

**A FIDUCIARY'S DUTY TO INSURE AND  
THE INSURANCE AGENT'S DUTY TO ADVISE**

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**REPORTED CASES**

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Probate proceedings and estate administration  
Non-immigrant visas: change of status applications and consular processing  
Immigrant visas: family- and employment-based petitions, labor certifications (PERM), permanent residence and consular processing of immigrant visas, waivers of inadmissibility  
Naturalization and derivative citizenship  
Analysis of impact of immigration law issues on estate planning, probate, and family law matters

## **PUBLICATIONS AND PRESENTATIONS**

Danuta Villarreal, *To Protect the Defenseless: The Need For Child-Specific Substantive Standards For Unaccompanied Minor Asylum-Seekers*, 26 HOUS. J. INT'L L. 743 (2004).

*Immigration Issues Affecting University Students*, University of Houston Law Center Joseph Vail Immigration Workshop, Houston, TX, Apr. 18, 2009.

*Employment Based Immigration*, Immigration Law for Students Fall 2009 Symposium, Texas Tech University School of Law, Lubbock, TX, Oct. 29, 2009.

*A Few Things to Know If One Crosses Over into Immigration Law*, 12<sup>th</sup> Annual Texas Minority Attorney Program, May 2014 (Speaker)

*Obtaining “Ancillary” Benefits*, State Bar of Texas, 13<sup>th</sup> Annual Advanced Immigration Law Course, Houston, February 2015 (Co-Author/Speaker).

*Employment-based Adjustment: How to Address Tricky Admissibility Issues*, AILA Texas Chapter Spring 2016 Conference, April 2016 (Speaker).

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## TABLE OF CONTENTS

I.	PREFACE.....	1
II.	INTRODUCTION.....	1
III.	WHO NEEDS INSURANCE.....	1
A.	Those with Property or Income .....	2
B.	Those under Contract .....	2
1.	Landlord and Tenant .....	2
2.	Borrower.....	2
a.	Security Agreement Covering Goods .....	2
b.	Deed of Trust and Real Property .....	2
3.	Buyer and Seller .....	2
4.	Construction .....	2
5.	Buy-Sell, Business Continuation, and Other Shareholder Agreements .....	2
C.	Those with Duties of Support.....	2
1.	Statutory .....	2
a.	Parents.....	2
b.	Spouses .....	2
c.	Adult Children—Filial Support .....	3
2.	Judicial.....	3
a.	Temporary Orders.....	3
b.	Final Decree of Divorce and Agreement Incident to Divorce .....	3
D.	Fiduciaries .....	3
1.	Generally .....	3
a.	Insuring the Estate .....	3
b.	Insuring the Fiduciary.....	3
i.	The Professional.....	3
ii.	Family .....	3
c.	Powers, Duties, and Preliminary Diligence .....	3
2.	Agent .....	4
a.	Controlling Law.....	4
i.	Common Law Powers of Attorney .....	4
(A)	Form.....	5
(B)	Unwritten Powers of Attorney—Implied Agency Agreement.....	5
(C)	Duties .....	5
(D)	Powers.....	5
(E)	Termination.....	5
ii.	Durable Power of Attorney Act .....	5
(A)	Duties .....	5
(B)	Authority .....	6
(C)	Choice of Law .....	6
(D)	Multiple Durable Powers of Attorney .....	6
iii.	Statutory Durable Power of Attorney .....	6
(A)	Both Chapters 751 and 752 Apply .....	6
(B)	The Statutory Form is a Special Power of Attorney .....	6
(C)	Agent's Duties.....	6
(D)	The 2017 REPTL Financial Power of Attorney Bill.....	6
iv.	Prior Statutes.....	7
(A)	1971 and earlier.....	7
(B)	January 1, 1972 to August 27, 1989.....	7
(C)	August 28, 1989 to August 31, 1993.....	7
v.	Foreign and Military Powers of Attorney .....	7
b.	Powers and Duties .....	7
i.	Immediate vs. Springing .....	7

ii.	When Does Liability Attach .....	7
iii.	Co-Agents .....	8
c.	Avoiding Personal Liability .....	8
i.	Disclosure of Principal .....	8
ii.	Implied Warranty of Authority .....	8
d.	Termination of Agent's Authority .....	8
i.	Principal's revocation .....	8
ii.	Agent's Renunciation or Resignation .....	8
iii.	Agent's Removal .....	8
iv.	Marriage .....	8
v.	Divorce or Annulment .....	8
vi.	Insolvency .....	8
vii.	Incapacity of Principal .....	8
viii.	Appointment of Guardian of Estate .....	9
(A)	Permanent .....	9
(B)	Temporary .....	9
ix.	Lapse .....	9
x.	Death of Principal .....	9
xi.	Extension Pending Actual Knowledge of Termination .....	9
xii.	Irrevocable Powers of Attorney—"Coupled with an interest" .....	9
3.	Trustee .....	9
a.	The Trust Instrument .....	9
i.	Limitations of Trust Code, Section 111.0035. ....	9
ii.	Limitations of Trust Code, Section 114.007 .....	10
b.	Trust Code .....	10
i.	Uniform Prudent Investor Act .....	10
ii.	Prudent Investor Rule .....	10
iii.	Duty of Care .....	10
iv.	Diversification .....	10
v.	Amendment, Elimination, or Waiver .....	10
vi.	Duties at Inception of Trusteeship .....	10
vii.	Multiple Trustees .....	10
viii.	Interpreting Trust Documents .....	11
c.	Powers .....	11
d.	Life Insurance .....	11
i.	As an investment .....	11
ii.	ILIT .....	11
e.	Delegation to Non-Trustees .....	11
4.	Guardian .....	11
a.	Authority .....	11
i.	Generally .....	11
ii.	Exercise of Authority under Court Order .....	11
iii.	Exercise of Authority without Court Order .....	11
iv.	Multiple Guardians .....	11
b.	Duty of Care .....	11
i.	Property generally .....	11
ii.	Investments .....	11
iii.	Investment plans .....	12
5.	Executor or Administrator .....	12
a.	Authority .....	12
i.	Generally .....	12
(A)	Presumption of Broad Powers .....	12
(B)	But Power of Sale is an Exception .....	12
ii.	Dependent Administration .....	12
(A)	Exercise of Authority under Court Order .....	12
(B)	Exercise of Authority without Court Order .....	12



(1) Permanent representative .....	12
(2) Temporary dependent administrator .....	12
(C) Perishable or burdensome personal property .....	12
iii. Independent Administration .....	12
iv. Administration with Will Annexed.....	12
v. Multiple Executors or Administrators.....	12
b. Duties .....	13
i. Estates Code.....	13
(A) Duty of care.....	13
(B) Duty to diversify .....	13
(C) Businesses in a dependent administration .....	13
(D) Nonprobate assets .....	13
ii. Common Law.....	13
6. Other Formal Fiduciaries .....	13
7. Informal Fiduciaries .....	13
IV. INSURABLE INTEREST.....	14
A. Executors and Administrators.....	14
B. The Homestead.....	14
1. Homesteader .....	14
2. Life Tenant.....	14
3. Remainderman.....	14
4. Co-Tenant.....	15
V. TYPES OF INSURANCE.....	15
A. Liability & Property .....	15
1. Liability only .....	15
a. Personal liability insurance.....	15
b. Commercial liability insurance .....	15
i. Commercial general liability.....	15
(A) Covered risks.....	15
(1) Premises operations .....	15
(2) Products-completed operations .....	15
(B) Types of coverage .....	15
(1) Property damage.....	15
(2) Bodily injury .....	15
(3) Personal injury.....	15
(4) Advertising injury .....	16
(5) Medical payments .....	16
ii. Directors & officers .....	16
iii. Errors & omissions .....	16
2. Property only .....	16
a. Personal-use property insurance .....	16
b. Commercial insurance .....	16
c. Liability & property combined .....	16
d. Homeowners' insurance.....	16
i. Liability.....	16
ii. Coverage for Firearms Injuries .....	16
iii. Property.....	16
(A) Coverage may be all-risk or named-peril .....	16
(B) Flood insurance .....	16
e. Automobile insurance.....	17
i. Liability.....	17
ii. Property.....	17
(A) Collision .....	17
(B) Comprehensive.....	17

B. Title .....	17
C. Fidelity.....	17
D. Workers' Compensation.....	17
 VI. INSURANCE AGENTS AND BROKERS.....	17
A. Texas.....	18
1. Agent License; Designated Product Certificate.....	18
2. General Agent Licensing and Continuing Education Requirements Are Insufficient .....	18
3. Agent for the Insurer.....	18
4. The Agent's Duties .....	18
B. Failure to Provide Agreed Coverage .....	18
1. Standard of Care .....	18
2. When Duty Arises.....	18
3. Examples .....	18
C. Failure to Advise Promptly of Rejection or Lack of Coverage .....	19
1. Standard of Care .....	19
2. Elements .....	19
3. Examples .....	19
D. Liability for Inadequate Coverage.....	19
1. An Agent is Generally Not Liable .....	19
2. Duty to Advise .....	19
a. Agreement.....	19
b. Reliance .....	19
c. Special relationship.....	20
3. Fact Patterns .....	20
 VII. RISK MANAGERS .....	20
A. Defined .....	20
B. Qualifications .....	20
1. CPCU.....	20
2. CIC .....	20
3. ARM.....	21
4. CRM .....	21
C. Licensing .....	21
1. Exemptions .....	21
2. Public Location.....	21
D. Dual Compensation .....	21
E. Violations .....	21
1. Civil Penalty .....	21
2. Criminal Penalty .....	21
3. Reporting Required.....	21
4. Validity of Insurance Contract .....	21
F. Terms of Engagement.....	21
1. One-Time Review.....	21
2. Continuing Review .....	22
 VIII. TIPS AND OBSERVATION.....	23
A. An Editorial Regarding Insurance Agent vs. Insurance Analyst vs. Risk Manager .....	23
1. Insurance Agent .....	23
2. Insurance Analyst .....	23
3. Risk Manager.....	24
4. Choosing.....	24
5. The Problem with Tips .....	24
B. When the Named Insured Dies.....	24
1. Don't Remove the Deceased's Name from Any Policy .....	25
2. Add the Personal Representative as Named Insured .....	25

3. Coverage May Lapse on Death Anyway .....	25
C. The Residence .....	25
1. Actual Residence .....	25
2. Vacant vs. Unoccupied.....	25
3. Observations .....	25
4. Suggestions.....	26
D. The Agent under a Power of Attorney .....	26
1. Learn from Corporate Agents .....	26
2. Minimize an Agent's Exposure to the Duty to Insure .....	26
E. Trustees May Shift Risk .....	26
F. The Executor .....	26
IX. CONCLUSION .....	26
APPENDIX A Fiduciary Checklist.....	28
APPENDIX B Power of Attorney Summary .....	29
APPENDIX C Durable Power of Attorney Legislative History .....	30
APPENDIX D Communicating with the Executor .....	33
APPENDIX E Communicating with the Agent .....	34



## A FIDUCIARY'S DUTY TO INSURE AND THE INSURANCE AGENT'S DUTY TO ADVISE

### I. PREFACE

The resources and examples here focus on property and liability insurance ("property and casualty" in the Texas Insurance Code) and related risks. However, the legal principles are equally applicable to life, health, long-term care, and other types of insurance.

