POA in home equity loan and reverse mortgage transactions. *Note – the POA must still be executed at the office of the title company or lender for home equity loans.*

§752.102 is amended to expand the list of real estate transaction powers conferred on an agent to include the power to handle mineral transactions, the power to designate a principal's homestead, and the power to mortgage and encumber real property and execute documents necessary to create a lien against the principal's homestead as provided by the HEL constitutional amendment. It also consents to the creation of a lien against property owned by the principal's spouse in which the principal has a homestead interest.

Underwriting Requirement: *FNTI will require that the agent presenting the POA provide the title agent with a satisfactory certification for any POAs to be accepted for use in an insured real estate transaction. The certification from the agent should be recorded with the POA (or separately, if the POA was previously recorded). The insuring requirement for an agent certification will apply to POAs executed prior to and after September 1, 2017.*

We advise that all escrow personnel be notified of the new insuring requirement and that a Schedule C requirement be included on Commitments to require an agent presenting a POA for use to provide a certification to the title agent. Since the Commitment is not always issued within 10 business days of receipt of the POA, escrow personnel should specifically make the request upon receipt of a POA.

Adverse Possession Among Co-Tenant Heirs. (SB1249)

This legislation adds §16.0265 to the Civil Practice & Remedies Code, effective September 1, 2017, creating a mechanism to allow an intestate heir (or their successor) to perfect limitation title by adverse possession against the other intestate heirs who simultaneously acquired identical interests in the property by continuous, uninterrupted possession for the 10 prior years, provided the possessory co-tenant heir held the property in peaceful and exclusive possession, cultivated, used or enjoyed the property and paid all ad valorem taxes.

The new statute goes on to list several restrictions on the ability of the possessory co-tenant heir to claim title by adverse possession, such as zero contributions to taxes or maintenance by another co-tenant heir, no written agreements among any of the co-tenant heirs relating to possession or rental, no challenges asserted against the exclusive possession, and no notices filed in the deed records by other co-tenant heirs.

The statute additionally provides the method to perfect the adverse possession title, by recording both an Affidavit of Heirship and Affidavit of Adverse Possession, or a combination thereof, publish notice in a newspaper for four consecutive weeks, and provide notice by certified mail to the other co-tenant heirs. The requirements for the content of the Adverse Possession Affidavit are also set out.

Once the affidavits are filed, one of the other co-tenant heirs can file a controverting affidavit or file suit to recover their interest no later than the 5th anniversary from the date the Adverse Possession Affidavit was recorded.

Without a title instrument, the adverse possession allowed under the statute is limited to 160 acres unless a larger space was enclosed.

Lis Pendens Expungement (SB 1955/HB 4086)

This legislation strengthened the expungement process found in §12.0071(f) of the Property Code to make clear that recordation of a certified copy of an order expunging a notice of lis pendens is recorded, the notice and any information derived from the notice does not constitute actual or constructive notice of any matter contained in the notice or of any matter relating to the underlying lawsuit.

The statute as amended now specifically provides that an interest in the real property may be transferred or encumbered free of all matters asserted or disclosed in the notice and all claims or other matters asserted or disclosed in the action in connection with which the notice was filed.

This statutory amendment becomes effective on September 1, 2017, but applies only to a certified copy of an expungement order of a lis pendens that is recorded on or after the effective date.

Notarization Procedures

(SB 1098 – **Notary's Record Book**) – This bill amended §406.014 of the Government Code and §121.012 of the Civil Practice & Remedies Code to require that a notary's record book show the signer's, grantor's, or maker's "mailing address" rather than their residence or alleged residence. The same change was made with respect to the witness information and information on a party introducing the signer to the notary that is maintained in the notary record book.

This change in the law is effective September 1, 2017, and applies to notarizations made on or after that date. ***Notaries should make appropriate revision to their record book.***

(HB 1217 – **E-Notarization**) This bill adopted new subsections to the Civil Practice & Remedies Code and Government Code to implement remote e-notarization procedures for Texas (person appears before the notary by an interactive two-way audio and video communication that qualifies as an online notarization). The acknowledgment will include a space for an online notarization appearance and the notary must be licensed as an online notary.

This bill is not effective until July 1, 2018, and the Secretary of State's (SOS) office will be developing standards and imposing rules for the new online notarization procedures, including rules for credential analysis (third party service affirms the validity of government-issued ID) and identity proofing. Once the SOS issues the rules, a separate bulletin will be issued addressing the specifics.