### II. INTRODUCTION

A probate client called: "The car insurance is about to cancel for nonpayment, and you still haven't filed the application. This is becoming a money pit. Do I pay the premium?"

Three years ago I didn't have an answer. Now, I still don't,<sup>1</sup> but I sound smarter, thanks to a storm.

My house flooded in Hurricane Harvey. So did my parents', two miles west. As I canoed through Meyerland Section 3 that day, my pants buzzed. I pulled out a wet Ziploc baggie, and held my iPhone to my ear, baggie and all. "Hello?" "Is the parents' house insured?" asked my sister. "I don't know," I replied.

I did know because I had paid the premium myself. I just forgot, lost in Waterworld.

To its credit, my brain immediately began assigning blame and making excuses. I kept my thoughts to myself, gathering them for the coming inquisition. Yes, I was each parent's agent under a power of attorney. Yes, they relied on me to tend their business. So what? Nobody asked me to get flood insurance. The house was paid off anyway, so who cares? It wasn't required by a lender anymore. The agent never said anything. Wouldn't he have prompted me? And who buys flood insurance on a 56-year old home in a neighborhood that never flooded?

Roy Hall, that's who. Decades after Mother and Daddy paid off the mortgage, Daddy kept flood insurance in place. If only out of inertia, I kept the policy in force and continued paying the premiums, all the way through Harvey.

That call bothered me, even after remembering they were insured. What would I have told a client? Was I a fiduciary? What is a fiduciary's duty with respect to insurance? When does it attach? What's to be done about it? Is the family insurance agent the right one to consult? And what about me, advisor to agents, executors, and trustees? Insurance coverage is nowhere near my comfort zone much less competence. If I don't recognize adequate coverage when I see it, how do I advise clients?

The answers are as clear as they are disturbing. Fiduciaries have a duty to insure in the usual amounts and coverages, and are liable for uninsured losses to the extent coverage was reasonably available. Insurance agents generally have no duty to advise when coverage is inadequate or overpriced. Fiduciaries stand alone.

The insured must assess his or her own needs and specify the coverage requested. An insurance analyst can review risks and suggest specific coverage, but is not liable for inadequate coverage absent an explicit agreement or representation.

At best, all most attorneys can do is explain the dilemma and assist the prospective fiduciary with some preliminary diligence, identify documents needed to survey insurance needs and, on rare occasion, negotiate and draft an insurance analysis contract.

Some fiduciaries will work with a retail agent who can broadly survey the estate's needs but only respond with a single carrier's products, and even those in limited amounts and coverages. Fiduciaries of larger estates should work with an insurance analyst, often marketed as a private client advisor or private risk manager, that represents several carriers, carries their own errors and omissions coverage, and is more capable of offering the best coverage at the lowest price. Only rarely will a fiduciary engage a licensed risk manager that charges a fee and operates under a written contract to analyze insurance, participate in contract drafting, and quantify retained risks.

It gets worse. Fiduciaries not only risk personal liability for uninsured losses, they may forfeit reimbursement of unauthorized expenses, e.g., insuring the wrong estate or entering a contract for insurance before or after the term of the appointment. Authority, in general and as to insurance in particular, varies widely from agent to executor to trustee to guardian.

Read on for a survey of those estates and fiduciaries that need insurance, a discussion of insurable interests, an introduction to insurance products, an overview of insurance agents' (limited) duties, the Texas statutes concerning insurance agents and risk managers, and some practical tips with model language for communicating with fiduciaries.

### III. WHO NEEDS INSURANCE

Anyone whose assets or income are at risk and cannot afford a loss needs insurance. In addition, contracts may impose a duty to procure specific insurance coverage. Contractual indemnity provisions may impose liabilities with or without a co-extensive insurance requirement. Statutes and judicial orders may impose support obligations that suggest if not mandate insurance. And every fiduciary must consider the duty of care, which more often than not compels insurance.

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<sup>1</sup> "It depends," isn't really an answer, is it?

**A. Those with Property or Income**

The need for property insurance is self-evident: if you cannot afford a new car or home, you should insure the one you have now.

The need for liability insurance is more subtle, especially in Texas, with generous property exemptions. Though your pension, life insurance, annuities, and IRAs may be exempt, distributions are not. Liability insurance can provide a fund to defend or settle claims that, if reduced to judgment, would attach to distributions.

Bessemer Trust advises their clients to consider a personal umbrella liability policy with a coverage amount equal to i) net worth, excluding trust and exempt assets, up to \$20 million, plus ii) five to ten years of income from irrevocable trusts, qualified retirement accounts, and other sources of income. Gary J. Pasternack, Bessemer Trust, *Personal Umbrella Liability Policy: A Must-Have Insurance* (Jan. 2019), [https://www.bessemertrust.com/sites/default/files/2020-04/01\\_09\\_19\\_BT\\_Byline\\_PersonalUmbrellaLiabilityInsurance\\_UA\\_ada.pdf](https://www.bessemertrust.com/sites/default/files/2020-04/01_09_19_BT_Byline_PersonalUmbrellaLiabilityInsurance_UA_ada.pdf) (last visited Oct. 13, 2020).

**B. Those under Contract**

Parties may agree to insurance and/or indemnity obligations. An indemnity agreement does not compel insurance, but, without it, is an unfunded liability.

1. Landlord and Tenant

Leases may require insurance by landlord and tenant both. *See, e.g.,* State Bar of Tex., *Texas Real Estate Forms Manual*, Forms 25-5, 25-36, 25-37 (3rd ed. 2017 & Supp. 2020) (Residential Lease & Insurance Addendum to Lease, Insurance Addendum to Lease [Long Form], Insurance Addendum to Lease [Short Form]). Tenant indemnities are common. *See, e.g. id.*, Form 25-1 (Lease [Basic]).

2. Borrower

a. Security Agreement Covering Goods

A secured party may specify reasonable requirements regarding choice of carrier, risks insured against, and amount of coverage. The secured party can require a policy be endorsed to name the secured party as additional insured and provide at least ten days' notice before cancellation. *See, e.g.,* State Bar of Tex., *Texas Real Estate Forms Manual*, Forms 9-1, 9-2 (3rd ed. 2017 & Supp. 2020) (Security Agreement [Goods, Including Documents Covering Goods, Equipment, Inventory, Consumer Goods, and Farm Products], Security Agreement [Accounts, Chattel Paper, General Intangibles, Commercial Tort Claims]).

b. Deed of Trust and Real Property

The simplest deed of trust may include a blanket power to demand any property and liability insurance that lender "reasonably requires." If the deed of trust covers income producing property or secures a construction loan, more detailed endorsements and coverage may be requested, as well as an indemnity agreement. *See, e.g.,* State Bar of Tex., *Texas Real Estate Forms Manual*, Forms 8-1, 8-9-18, 8-12 (3rd ed. 2017 & Supp. 2020) (Deed of Trust, Insurance Clause, Insurance and Indemnity Agreement).

3. Buyer and Seller

Earnest money contracts may require evidence of the Buyer's liability insurance for its proposed inspection. *Id.* Forms 4-1, 4-23 (Real Estate Sales Contract, Access and Due Diligence Agreement). Earnest money contracts may also impose casualty insurance requirements on the seller.

4. Construction

Insurance and indemnity obligations abound in construction contracts. *Texas Real Estate Forms Manual*, ch. 51 (Residential Construction Contract Documents). An indemnity is a promise to safeguard and hold another party harmless against a liability. An indemnity creates a potential cause of action for the indemnitee against the indemnitor. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

5. Buy-Sell, Business Continuation, and Other Shareholder Agreements

Insurance on owners or other key employees may be mandated to fund payments under buy-sell, business continuation, and other shareholder agreements. Brandy Baxter-Thompson, *Handbook for the Fiduciary Advising and Counseling Executors and Trustees*, in 15 State Bar of Tex. Prof. Dev. Program, Adv. Est. Planning & Probate 10 (2019).

**C. Those with Duties of Support**

A duty of support may indicate life insurance on the obligor, and health insurance, long term care insurance, and even automobile insurance on third parties.

1. Statutory

a. Parents

Parents have a duty to support their child, which includes clothing, food, shelter, medical and dental care, and education. Tex. Fam. Code § 151.001(a)(3).

b. Spouses

Each spouse has a duty to support the other. The spouse who fails to so do is liable to third parties who

provide necessities to the other spouse. Tex. Fam. Code § 2.501(a).

**c. Adult Children—Filial Support**

There is no common law duty of filial support. Absent a statute, a parent may not compel financial support from an adult child. However, at least twenty-nine states impose some form of filial support. Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 Elder L. J. 270, 278 (2013).

Texas does not. *Missouri-Kansas-Texas R. Co. v. Fierce*, 519 S.W.2d 157 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (Son had no legal obligation to parent).

**2. Judicial**

**a. Temporary Orders**

Temporary orders may provide for continuation of health insurance premiums, enjoin access to the cash surrender value of life insurance on the life of either party, enjoin changes to the beneficiary designation on life insurance on the life of either party, and order premium payments, maintenance, and renewal of all life, casualty, automobile, or health insurance policies insuring the parties' property or persons, including a child of the parties. *See, e.g., State Bar of Tex., Texas Family Law Practice Manual* Form 4-3 (2020 ed.) (Temporary Orders).

**b. Final Decree of Divorce and Agreement Incident to Divorce**

A final decree of divorce and an agreement incident to divorce may continue, modify, or add to the insurance provisions of the temporary orders, e.g., health insurance as additional child support, life insurance on an obligor, and "appropriate" automobile insurance for child drivers. *Id.*, Forms 23-1, 23-6 (Final Decree of Divorce; Agreement Incident to Divorce).

**D. Fiduciaries**

**1. Generally**

**a. Insuring the Estate**

A fiduciary's duty of care generally compels insurance. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges—Family & Probate* PJC 235.17 (2020) (Liability of Cotrustees—Not Modified by Document).

A temporary administrator, e.g., has a duty of care upon qualifying, "and must take such care of estate property as a prudent man would take care of his own property." "[I]t is almost an inviolate rule to insure any property with the usual and customary coverage—fire,

windstorm, hail, extended coverage." *Frost Nat'l Bank v. Kayton*, 526 S.W.2d 654, 660–61 (Tex. App.—San Antonio 1975, writ ref'd n.r.e.) (discussing Probate Code § 230, now Estates Code, Section 351.101). If insurance is obtained but inadequate, the fiduciary is liable for the unprotected loss. *Id.*, at 61 (citing Bogert, *Trusts and Trustees*, Section 599 (2d ed. 1960)).

The standard of review regarding procurement of insurance is negligence. A fiduciary is not an insurer, and is only obliged to use reasonable care. Thus, if insurance is not available, failure to obtain it is not a breach of duty. *Lawyers Sur. Corp. v. Snell*, 617 S.W.2d 750, 752 (Tex. App.—Houston [14th Dist.] 1981, no writ) (house uninsurable given neighborhood's reputation). A decedent's failure to obtain insurance is some evidence of the care which a reasonable, prudent man would take. *Id.*, at 753.

Query whether a prudent person would sell property that was uninsurable or else change its use to one that is insurable. Query at what price it becomes imprudent to insure estate property.

**b. Insuring the Fiduciary**

**i. The Professional**

Professional errors and omissions policies may not cover fiduciary claims without a rider and an additional premium. Patrick J. Pacheco & Sarah Patel Pacheco, *The Estate Administration Guide*, in 5 State Bar of Tex. Prof. Dev. Program, 21st Ann. Building Blocks of Wills, Estates, & Probate Course 5 (2020).

**ii. Family**

Family trustee liability insurance is available from at least one personal umbrella liability insurer. Similar to nonprofit D&O coverage, it pays for the trustee's errors, omissions, negligence, and breach of duty in the management of a family trust. Pasternack, *op. cit.*, at 3.

**c. Powers, Duties, and Preliminary Diligence**

The power to insure does not precede the duty to insure. Even the most diligent fiduciary begins as a vulnerable fiduciary, at least from the time the appointment is accepted until adequate insurance is in place. Ideally, before a fiduciary appointment is agreed, some diligence is completed in anticipation of promptly determining and meeting the estate's insurance needs.

The attorney should complete certain preliminary diligence. What instrument controls the fiduciary? Which statutes? Are they collected? Reconciled? What are the estate's assets and activities? Are any prohibited or restricted? Are there others with insurable interests in estate property (homesteader or life tenant, remainderman, landlord, tenant, etc.)? Will the fiduciary have full or limited power to manage all? Will the power to insure be granted or restricted? What court orders, if

any, will be required? Is diversification of the estate's assets required, limited, or prohibited? What is the anticipated distribution plan for estate assets? What is the timetable for finalizing an investment or distribution plan? What is the term of the fiduciary's appointment? When does it begin and end? When may it be involuntarily terminated?

These preliminary diligence issues are common to each type of fiduciary, but the sources and methods and extent of diligence may vary significantly. A common law power of attorney can be much harder to resolve than a statutory one. A durable power of attorney requires resort to the law effective at the date of execution. Interpreting a trust may require identifying and disregarding statutorily prohibited language. Preliminary guardianship diligence may involve little more than reading a (hopefully) well-crafted proposed order.

See Appendix A for a Fiduciary Checklist.

## 2. Agent

A power of attorney creates a principal-agent relationship. Even without a writing, one may arise by express or implied agreement.

Every agency relationship presents the same questions: i) what law governs, ii) does the instrument meet the applicable requirements, iii) is it currently effective, and iv) what are the agent's powers and duties? See Appendix B for a Power of Attorney Summary, designed for reference when reviewing a power of attorney.

Durability, i.e., whether a power of attorney is effective during the principal's disability, is but one of many factors determining when an agency or fiduciary relationship begins and ends. It commands outside attention and has dominated legislation and drafting for 48 years. In Texas, the date of execution of the power of attorney determines the durability requirements. Four dates signpost very different analyses: i) before 1972 (no statute enabled durability), ii) January 1, 1972 (Probate Code, Section 36A first enabled durability), iii) August 28, 1989 (Section 36A requirements were supplemented and recording was required), and iv) September 1, 1993 (Durable Power of Attorney Act, Probate Code, Chapter XII was added, superseding Section 36A, making recording optional, adding a statutory power of attorney form, and fixing the durability requirements for nonstatutory powers of attorney).

Other relevant factors, e.g., divorce, may be the subject of a statute with a different effective date. Acts 1997, 75th Leg., ch. 455, § 1, eff. Sept. 1, 1997 (adding Probate Code, Section 485A, terminating a spouse's power of attorney on divorce)<sup>2</sup>. See Appendix C for a

Durable Power of Attorney Legislative History. Although much of it is beyond the scope of a fiduciary's duty to insure, analysis of an instrument executed under prior law cannot be completed without it. Little wonder that banks are so skeptical.

### a. Controlling Law

Texas law recognizes common law, durable, and statutory durable powers of attorney, distinguished, in part, by the requirements to survive disability.

*Common law powers of attorney*, unauthorized by any statute, generally terminate on disability. Before 1972, every Texas power of attorney was common law.

A *durable power of attorney* has met the durability requirements of a specific statute, and is effective during the principal's disability. Under Texas law, aside from a specific reference to durability, no particular form is required.

The *statutory durable power of attorney* follows a form first promulgated September 1, 1993, the effective date of the Texas Durable Power of Attorney Act, which grandfathered all Section 36A powers of attorney and revised the durability requirements for the last time. The optional form, originally found at Probate Code, Section 490(a), is now located at Estates Code, Section 752.051.

For further reading, including a detailed history of the relevant statutes and requirements, see William D. Pargaman, *What Death Lawyers Want Dirt Lawyers to Know About Powers of Attorney—Part Deux*, in 5 State Bar of Tex. Prof. Dev. Program, 26th Annual Advanced Real Estate Drafting Course (2015) (deep dive into legislative history); Wesley L. Bowers, *Mind the Gap: Advanced Planning Techniques for Incapacity*, in 1.4 State Bar of Tex. Prof. Dev. Program, Adv. Estate Planning Strategies (2017) (one of the last best papers before the 2017 revisions); and G. Roland Love, *The Revised Texas Durable Power of Attorney Act*, in State Bar of Tex. Prof. Dev. Program, 21st Annual Summer School (2019) (a clear view from today, including the 2017 acceptance enhancements).

### i. Common Law Powers of Attorney

A common law power of attorney gives one person authority to act for another. A common law form is any that did not, at the time of execution, meet the requirements of a statute. *See generally* 22 Texas

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Reference Library of Texas. <https://lrl.texas.gov/legis/billsearch/lrlhome.cfm> (last visited Nov. 1, 2020). Bill Pargaman's updates explain legislative process and research. *See e.g.*, William D. Pargaman, *2019 Texas Estate and Trust Legislative Update (1-2-20)*, Saunders Norval Pargaman & Atkins, <https://snpalaw.com/resources> (Nov. 1, 2020) (3.10 Where You Can Find Information About Previous Versions of Statutes).

<sup>2</sup> Texas bills and session laws are available from the Legislative



*Transaction Guide* § 92.20 (2017) (Definition of Common-Law Powers of Attorney).

(A) Form

No particular form is required of a common-law power of attorney. However, its utility is limited if it is not in writing, signed by the principal, and acknowledged before a notary. *Cf.* Property Code, Section 5.021 (agent requires written authority to convey a fee interest in real property or any estate lasting more than one year) and Sections 11.004(a)(1), 12.001, and 12.0011 (recording requires the instrument be acknowledged, proved, or sworn to).

(B) Unwritten Powers of Attorney—Implied Agency Agreement

Agency does not require a written instrument. An agency relationship based on actual authority may be implied through the conduct of either party or from the facts and circumstances surrounding the transaction in question. *Sanders Oil & Gas GP, LLC v. Ridgeway Electric*, 479 S.W.3d 293, 301 (Tex. App.—El Paso 2015, no pet.). Actual authority arises when the principal either i) intentionally confers authority on the agent or ii) intentionally or negligently allows the agent to believe it has authority. *Id.*, 301–302. *See generally* 3 Tex. Jur. 3d *Agency* § 32 (Oct. 2020) (Implied contract for agency).

(C) Duties

The common law agent's fiduciary duties include i) accounting for profits arising out of the employment, ii) not acting as or for an adverse party, iii) not competing with the principal in matters relating to the agency, and iv) dealing fairly with the principal. 22 *Texas Transaction Guide* § 92.24 (2020) (Fiduciary Duties of Attorney-in-Fact).

The common law agent has a duty to conduct the transactions delegated from the principal to the agent. 22 *Texas Transaction Guide* § 92.23 (2020) (General and Special Powers of Attorney).

(D) Powers

The Restatement (Second) of Agency distinguishes between general and special agents. A general agent is authorized to conduct a series of transactions, and has a continuing period of service. A special agent is authorized to conduct a single transaction or a limited series of transactions, but only for a limited period of time. Restatement (Second) of Agency §§ 3(1), 3(2). A written power of attorney may convey general powers, special powers, or both. 22 *Texas Transaction Guide* § 92.23 (2020) (General and Special Powers of Attorney).

This may do violence to the Restatement, but I find it easier to ask whether the power of attorney authorizes the agent to do anything the principal might, or

something less. I think of the first as a general power of attorney and the second as a special power of attorney.

When a party establishes an agency without a showing of its extent, it will be presumed to be a general agency, and not a special agency. 22 *Texas Transaction Guide* § 92.23[2] (2020) (Construction of Instrument to Determine Extent of Powers Transferred) (citations omitted). *See also* 14 Dorsaneo, *Texas Litigation Guide* § 216.03 (2020) (General Versus Special Agent).

(E) Termination

Common law powers of attorney generally cease on the principal's death or upon declaration of mental incapacity. 22 *Texas Transaction Guide* § 92.25 (2020) (Expiration of Power of Attorney). For a list of other events and considerations regarding termination, see Termination of Agent's Authority, III.D.2.d below.

ii. Durable Power of Attorney Act

Durable powers of attorney survive the principal's incapacity. Texas has authorized durable powers of attorney since 1972. The Durable Power of Attorney Act was first enacted effective since September 1, 1993. Acts 1993, 73d Leg., ch. 49, § 3.