Proposed Constitutional Amendment Relating to Home Equity Loans (SJR 60)

This change, if approved by the voters, will take effect on January 1, 2018, and will make the following changes:

- **Authorizes the creation of home equity loans on homestead property designated for agricultural use.**
- Lowers the fee limit from 3 percent to 2 percent.
- Excludes three fees from the fee cap limit, including title insurance.
- Permits the refinance of a home equity loan with a non-HEL rate and term refi if certain specified criteria are satisfied.
- Revises the Notice Concerning Extensions of Credit.

This Underwriting Bulletin becomes a part of the principles and practices with which you are to comply under the terms of your Underwriting Agreement with First National Title Insurance Company. Should the content of this bulletin address the closing and escrow function, this information should be considered a directive and part of the principles and practices if non-compliance would result in liability to FNTI under either the insured closing service letter or policy of title insurance notwithstanding that the Underwriting Agreement does not include the closing and escrow functions of your agency.

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. IF YOU WANT YOUR AGENT TO HAVE THE AUTHORITY TO SIGN HOME EQUITY LOAN DOCUMENTS ON YOUR BEHALF, THIS POWER OF ATTORNEY MUST BE SIGNED BY YOU AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A TITLE COMPANY.

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

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

I, _____, appoint _____, as my agent to act for me in any lawful way with respect to all of the following powers that I have initialed below. (YOU MAY APPOINT CO-AGENTS. UNLESS YOU PROVIDE OTHERWISE, CO-AGENTS MAY ACT INDEPENDENTLY.)

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 agent compensation (initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to compensation that is reasonable under the circumstances):

- _____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf and to compensation that is reasonable under the circumstances.
- _____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf but shall receive no compensation for serving as my agent.

Special instructions applicable to co-agents (if you have appointed co-agents to act, initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to act independently):

- _____ Each of my co-agents may act independently for me.
- _____ My co-agents may act for me only if the co-agents act jointly.
- _____ My co-agents may act for me only if a majority of the co-agents act jointly.

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

- _____ I grant my agent 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.

POWERS GRANTED HEREIN SHALL INCLUDE, BUT NOT BE LIMITED TO, THE EXECUTION OF THE CLOSING DOCUMENTS FOR THE PROPERTY LOCATED AT _____ (FULL PROPERTY HERE) AND BEING MORE PARTICULARLY DESCRIBED IN THE LEGAL DESCRIPTION LISTED BELOW:

(LEGAL DESCRIPTION FROM COMMITMENT) _____

UNLESS YOU DIRECT OTHERWISE BELOW, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT TERMINATES.

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. Termination of this durable power of attorney is not effective as to a third party until the third party has actual knowledge of the termination. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney. The meaning and effect of this durable power of attorney is determined by Texas law.

If any agent named by me dies, becomes incapacitated, resigns, or refuses to act, or if my marriage to an agent named by me is dissolved by a court decree of divorce or annulment or is declared void by a court (unless I provided in this document that the dissolution or declaration does not terminate the agent's authority to act under this power of attorney), I name the following (each to act alone and successively, in the order named) as successor(s) to that agent:

_____ .

Signed this _____ day of _____, 2017.

Name: _____

State of _____

County of _____

This document was acknowledged before me on the ____ day of _____, 2017 by

Name: _____

Signature of Notarial Officer

Printed Name: _____

My commission expires: _____

IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, you establish a "fiduciary" relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated or revoked by the principal or by operation of law. A fiduciary duty generally includes the duty to:

- (1) act in good faith;
- (2) do nothing beyond the authority granted in this power of attorney;
- (3) act loyally for the principal's benefit;
- (4) avoid conflicts that would impair your ability to act in the principal's best interest; and
- (5) disclose your identity as an agent when you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's Name) by (Your Signature) as Agent

In addition, the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code) requires you to:

- (1) maintain records of each action taken or decision made on behalf of the principal;
- (2) maintain all records until delivered to the principal, released by the principal, or discharged by a court; and
- (3) if requested by the principal, provide an accounting to the principal that, unless otherwise directed by the principal or otherwise provided in the Special Instructions, must include:
 - (A) the property belonging to the principal that has come to your knowledge or into your possession;
 - (B) each action taken or decision made by you as agent;
 - (C) a complete account of receipts, disbursements, and other actions of you as agent that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately;
 - (D) a listing of all property over which you have exercised control that includes an adequate description of each asset and the asset's current value, if known to you;
 - (E) the cash balance on hand and the name and location of the depository at which the cash balance is kept;
 - (F) each known liability;
 - (G) any other information and facts known to you as necessary for a full and definite understanding of the exact condition of the property belonging to the principal; and
 - (H) all documentation regarding the principal's property.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. An event that terminates this power of attorney or your authority to act under this power of attorney includes:

- (1) the principal's death;
- (2) the principal's revocation of this power of attorney or your authority;
- (3) the occurrence of a termination event stated in this power of attorney;
- (4) if you are married to the principal, the dissolution of your marriage by a court decree of divorce or annulment or declaration that your marriage is void, unless otherwise provided in this power of attorney;
- (5) the appointment and qualification of a permanent guardian of the principal's estate; or
- (6) if ordered by a court, the suspension of this power of attorney on the appointment and qualification of a temporary guardian until the date the term of the temporary guardian expires.