The Durable Power of Attorney Act applies to any power of attorney that, among other requirements, contains—

(A) the words:

(i) “This power of attorney is not affected by subsequent disability or incapacity of the principal”; or

(ii) “This power of attorney becomes effective on the disability or incapacity of the principal”; or

(B) words similar to those of Paragraph (A)

that clearly indicate that the authority conferred on the agent shall be exercised notwithstanding the principal's subsequent disability or incapacity . . .

Estates Code, Section 751.0021(a)(3).

(A) Duties

An agent is a fiduciary and has a duty to inform and to account for actions taken under the power of attorney. Estates Code, Section 751.101. Sections 751.102 through 751.106 elaborate on duties to disclose, record retention, accountings, and enforcement. Sections 751.121 and 751.122, added effective September 1, 2017, address breaches by another agent and preservation of the principal's estate

plan. Section 752.051, the form statutory durable power of attorney, discusses additional duties, below.

**(B) Authority**

A power of attorney under Chapter 751 incorporates no powers by reference, and the agent's authority should be clearly stated. The powers that are articulated will be strictly construed, to a point. As noted at Special vs. General Powers of Attorney, III.D.2.b.i below, when a party establishes an agency without a showing of its extent, it is presumed a general agency.

**(C) Choice of Law**

The principal may elect any jurisdiction's laws to control interpretation of a durable power of attorney. Otherwise, the principal's recited domicile, otherwise the place of execution determines the controlling law. Estates Code, Section 751.0024.

**(D) Multiple Durable Powers of Attorney**

Without more, execution of a new durable power of attorney does not revoke prior durable powers of attorney. Either revocation of the previous power or revocation of all other durable powers of attorney is required. Estates Code, Section 751.135. Added by Acts 2017, 85th Leg., ch. 834 (H.B. 1974), § 5, eff. Sept. 1, 2017.

**iii. Statutory Durable Power of Attorney**

Chapter 752 of the Estates Code sets out model, uniform language to create the Statutory Durable Power of Attorney. The form is brief, incorporating construction language from elsewhere in the chapter. The legalese is in the Code, not the form.

**(A) Both Chapters 751 and 752 Apply**

A power of attorney substantially in the form of Section 752.051 will have meaning and effect prescribed by Subtitle P, Durable Powers of Attorney which encompasses *both* the Chapter 751 General Provisions Regarding Durable Powers of Attorney and the Chapter 752 Statutory Durable Power of Attorney. Estates Code, Section 752.001.

**(B) The Statutory Form is a Special Power of Attorney**

The powers the Statutory Durable Power of Attorney includes are set out in detail in Title II, Subtitle P, Subchapter C of the Estates Code (Sections 752.101 to 752.115).

Although "Broad and Sweeping," to quote the notice in Section 752.051, the powers are not unlimited, and do not purport to be. For example, an agent under a statutory durable power of attorney, at least one without special instructions, has express authority to *fund* a revocable trust created by the

principal, but does not have the authority to *create* one for the principal. Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* Trust Code, Section 752.109 cmt (2020) (Estate, Trust and Other Beneficiary Transactions) (citing *Filipp v. Till*, 230 S.W.3d 197 (Tex. App.—Houston [14th Dist.] 2006, no writ). Effective September 1, 2017, Section 752.052 expressly authorizes modifications including express authority to create a trust.

The statutory durable power of attorney form expressly authorizes the agent to insure against a casualty, liability, or loss with respect to an interest in or right incident to real or personal property. Estates Code, Sections 752.102, 752.103.

**(C) Agent's Duties**

The form in Subchapter B includes extensive recitations regarding the agent's duties. The agent is informed a fiduciary relationship is formed on acceptance, and the following fiduciary duties are set out:

- (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 . . .

Detailed instructions are also provided regarding duties to maintain records and to account to the principal. Estates Code, Section 752.051.

**(D) The 2017 REPTL Financial Power of Attorney Bill**

Uncooperative banks and other financial institutions remain a persistent problem. They reject valid powers of attorney for arbitrary reasons, offering principals and agents little recourse but to seek counsel at significant delay and expense, and often at a time of medical or other crisis. Effective September 1, 2017, new Subchapter E added a scheme of acceptance and reliance provisions that are beyond the scope of this paper. Suffice to say that it extends to both statutory and nonstatutory powers of attorney, that custodians have less room to reject powers of attorney on receipt of an agent's certification, but that custodians can still demand a legal opinion or physician's statement of incapacity or disability. For a practical discussion with forms, see Lora G. Davis and Donald L. Totusek, *The "New and Improved" Texas Durable Power of Attorney Act*, in State Bar of Tex. Prof. Dev. Program, 4 Estate Planning & Probate Drafting (2018).

iv. Prior Statutes

The Durable Power of Attorney Act, effective September 1, 1993, grandfathered powers of attorney executed under prior statutes. If a power of attorney was executed between January 1, 1972, and August 31, 1993, reference to prior law is necessary to determine durability and other requirements. A power of attorney created under Probate Code 36A is governed by the law as it existed at the time of execution. Acts 1993, 73d Leg., ch. 49, § 2. *See generally* 22 *Texas Transaction Guide* § 92.44 (2017) (Durable Powers Executed Prior to September 1, 1993).

(A) 1971 and earlier

Prior to 1972, no Texas statute authorized durable powers of attorney. William D. Pargaman, *What Death Lawyers Want Dirt Lawyers to Know About Powers of Attorney—Part Deux*, in 5 State Bar of Tex. Prof. Dev. Program, 26th Annual Advanced Real Estate Drafting Course 5 (2015) (History of Durable Powers of Attorney in Texas).

(B) January 1, 1972 to August 27, 1989

In 1971, the Texas Legislature added Section 36A to the Texas Probate Code, effective January 1, 1972. Just two elements created a durable power of attorney: i) a writing with ii) “this power of attorney shall not terminate on disability of the principal” or similar words. Acts 1971, 62nd Leg., p. 971, Ch. 173, § 3. This particular version of Section 36A was grandfathered both by subsequent 1989 and the 1993 revisions. Powers of attorney executed then and meeting just these two requirements remain durable, even today. Acts 1989, 71st Leg., Ch. 404, § 2; Acts 1993, 73rd Leg., Ch. 49, § 2.

(C) August 28, 1989 to August 31, 1993

In 1989, the Texas Legislature substantially rewrote Probate Code, Section 36A, effective August 28, 1989. Three elements were added to the original two: iii) the adult principal must sign, iv) two witnesses at least 18 must sign, and v) it had to be filed of record in the county where the principal resided. Former Probate Code § 36A(c), now repealed. Acts 1989, 71st Leg., Ch. 404, § 1.

Former Section 36A(f) permitted the principal to revoke the power of attorney with a revocation recorded where the power of attorney was recorded. Although the language is permissive, where the chain of title is concerned, a recorded revocation is the exclusive method of revocation. Of course, that does not preclude termination of the power of attorney by the principal's death or on the terms set out in the instrument.

When the 1993 Durable Power of Attorney Act was added to Chapter XII of the Probate Code, Former Section 36A was repealed and those durability

requirements were replaced with the present ones. The recording requirement was dropped. Former Probate Code, Section 482. However, both the 1972 and 1989 versions of Former Section 36A, including the 1989-1993 recording requirement, were grandfathered. Acts 1993, 73rd Leg., Ch. 49, § 2. Decades later, real property records remain replete with forgotten powers of attorney, recorded, but never revoked.

v. Foreign and Military Powers of Attorney

If executed outside Texas, a durable power of attorney is valid here if it meets the requirements of either the controlling jurisdiction or 10 U.S.C. Section 1044b (military power of attorney). Estates Code, Section 751.0023. Note that the operative law under either a foreign or military power of attorney will not necessarily be the law at the time of execution. To date, each Texas revision has grandfathered prior statutes. Other jurisdictions need not. Section 751.0023 tests the validity of foreign and military powers of attorney against the law at the time of execution, but does not preclude subsequent amendments to the law of the jurisdiction.

b. Powers and Duties

The appointing document determines an agent's powers and duties. The Estates Code, Sections 752.101 through 752.115, provides rules of construction and elaborates on the powers summarized in the Section 752.051 statutory durable power of attorney form. Numerous cases address rules of construction for common law powers of attorney, e.g., *First Nat. Bank in Dallas v. Kinabrew*, 589 S.W.2d 137, 145 (Civ. App.—Tyler 1979, ref. n.r.e.) (general powers convey broader authority than special powers). *See generally* 22 *Texas Transaction Guide* § 92.23 (2020) (Powers and Duties Transferred to Attorney-in-Fact).

i. Immediate vs. Springing

Powers of attorney are usually effective immediately upon execution. A springing power of attorney is not effective before the principal's disability or incapacity. Estates Code, Section 751.0021(a)(3)(A)(ii).

Incapacity is defined by Estates Code, Section 22.016. The Durable Power of Attorney Act calls for certification of disability or incapacity by an examining physician, but allows for different definitions in the durable power of attorney. Estates Code, Section 751.00201. *See also* Lora G. Davis and Donald L. Totusek, *The “New and Improved” Texas Durable Power of Attorney Act*, in State Bar of Tex. Prof. Dev. Program, 4 Estate Planning & Probate Drafting Exhibit F (2018) (Certification of Disability or Incapacity).

ii. When Does Liability Attach

Two courts have presumed or held that the mere existence of a power of attorney conclusively established a fiduciary relationship, regardless whether the agent exercised any authority over the property. *Vogt v. Warnock*, 107 S.W.3d 778 (Tex. App.—El Paso 2003, writ denied); *Jordan v. Lyles*, 455 S.W.3d 785 (Tex. App.—Tyler 2015). For powers of attorney executed September 1, 2017, or later, revisions to Estates Code, Section 751.101, preclude fiduciary liability before an agent accepts his or her appointment. Section 751.022 makes clear acceptance requires some act on the part of the agent, and not mere knowledge. H.B. 1974, §§3, 4, 85th Leg., eff. Sept. 1, 2017.

### iii. Co-Agents

The Durable Power of Attorney Act expressly authorizes co-agents, and each may act independently of the other unless the durable power of attorney provides otherwise. Estates Code, Section 751.021. Acts 2017, 85th Leg., ch. 834, § 3, eff. Sept. 1, 2017. Thus, disagreement among co-agents cannot excuse a failure to insure.