Liability of Agent

The authority granted to you under this power of attorney is specified in the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under Chapter 32 of the Texas Penal Code.

THE AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

CERTIFICATION OF DURABLE POWER OF ATTORNEY

Durable Power of Attorney (hereinafter “power of attorney”):

Date: _____

Principal: _____

Agent: _____

Property: _____

I, _____ (Agent), certify under penalty of perjury that:

1. I am the agent named in the power of attorney validly executed by the Principal on _____ (date), and the power of attorney is now in full force and effect.
2. The Principal is not deceased and is presently domicile in _____ (city and state/territory or foreign country).
3. To the best of my knowledge after diligent search and inquiry:
 - a. The power of attorney has not been revoked by the Principal or suspended or terminated by the occurrence of any event, whether or not referenced in the power of attorney;
 - b. At the time the power of attorney was executed, the Principal was mentally competent to transact legal matters and was not under the undue influence of any other person;
 - c. A permanent guardian of the estate of the Principal has not qualified to serve in that capacity;
 - d. My powers under the power of attorney have not been suspended by a court in a temporary guardianship or other proceeding;
 - e. If I am (or was) the Principal’s spouse, my marriage to Principal has not been dissolved by court decree of divorce or annulment or declared void by a court, or the power of attorney provides specifically that my appointment as the Agent for the Principal does not terminate if my marriage to the Principal has been dissolved by court decree of divorce or annulment or declared void by a court;
 - f. No proceeding has been commenced for a temporary or permanent guardianship of the person or estate, or both, of the Principal; and
 - g. The exercise of my authority is not prohibited by another agreement or instrument.
4. If under its terms the power of attorney becomes effective on the disability or incapacity of

the Principal or at a future time or on the occurrence of a contingency, the Principal now has a disability or is incapacitated or the specified future time or contingency has occurred.

5. I am acting within the scope of my authority under the power of attorney, and my authority has not been altered or terminated.
6. N/A (if this section is not applicable, check the box)

If applicable, I am the successor to _____ (predecessor agent), who has resigned, died or become incapacitated, is not qualified to serve or declined to serve as agent or is otherwise unable to act. There are no unsatisfactory addition's remaining under the power of attorney that preclude my acting as successor agent.

7. I agree not to:
 - a. Exercise any powers granted by the power of attorney if I attain knowledge that the power of attorney has been revoked, suspended, or terminated; or
 - b. Exercise any specific powers that have been revoked, suspended, or terminated.
8. A true and correct copy of the power of attorney is attached to this document.
9. If used in connection with an extension of credit under Section 50 (a) (6), Article XVI, Texas Constitution, the power of attorney was executed in the office of the lender, the office of a title company, or the law office of

_____ .

10. If applicable, the undersigned affirms that Principal executed a Durable Power of Attorney on _____ (date of POA), wherein (1) the Principal had the mental capacity to understand the power conveyed by the Principal to the Agent on the date the Principal executed the Durable Power of Attorney and (2) that the Principal has since become incapacitated and is currently unable to manage the Principal's personal or financial affairs. A letter from Principal's physician attesting to the Principal's physical or mental capacity, personal stability or maturity of judgment needed to effectively manage the Principal's personal or financial affairs is attached hereto as Exhibit A and incorporated herein by reference.
11. The undersigned acknowledge that _____ (title company) and its directors, officers, employees, agents, stockholders, its underwriters and Affiliates (collectively, "Indemnified Parties") are relying upon the representations in this Certification as being true and correct. I, my successor and/or assigns, shall fully indemnify, hold harmless and defend the Indemnified Parties from and against all claims, demands, actions, suits, damages, liabilities, losses, settlements, judgments, costs and expenses (including but not limited to reasonable attorney's fees and costs) (collectively, "Claim"), whether or not involving a third party claim, which arise out of or relate to the Agent acting without proper authority as granted by the Principal under the Durable Power of Attorney and/or any false representations made herein to the Indemnified Parties for reliance by the Indemnified Parties in closing the proposed transaction of the aforementioned Property, whether or not caused by the negligence

of _____ (title company), or any other Indemnified Party and whether or not the relevant Claim has merit.

Dated this _____ day of _____, 20_____.

(Signature of Agent)

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 20_____.

Notary Public for: _____

My commission expires: _____

EXHIBIT A
(Doctor's Letter)