### c. Avoiding Personal Liability

#### i. Disclosure of Principal

To avoid personal liability, an agent must communicate that the agent acts on behalf of a named principal. 14 Dorsaneo, *Texas Litigation Guide* § 216.07[2][b] (2020) (Liability of Principal and Agent; Disclosure of Principal) (citing *John C. Flood of DC v. Supermedia, LLC*, 408 S.W.3d 645, 657 (Tex. App.—Dallas 2013, no pet.); other citations omitted). Contracts and orders should identify both principal and agent, e.g.,

(Name of Principal), acting by (Name of attorney), attorney in fact

See James Noble Johnson, *Execution of Documents*, in State Bar of Tex. Prof. Dev. Program, 10 Real Estate Law 101 pp. 17-18 (2018) (Attorney-in-Fact) (Model identification, subscription, and acknowledgment; Recommended related documentation).

#### ii. Implied Warranty of Authority

Absent actual authority, one who acts as an agent for a principal is personally liable to any third party who deals with the agent in reliance on such authority, based on an implied warranty of authority. Dorsaneo, *op. cit.*, § 216.07[2][a] (Liability of Principal and Agent; Implied Warranty of Authority). Thus, the agent concerned about personal liability must scrutinize the power of attorney to confirm the agent's authority.

### d. Termination of Agent's Authority

Powers of attorney generally do not survive death. They may also terminate during the principal's lifetime, e.g., at common law, upon the principal's

marriage, or upon qualification of a permanent guardian of the estate. See generally 22 *Texas Transaction Guide* § 92.25 (2020) (Expiration of Power of Attorney); Estates Code, Section 751.131 (Termination of Durable Power of Attorney).

#### i. Principal's Revocation

A principal may revoke a common law power of attorney. Restatement (Second) of Agency §§ 118, 119; *Lawler v. Federal Deposit Ins. Corp.*, 538 S.W.2d 245, 249 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.). A principal may revoke a durable power of attorney altogether, or just the acting agent's authority. If just the acting agent's authority is revoked, the power itself survives if there is provision for an alternate agent. Estates Code, Sections 751.131(2), 751.131(5), 751.132(a)(1).

#### ii. Agent's Renunciation or Resignation

The power of attorney terminates on the agent's renunciation or resignation. Restatement (Second) of Agency §§ 118, 119; *Lawler, op. cit.* Estates Code, Sections 751.132(a)(2).

#### iii. Agent's Removal

Agents under durable powers of attorney may be removed on application of a successor agent, or, in the case of a guardianship proceeding, application of an interested person, e.g., attorney ad litem or guardian ad litem. Estates Code, Section 753.001.

#### iv. Marriage

At common law, marriage terminates a power of attorney. *Wallis v. Hemness*, 600 S.W.2d 407, 408 (Tex. Civ. App.—Fort Worth 1980, no writ).

#### v. Divorce or Annulment

Absent contrary language in the power of attorney, divorce or annulment of a marriage between principal and agent terminates the agent's authority under a durable power of attorney on the date of the court's order. Estates Code, Section 751.132(a)(3).

#### vi. Insolvency

A common law power of attorney is revoked by the legal insolvency of the principal. *Interstate National Bank v. Claxton*, 80 S.W. 604 (Tex. 1904) (citing *Mechem on Agency*, secs. 263 to 267; *Ewell's Evans on Agency*, pp. 92, 401; *Audenried v. Betteley*, 8 Allen, 302; *Hudson v. Granger*, 5 Barn. & Ald., 27; *Ex parte Snowball*, L. R. 7 Ch., 548; 1 *Am. and Eng. Enc. of Law*, 1227; *Story on Agency*, secs. 482, 486.).

#### vii. Incapacity of Principal

Common law powers of attorney generally terminate when the principal is declared of unsound

mind. *Harrington v. Bailey*, 351 S.W.2d 946, 948 (Tex. Civ. App.—Waco 1961, no writ).

viii. Appointment of Guardian of Estate

(A) Permanent

On qualification of a guardian of the principal's estate, the agent's authority terminates. Estates Code, Section 751.131(6). This statute has wandered through the various acts and codes since 1971, and was last found at Estates Code, Section 751.052 before it was redesignated as Section 751.131. Acts 2017, 85<sup>th</sup> Leg., ch. 834 (H.B. 1974), § 6, eff. Sept. 1, 2017. For prior citations and legislative history, see Wesley L. Bowers, *Mind the Gap: Advanced Planning Techniques for Incapacity*, in 1.4 State Bar of Tex. Prof. Dev. Program, Adv. Estate Planning Strategies 24–25 (2017) (No Guardian Qualified).

(B) Temporary

An agent's authority is automatically suspended during the term of a temporary guardian of the principal's estate. The court has discretion to reaffirm the agent's authority. Estates Code, Section 751.133.

ix. Lapse

A power of attorney may have a specific term, or may lapse upon the performance of specific acts or specified results. Restatement (Second) of Agency § 106. Estates Code, Section 751.132(a)(4). If no date or condition is specified, it may terminate after a "reasonable" time. Restatement (Second) of Agency § 105. A durable power of attorney terminates when its purpose is accomplished. Estates Code, Section 751.131(4).

x. Death of Principal

Under common law, powers of attorney generally terminate on the principal's death.

Chapters 751 and 752 expressly provide that the principal's death terminates the power of attorney and the agent's authority. Estates Code, Sections 751.131(1), 752.051.

xi. Extension Pending Actual Knowledge of Termination

When a power of attorney terminates on revocation, death, or the qualification of a guardian, the agency relationship continues while the agent "acts in good faith under or in reliance on the power without actual knowledge of the termination of the power." Estates Code, Section 751.054(a).

xii. Irrevocable Powers of Attorney—"Coupled with an interest"

If the agent has a present interest in the property subject of the power of attorney, the principal's death, disability, or other terminal act or condition does not revoke the agency coupled with that interest. *See generally* 22 *Texas Transaction Guide* § 92.26 (2020) (Irrevocability of Certain Powers of Attorney). Look for powers of attorney coupled with an interest in deeds of trust and blanket bills of sale. *See, e.g.*, State Bar of Tex., *Texas Real Estate Forms Manual* Forms 5-15, 8-10, 16-21, 16-22 (3rd ed. 2017 & Supp. 2020) (Blanket Bill of Sale, Leasehold Deed of Trust, Deed of Trust and Security Agreement [Water Rights], Security Agreement [Water Rights]). Mineral interests are another flag. *Pan Am. Petroleum Corp. v. Cain*, 340 S.W.2d 93, 95–96 (Tex. Civ. App.—Amarillo 1960), *aff'd on other grounds*, 355 S.W.2d 506 (1962).

Chapters 751 and 752 expressly provide that the principal's death terminates the power of attorney and the agent's authority. Estates Code, Sections 751.131(1), 752.051. However, 2017 amendments exclude the application of Chapters 751 and 752 to powers of attorney coupled with an interest in the subject of the power. Estates Code, Section 751.0015(1). Acts 2017, 85<sup>th</sup> Leg., ch. 834 (H.B. 1974), § 1, eff. Sept. 1, 2017.

3. Trustee

A trustee is obligated to administer a trust in good faith according to its terms and Subtitle B of the Texas Trust Code. The trustee remains subject to all common law duties absent contrary provisions of the trust or Subtitle B. Trust Code, Section 113.051.

For the reasons set out below, a trust instrument i) must be reviewed against the Trust Code to determine the enforceable terms of each, before ii) reviewing the assets to determine those to keep and those to sell, in tandem with iii) planning for the trust's (and the trustee's) insurance needs.

a. The Trust Instrument, the Trust Code, and Common Law

The trust instrument is the primary source of a trustee's duties, subject to Trust Code sections 111.0035 and 114.007, which set out mandatory Trust Code provisions that cannot be modified or eliminated by the settlor. Subject to that, duties are drawn from the Texas Trust Code. Only those common law duties survive that are not expressly covered by the trust instrument or the Trust Code. Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges—Family & Probate* PJC 235.9 cmt (2020). Repeal of prior law abrogating or restating a common law rule reestablishes the common law rule, subject to revisions by the current statute. Trust Code, Section 111.005.

i. Limitations of Trust Code, Section 111.0035  
The trust terms may not:

- (A) Create a trust for an illegal purpose, or require the trustee to commit an act that is criminal, tortious, or contrary to public policy (*cf.* Trust Code, Section 112.031);
- (B) Authorize a corporate trustee to borrow trust funds or buy or sell trust assets (*cf.* Trust Code, Section 112.031);
- (C) Exculpate a trustee in violation of Section 114.007;
- (D) Limit the statute of limitations;
- (E) Limit the trustee's duty to account on demand to primary beneficiaries, to act in good faith, and to keep beneficiaries over 25 reasonably informed;
- (F) Limit the court's power to modify or terminate a trust, remove a trustee, require a fiduciary bond, or to adjust or deny a trustee's compensation.

Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* Trust Code, Section 111.0035 cmt (2020).

- ii. Limitations of Trust Code, Section 114.007  
The trust terms may not:
  - (A) Exculpate a trustee for breach committed in bad faith, intentionally, or with reckless indifference to a beneficiary; [but]
  - (B) An exculpatory clause relieving a trustee of liability for negligence is valid.

Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* Trust Code, Section 114.0075 cmt (2020) (citing *Tex. Com. Bank v. Grizzle*, 96 S.W.3d 240 (Tex. 2002)).

b. Trust Code

Aside from permissible modifications in the trust instrument, a trustee is also subject to the duties set out in the Code. Trust Code, Sections 111.0035(a), 116.004.

i. Uniform Prudent Investor Act

Texas enacted its version of the Uniform Prudent Investor Act in 2003, with an effective date of January 1, 2004. The UPIA applies to existing trusts as well as to trusts created after that date. The UPIA is found at Chapter 117 of the Trust Code. *Johanson's Texas Estates Code Annotated* Trust Code, Section 117.001 cmt (2020).

ii. Prudent Investor Rule

The UPIA imposes a duty on all trustees to comply with the Prudent Investor Rule.

(a) Except as otherwise provided in Subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this chapter.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

Trust Code, Section 117.003.

iii. Duty of Care

"A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." Trust Code, Section 117.004(a).

iv. Diversification

"A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." Trust Code, Section 117.005.

v. Amendment, Elimination, or Waiver

As noted above, the Prudent Investor Rule is the default, but may be altered or eliminated by the settlor. It may also be waived by the beneficiaries. *Johanson's Texas Estates Code Annotated* Trust Code, Section 117.003 cmt (2020) (citing Restatement of Trusts 2d § 216 (1959)).

vi. Duties at Inception of Trusteeship

The trustee has a "reasonable time" to review the trust assets and make changes. This duty of review is ongoing, suggesting periodic reassessment of investments. Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* Trust Code, Section 117.006 cmt (2020).

vii. Multiple Trustees

Cotrustees may act by majority decision. In a vacancy, the remaining cotrustees may act for the trust. If a cotrustee is unavailable for certain reasons, another cotrustee, even absent a majority, may act to avoid injury to trust property. Trust Code, Section 113.085. It is dangerous to assume an impasse excuses a cotrustee from the duty to insure absent scrutiny of this statute.

viii. Interpreting Trust Documents

For an extensive discussion on trust interpretation, see Sarah Patel Pacheco & C. Vance Christopher, *Defending the Trustee*, in 5.1 State Bar of Tex. Prof. Dev. Program, 23rd Ann. Adv. Estate Planning Strategies 14–22 (2017).

c. Powers

A trustee may exercise any powers necessary to carry out the purposes of the trust. Trust Code, Section 113.002. A trustee may purchase insurance to protect the trust property and the trustee. Trust Code, Section 113.013.

d. Life Insurance

i. As an investment

Life insurance is a unique investment, with unique review considerations. Mary C. Burdette, *Handbook for the Fiduciary: Advising and Counseling Executors and Trustees*, in, 3 State Bar of Tex. Prof. Dev. Program, *Malpractice Avoidance for Estate Planners* 10 (2010).

ii. ILIT

The prospective trustee of an irrevocable life insurance trust should review both the trust instrument and the policy before deciding whether to accept the trusteeship. Arielle M. Prangner & Wesley L. Bowers, *Irrevocable Life Insurance Trusts*, in 2 State Bar of Tex. Prof. Dev. Program, *Intermediate Estate Planning and Probate Course* 8–10 (2012) (Due Diligence and Other Fiduciary Concerns); Kristin L. Brown, *Roses are Red, My ILIT Makes Me Blue: Replanting an Insurance Policy*, in 4 State Bar of Tex. Prof. Dev. Program, *Estate Planning & Probate Drafting Course* (2019).

e. Delegation to Non-Trustees

A trustee may delegate management decisions, e.g., insurance and risk management, and avoid liability for the agent's decisions. Trust Code, Section 117.011. See generally Sarah Patel Pacheco & C. Vance Christopher, *Defending the Trustee*, in 5.1 State Bar of Tex. Prof. Dev. Program, 23rd Ann. Adv. Estate Planning Strategies 24 (2017).

Reasonable care, skill, and caution is required in selecting the agent, defining the scope of the agent's duties consistent with the trust, and periodically reviewing the agent's actions. Trust Code, Section 117.011(a).

Diligence in selecting an agent might include investigating the agent's credentials (performance history, experience, and financial stability), verifying the agent's professional license and registration, and confirming that the agent is bonded and insured. Pacheco & Christopher, *op. cit.*

The agent does not avoid liability if the agent is an affiliate of the trustee, the engagement contains an arbitration clause, or the engagement reduces the limitations period otherwise applicable to trustees. Trust Code, Section 117.011(c).

An agent who accepts the delegation of a trust function is subject to the jurisdiction of Texas courts. Trust Code, Section 117.011(d).

4. Guardian

a. Authority

i. Generally

The duties and authority of a guardian are governed by Chapter 1151 of the Estates Code and by the orders of the court. See Texas Estates Code Title 3. Title 2, concerning decedent's estates, applies where not inconsistent with Title 3. Estates Code, Section 1001.002. Thus, the common law, if not inconsistent with code, also applies. Estates Code, Section 351.001.

ii. Exercise of Authority under Court Order

The guardian of the estate generally requires an application and order to administer the estate's property. Estates Code, Section 1151.102.

iii. Exercise of Authority without Court Order

A guardian of the estate may obtain property and liability insurance without either an application or an order. Estates Code, Sections 1151.103(a)(4), 1151.103(a)(5).

iv. Multiple Guardians

Joint guardians are authorized in limited circumstances. No statutory provision is made for resolving stalemates. Estates Code, Section 1104.001. The policy expressed in Section 1151.103, enabling procurement of property and liability insurance without an order, suggests that an impasse among coguardians would not excuse the duty to insure.

b. Duty of Care

i. Property generally

"The guardian of the estate shall take care of and manage the estate as a prudent person would manage the person's own property, except as otherwise provided by this title." Estates Code, Section 1151.151.

ii. Investments

"In acquiring, investing, reinvesting, exchanging, retaining, selling, supervising, and managing a ward's estate, a guardian of the estate shall exercise the judgment and care under the circumstances then prevailing that a person of ordinary prudence,

discretion, and intelligence exercises in the management of the person's own affairs, considering the probable income from, probable increase in value of, and safety of the person's capital." Estates Code, Section 1161.002.

iii. Investment plans

Unless opting for the statutorily permitted investments, the guardian of an estate files an investment plan within 180 days of qualification or as ordered. Estates Code, Section 1161.051. Typical plans make express provision for insurance on the homestead, other real property, personal property, and vehicles and authorized drivers. See State Bar of Tex., *Texas Guardianship Manual* Forms 8-43 and 8-44 (2020 ed.) (Application and Order Approving Guardian's Management Plan). Absent an approved plan, investments should be limited to certain government bonds, FDIC insured accounts and short-term CDs, and collateral bonds. Estates Code, Section 1161.003.

5. Executor or Administrator

a. Authority

i. Generally

(A) Presumption of Broad Powers

When appointed pursuant to a will, a personal representative has the authority to do anything the testator could have done, except as limited by the will. *Marlin v. Kelly*, 678 S.W.2d 582, 588 (Tex. App.—Houston [14th Dist.] 1984, writ granted), *affirmed by Kelley v. Marlin*, 714 S.W.2d 303 (Tex. 1986) (citing *Hutcherson v. Hutcherson*, 135 S.W.2d 757 (Tex. Civ. App.—Galveston 1939, writ ref'd)); Sarah Patel Pacheco, *Fiduciary Litigation*, in 4.3 State Bar of Tex. Prof. Dev. Program, Adv. Estate Planning Strategies (2018) (Personal Representatives). See also Sarah Patel Pacheco, *Pre-Lawsuit Evaluation and Investigation of Fiduciary Claims*, in 9.2 State Bar of Tex. Prof. Dev. Program, 11th Ann. Fiduciary Litigation 16 (2016) (Modification of Duties of Personal Representatives).

(B) But Power of Sale is an Exception

The sale of estate property generally requires a court order. Estates Code, Section 356.001. Not even an independent executor may sell estate property, absent court order, unless the will authorizes the executor to sell the testator's property. Estates Code, Section 356.002.

ii. Dependent Administration

(A) Exercise of Authority under Court Order

A dependent representative generally requires an application and order to administer the estate's property. Estates Code, Section 351.051.

(B) Exercise of Authority without Court Order

(1) Permanent representative

A dependent representative generally may obtain property and liability insurance without either an application or an order. Estates Code, Sections 351.052(a)(4), 351.052(a)(5).

(2) Temporary dependent administrator

A temporary administrator requires express authorization to act, and so may not secure insurance without a court order. See Estates Code, Section 452.101.

(C) Perishable or burdensome personal property

"After approval of the inventory, appraisal, and list of claims, the personal representative of an estate promptly shall apply for a court order to sell, at public auction or privately, for cash or on credit for a term not to exceed six months, all estate property that is liable to perish, waste, or deteriorate in value, or that will be an expense or disadvantage to the estate if kept." Estates Code, Section 356.051(a).

iii. Independent Administration

Independent executors may act without court approval, even where a dependent representative would require a court order. Estates Code, Section 402.002.

iv. Administration with Will Annexed

If all the executors named in a will decline to serve, die, resign, or are removed, the court may grant administration with will annexed on application by a qualified person interested in the estate. Estates Code, Section 361.152. On qualification, the representative will have the same rights, powers, and duties of the predecessor, except as the testator limited under the will. Estates Code, Section 361.153. For example, a testator might grant named executors a power of sale in a will, but withhold that power from others.

v. Multiple Executors or Administrators

The act of a single co-executor or co-administrator is valid, except for conveyances of real estate. Estates Code, Section 307.002. The act of one representative binds the estate regardless of other co-representatives' knowledge. Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* Estate Code, Section 307.002 cmt (2020) (citing *Primm v. Mensing*, 38 S.W. 382 (Tex. App. 1896, no writ)). Thus, absent provisions in the will that might give rise



to a stalemate, disagreement among co-representatives cannot excuse the duty to insure.

### b. Duties

#### i. Estates Code

The duties of executors and administrators are set out in Chapter 351 of the Estates Code. Executors and administrators are also subject to common law duties not preempted by statute. Estates Code, Section 351.001.

##### (A) Duty of care

Absent a contrary court order, an executor or administrator must keep estate buildings in good repair. The executor or administrator must care for all estate property as a prudent person would their own. Estates Code, Section 351.101.

Estates Code, Section 356.051(c)(1) directs the court, in determining whether to order the sale of personal property, to consider “the personal representative’s duty to take care of and manage the estate in the manner a person of ordinary prudence, discretion, and intelligence would manage the person’s own affairs.”

The duty of care does not extend to the estate’s creditors. *U.S. v. Marshall*, 771 F.3d 854, 878 (5th Cir. 2014).

##### (B) Duty to Diversify

In contrast to trustees, executors and administrators have no per se duty to diversify. However, it would seem to be a breach of the duty of care not to sell or exchange an asset at excessive risk of uninsured loss. *See, e.g., Lawyers Sur. Corp. v. Snell*, 617 S.W.2d 750, 752 (Tex. App.—Houston [14th Dist.] 1981, no writ) (house uninsurable given neighborhood’s reputation).

##### (C) Businesses in a dependent administration

Operation of a business by a dependent administrator can be impractical under the usual court supervision. If the business is not part of the residuary and need not be sold to satisfy creditors, an order to operate the business, and with expanded powers, may be requested after notice and hearing. Estates Code, Section 351.202. The order does not relax the duty of care. Estates Code, Section 351.204. The availability and cost of the usual and customary insurance coverage for that business should be confirmed before seeking such an order.

##### (D) Nonprobate assets

A transfer on death deed is a nontestamentary instrument. Estates Code, Section 114.053. However, the property may become part of the residuary estate if

the beneficiary does not survive the transferor by 120 hours. *Cf.* Estates Code, Sections 114.103, 255.152. It is unclear whether a transfer on death deed may provide for longer survival periods. Query whether the duty to insure attaches to the executor or administrator during the survival period.

#### ii. Common Law

The personal representative of an estate is held to the same high fiduciary standards in administering an estate as a trustee. *Humane Society v. Austin National Bank*, 531 S.W.2d 574, 577 (Tex. 1975). *See generally* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges—Family & Probate* PJC 232.1 cmt (2020).

Some commentators feel an executor (and presumably administrator, too) is held to a higher standard than a trustee to preserve the estate for distribution. *See* Steve R. Akers, Bernard E. Jones, & R.J. Watts, II, *Wills Road Map: Practical Considerations in Will Drafting* 154 (3d ed. 2017) (citing *Humane Society of Austin and Travis County v. Austin National Bank*, 531 S.W.2d 574, 580 (Tex. 1976) (primary duty of executor is to preserve estate for distribution)).

### 6. Other Formal Fiduciaries

Other formal fiduciary relationships include attorney-client, officer/director-corporation, and partner-partner, which as a matter of law are relationships of trust and confidence. Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 104.1 cmt (2018).

The PJC’s list is not exclusive. Other fiduciary relationships established as a matter of law: guardian ad litem, spouse to spouse, and joint ventures. Sarah Patel Pacheco, *Pre-Lawsuit Evaluation and Investigation of Fiduciary Claims*, in 9.2 State Bar of Tex. Prof. Dev. Program, 11th Annual Fiduciary Litigation 5 (2016) (Fiduciaries) (citations omitted).

### 7. Informal Fiduciaries

Informal fiduciary relationships are sometimes referred to as a “relationship of trust and confidence” or a “confidential relationship.” Informal fiduciary relationships are a question of fact. The relationship may arise from moral, social, domestic, or purely personal relationships. *Ritchie v. Rupe*, 443 S.W.3d 856, 874 n.27 (Tex. 2014); *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005); *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *MacDonald v. Follett*, 180 S.W.2d 334, 337 (Tex. 1944). Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 104.1 cmt (2018).

#### IV. INSURABLE INTEREST

To discourage the use of insurance for improper purposes, an insurable interest is required to recover on an insurance contract. Different lines of authority address property insurance and life insurance. *State Farm Mut. Auto. Ins. v. Kelly*, 945 S.W.2d 905, 907–908 (Tex. App.—Austin 1997, writ denied) (property); *Drane v. Jefferson Standard Life Ins. Co.*, 161 S.W.2d 1057, 1058 (1942) (life). See generally 21 Dorsaneo, *Texas Litigation Guide* §§ 343.02, 344.03[1] (2020) (property; life, health, and accident).

##### A. Executors and Administrators

An executor or administrator has an insurable interest in the property of the estate. See generally Robert

J. Birnbaum & Leslie Inrig Olear, in 2 Stephen A. Cozen, *Insuring Real Property* § 16.11 (2014 & Supp. 2016) (Insurable Interest; Executors and Administrators).

In some states, real property is not subject to administration in solvent estates of intestate decedents, in which case the administrator has no insurable interest unless insolvency is at least suspected. *Id.*, § 16.11[2][a] (Interest of the Administrator).

In contrast, a Texas personal representative has a duty to collect the entire estate pending administration, regardless of debts, solvency, or the existence of just one beneficiary. Estates Code, Section 101.003; *Atlantic Ins. v. Fulfs*, 417 S.W.2d 302, 305 (Tex. App.—Fort Worth 1967, writ ref'd n.r.e.). The executor or administrator's duty of care and duty to insure extends to all estate property. Estates Code, Section 351.101; *Frost Nat'l Bank v. Kayton*, 526 S.W.2d 654, 660–61 (Tex. App.—San Antonio 1975, writ ref'd n.r.e.).

The personal representative's insurable interest ends when the property is distributed or sold, or when the administration is terminated. Robert J. Birnbaum & Leslie Inrig Olear, in 2 Stephen A. Cozen, *Insuring Real Property* § 16.11[3][d] (2014 & Supp. 2016).

##### B. The Homestead

Interests in the homestead may be divided among an owner, homesteader/life tenant and remainderman, and co-tenants, with different insurable interests, right to insure, duty to insure, and right to insurance proceeds. See Prof. Thomas M. Featherston Jr., *Death of a Spouse; Phantom Estate Administration*, in 35 State Bar of Tex. Prof. Dev. Program, Adv. Estate Planning & Probate 18 (2019), and Gus G. Tamborello, “A House Divided”: *The Rights and Duties of Homesteaders, Life Tenants & Remaindermen*, 10 State Bar of Tex. Prof. Dev. Program, 40th Annual Advanced Estate Planning & Probate (2016).

Also, see The Residence, VIII.C below, regarding residence and occupancy requirements under the standard homeowners policy.

##### 1. Homesteader

The surviving spouse's (or minor child's) homestead right operates like a life estate determinable. The surviving spouse has a right of occupancy for life, so long as he or she uses or occupies the property as a homestead. A child's homestead rights terminate on adulthood. Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* Estates Code, Section 102.005 cmt (2020).

A homesteader has an insurable interest to the full value of the property, and may be entitled to the full amount of insurance proceeds so long as his or her homestead has not terminated. *Doss v. Roberts*, 487 S.W.2d 839, 841 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.).

##### 2. Life Tenant

A life estate is typically i) created by the fee owner's transfer or retention of an interest for life, or ii) acquired by the purchase of a life interest from another. The instruments creating or transferring the life estate may contain conditional limitations terminating the life estate prior to death. See generally Tamborello, *op. cit.*, at 8 (Life Estates).

Life estates in undivided fractional interests are common where the decedent died intestate and left a surviving spouse. Estates Code, Sections 201.002, 201.003 (Separate Estate of an Intestate; Community Estate of an Intestate).

The life tenant has an insurable interest, but no duty to insure. Tamborello, *op. cit.*, at 9 (citing *Richardson v. McCloskey*, 276 S.W. 680, 684 (Tex. Comm. App. 1925)).

##### 3. Remainderman

A remainderman has an insurable interest. Robert J. Birnbaum & Leslie Inrig Olear, in 2 Stephen A. Cozen, *Insuring Real Property* § 16.13 (2014 & Supp. 2016) (Insurable Interest; Life Tenants and Remaindermen).

*Hill v. Hill*, 628 S.W.2d 779 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.), is often cited for the proposition that the remainderman has a duty to insure. See, e.g., Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* Estates Code, Section 102.005 cmt (2020).

The better construction may be that the life tenant has no duty to insure, and the remainderman who elects to insure does so at his or her own expense.

In the absence of a requirement in the instrument creating the life estate or of any agreement to that effect, a life tenant is not

bound to keep the property insured for the benefit of the remainderperson. Where insurance policies are not taken out at the instance of or specially for the benefit of the life tenant but are taken out in favor of the estate by legal representatives of the estate, and the proceeds, therefore, belong to the estate, the estate should be charged with the premiums.

34 Tex. Jur. 3d *Estates* § 44 (Oct. 2020) (Insurance premiums for life estate) (citing *Hill v. Hill*, 628 S.W.2d 779 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.); other citations omitted).

#### 4. Co-Tenant

Decedents' children often inherit real property in undivided interests. Co-tenants share a duty to preserve. *Gonzalez v. Gonzalez*, 552 S.W.2d 175, 181 (Tex. Civ. App.—Corpus Christi 1977, writ refused n.r.e.) A cotenant is entitled to reimbursement from the other cotenants for their proportionate share of insurance in the preservation of common property. *Duke v. Squibb*, 392 S.W.2d 885, 888 (Tex. Civ. App.—Texarkana 1965, no writ). The right of reimbursement may be enforced in a partition action. *Gonzalez v. Gonzalez*, *op. cit.*

### V. TYPES OF INSURANCE

There are several categories of insurance.

Property insurance is “first party,” and compensates the named insured for property that has been lost, damaged, or destroyed. Examples include commercial property, builder's risk, and flood insurance. State Bar of Tex., *Texas Real Estate Forms Manual* § 17.4 (3rd ed. 2017 & Supp. 2020) (Property Insurance).

Liability insurance is “third party,” and compensates a third party injured by the actions or omissions of an insured. Examples include commercial general liability, business auto, worker's compensation, umbrella, and hunting lease liability insurance. *Id.*, § 17.5 (Liability Insurance).

Package policies cover both property and liability risks. Examples of package insurance policy include homeowner's, condominium, tenant's, and farm and ranch insurance. *Id.*, § 17.4:4 (Residential or Farm Property Insurance).

The following is from *O'Connor's \* Texas Causes of Action* ch. 13–A § 2 (2020) (Types of Insurance) (citing *Couch on Insurance* 3d §§ 1:26 to 1:66). For consumer guides to both personal and commercial lines, see the Texas Department of Insurance (TDI), <https://www.tdi.texas.gov/pubs/consumer/index.html> (last visited Oct. 26, 2020). The Office of Public Insurance Counsel can answer phone

and e-mail questions about personal lines, and also has consumer guides online. <https://www.opic.texas.gov/faq/> (last visited Oct. 26, 2020).

#### A. **Liability & Property**

##### 1. Liability only

Under a standard liability-insurance policy, an insurer assumes the duty to indemnify the insured for damages caused to a third party and to defend the insured against lawsuits alleging the insured's liability for an occurrence covered by the policy. I equate the duty to defend with a prepaid legal policy.

##### a. Personal liability insurance

Personal liability insurance protects the individual sued for bodily injury or property damage.

##### b. Commercial liability insurance

##### i. Commercial general liability

Similar to personal liability insurance, this insurance instead protects businesses for injury or damage to a third party (typically excluding the insured's employees).

##### (A) Covered risks

Risks covered by other specialized insurance are excluded, e.g., workers' compensation, professional liability, products liability.

##### (1) Premises operations

This covers use of land and buildings, and the operations of a business (e.g., manufacturing, transportation).

##### (2) Products-completed operations

This covers products manufactured, distributed, or sold by the insured that are no longer in the insured's possession and completed operations occurring away from the premises (e.g., completed construction).

##### (B) Types of coverage

##### (1) Property damage

This includes physical injury to or loss of use of tangible property, such as buildings and their contents. Economic losses, e.g., loss of investment or profits, are not property damage.

##### (2) Bodily injury

This includes illness, physical injury, disease, or death, but does not include purely mental or emotional injuries.

##### (3) Personal injury

In a standard CGL policy, personal injury is an injury that is not a bodily injury and that arises from certain listed offenses, including false imprisonment, malicious prosecution, wrongful eviction, defamation, and invasion of privacy.

### (4) Advertising injury

An advertising injury is any injury caused by the advertising or marketing activities of the insured, including claims for defamation, invasion of privacy, misappropriation of ideas, and copyright infringement.

### (5) Medical payments

The insurer agrees to pay medical expenses for bodily injury caused by an accident occurring on the insured's premises or as a result of the insured's operations.

### ii. Directors & officers

D&O insurance protects corporations against liability resulting from negligence and good faith errors committed by their directors and officers in the performance of the directors' and officers' official duties. Rather than a duty to defend, reimbursement of defense costs is typical.

### iii. Errors & omissions

E&O insurance protects individuals against liability resulting from negligent acts and omissions in the performance of a professional service. E&O insurance is commonly called "professional liability" or "malpractice" insurance.

## 2. Property only

Property insurance protects the insured against loss of or damage to the property described in the policy. The policy may limit the property's use to a stated purpose. "All-risk" and cheaper "named-peril" forms are available.

### a. Personal-use property insurance

This covers the insured's residence and personal property within the residence. Often purchased as part of a combination policy, e.g., homeowners, automobile. Other common types of personal-use property insurance include renter's insurance and flood insurance.

### b. Commercial insurance

This protects against loss or damage to the insured's business property, equipment, and inventory. Business-interruption coverage can be added to protect against economic losses resulting from property damage.

### c. Liability & property combined

Personal liability and property coverage are often purchased together in a combination or "package" policy. Automobile insurance and homeowners' insurance are common combination policies.

### d. Homeowners' insurance

Provides liability protection for injuries that occur on the insured's property and property protection for damage to the insured's home and its contents. There are three standard homeowners' policies in Texas (HO-A, HO-B, and HO-C). Insurers can issue modified policies with TDI approval. Insurance Code § 2301.006. For policy comparisons, visit <http://www.opic.texas.gov/residential-property/compare-policy-coverages/homeowners>.

### i. Liability

Homeowners' insurance provides coverage for liability and medical expenses arising from bodily injury or property damage sustained by a third party while on the insured's property. Intentional acts and business activities at home are excluded from the standard policies.

### ii. Coverage for Firearms Injuries

Because defense costs of firearms accidents and intentional shootings are so high, the available insurance is a critical consideration. Sabrina R. Karels, *Tort Liability and Insurance Coverage for Firearms Injuries*, in 6 State Bar of Texas, *Essentials of Texas Firearms Law* 137 (2020). Since intentional acts are excluded, homeowner's insurance does not cover civil suits concerning firearms injuries when the insured claims self-defense. Coverage may still be available for negligent acts, e.g., negligent control or supervision of children permitted a shooting. Although firearms only policies are available, coverage may also be found under homeowners, automobile, and accident and/or life insurance policies. *Id.*, Section 6.3 (Insurance Coverage and Firearms).

### iii. Property

Homeowners' insurance covers (1) damage to the insured's home, (2) theft of or damage to personal property within the home, and (3) living expenses if damage or repairs render the home uninhabitable.

(A) Coverage may be all-risk or named-peril

### (B) Flood insurance

The National Flood Insurance Program administers public flood insurance, which must be purchased separately. See <https://www.floodsmart.gov/> (last visited Oct. 26, 2020). For a discussion of both public and private flood insurance coverage, see the State Bar of Texas, *Texas Real Estate Forms Manual* §

2.104 (3d ed. 2017 & Supp. 2020) (Flood Insurance), *id.* § 17.4:3 (Specialized Coverages; Flood Insurance).

e. Automobile insurance

Only liability coverage is required, but many policies include property coverage as well.

i. Liability

Standard automobile policies have four types of liability coverage: bodily-injury coverage, property-damage coverage, uninsured/underinsured-motorist (UM/ UIM) coverage, and personal-injury-protection (PIP) coverage. The insured must carry a minimum liability coverage for bodily injury and property damage. UM/UIM and PIP must be included by the insurer unless rejected in writing by the insured. Details are found at

*O'Connor's \* Texas Causes of Action* ch. 13–A § 2.1.3(2) (2017) (Automobile insurance).

ii. Property

Property insurance can be purchased in the form of collision coverage and comprehensive coverage to cover damage to the insured's car.

(A) Collision

Collision coverage pays for damage to the insured's car resulting from an accident.

(B) Comprehensive

Comprehensive coverage pays for damage to the insured's car from most causes, including fire, severe weather, vandalism, floods, and theft.

**B. Title**

Title insurance protects an owner of real property or other interested person against loss or damage resulting from (1) a lien or encumbrance on or a defect in title to the property or (2) the invalidity or impairment of a lien on the property.

As an aside, care is required to preserve title insurance when funding tax-planned gifts and other estate planning transactions. See Michael A. Wren, *Property Taxes and Title Insurance: Issues and Answers for the Estate Lawyer*, 6 State Bar of Tex. Prof. Dev. Program, 36th Annual Estate Planning and Probate Course 15 (2012) (Conveyancing language to preserve warrantor's coverage under T-1 Owner Policy). For language limiting grantor's liability to the title insurance proceeds, see Jason L. Davis, *Deeds in Estate Planning & Probate*, 1 State Bar of Tex. Prof. Dev. Program, 29th Annual Estate Planning & Probate Drafting Course 4 (2018) (Limitation of Executor Grantor Liability to Title Insurance Policy)

Also, note that as to title policies issued or renewed on or after January 1, 2010, coverage on residential real property extends to successors on the insured's death. Tex. Ins. Code § 2703.101. Stanley M. Johanson, *Johanson's Texas Estates Code Annotated* Tex. Ins. Code § 2703.101 cmt (2020).

**C. Fidelity**

Fidelity insurance and fidelity bonds protect business owners against losses arising from the dishonesty or fraud of employees, agents, and independent contractors.

**D. Workers' Compensation**

The Workers' Compensation Act (Comp Act) establishes a system under which employers provide income and medical benefits to employees or their beneficiaries for work-related injuries or death, regardless of fault. Generally, recovery under the Comp Act is an injured employee's sole remedy for work-related injuries; acceptance of benefits waives the right to pursue a common law cause of action against her employer. Participation in the system is voluntary for private employers.

**VI. INSURANCE AGENTS AND BROKERS**

The Texas Insurance Code does not distinguish brokers and agents. In jurisdictions that do, an agent represents the insurer, a broker represents the insured, and yet both have the same duties to the insured.

A prospective insured deals with an insurance agent or broker in order to procure the obligation of an insurance company to pay money on the happening of some contingency. If all goes as expected, the insured receives a writing from an insurer that contains the terms of a valid and responsive insurance policy. And, when a loss occurs, the insurer pays in accordance with the insurance policy.

Unfortunately, all may not go as expected. Circumstances may intervene and the person who dealt with the broker or agent can find himself either without any insurance at all, with the wrong or unexpected coverage, or with a faulty or worthless company. When these circumstances arise, the agent or broker may conceivably be held personally and independently liable to the purported insureds under appropriate theories of responsibility.

1 Bertram Harnett, *Responsibilities of Insurance Agents and Brokers* § 3.01 (1974 & Supp. Dec. 2016).

Except where noted, the following discussion relies on Harnett, *id.*, chapter 3 (Liability to the Insured).

### A. Texas

#### 1. Agent License; Designated Product Certificate

A license is required to solicit or accept an insurance application. Particular lines of insurance require additional certification. Tex. Ins. Code § 4001.101(a). For example, a licensed agent with only a personal lines of property and casualty certificate may only sell to individuals and families primarily for personal or household use. Ins. Code § 4051.401.

#### 2. General Agent Licensing and Continuing Education Requirements Are Insufficient

Consider this before assisting your clients with the purchase of insurance:

Certain insurance products are so complex that the general agent licensing and continuing education requirements are insufficient to ensure the level of agent expertise necessary to safeguard consumer interests. Agents should be equipped with the necessary skills and knowledge to assist insureds appropriately in their purchases. Requiring agent training or demonstration of knowledge before an agent may sell particularly complex products mitigates the negative impact caused by agents selling complex products without the training and knowledge necessary to sell those products in a manner that is fair and beneficial to insureds.

Ins. Code § 4008.001 (Agent Certification and Education Programs for Complex Insurance Products; Purpose).

#### 3. Agent for the Insurer

An insurance agent is not your agent.

A person who solicits an application for life, accident, or health insurance or property or casualty insurance is considered the agent of the insurer issuing a policy on the application and not the agent of the insured in any controversy between the insurer and the insured, the insured's beneficiary, or the insured's dependents.

Ins. Code § 4001.052 (Solicitor of Application for Insurance Considered Agent of Insurer).

#### 4. The Agent's Duties

In Texas, the duties owed by an agent or broker are determined by common law, any contract between the parties, the Texas Insurance Code, and the Texas

Deceptive Trade Practices Act. There is no duty of good faith and fair dealing, and no duty to explain the terms of the policy. Texas recognizes common law duties to i) use reasonable diligence in procuring the requested insurance and ii) inform the client promptly if unable to do so. Gregg S. Weinberg *et al.*, *Avoiding Fiduciary Liability for Tax and Probate Lawyers*, in 17 State Bar of Tex. Prof. Dev. Program, 26th Annual Estate Planning and Probate Course 8 (2015) (citations omitted).

### B. Failure to Provide Agreed Coverage

In practice, brokers or agents have a duty to do what they are asked to do, but not a duty to determine what needs to be done.

Whether more insurance than requested is needed is expert advice, addressed at VI.D below, and part of a duty to advise that generally does not apply to an insurance agent. Except where noted, the following discussion is derived from Harnett, *op. cit.* § 3.03[1].

#### 1. Standard of Care

An agent or broker is obligated to act with reasonable care, skill, and diligence in providing coverage.

#### 2. When Duty Arises

The duty attaches when the agent agrees to provide specific coverage.

General communication with the agent is insufficient. One court found for the agent who agreed to "take care of it" after the insured called and requested business and fire coverage for his equipment and the contents of his office. "The agent was not told the type of business insurance requested, the value of the equipment to be insured, what deductible the insured wanted, or when he wanted the policy to take effect." Such vagueness might be forgiven if the insured completed a policy application or received a policy or a bill. Here though, this insured did not hear from the agent again after his initial call. *Id.* § 3.02[2] n.29.3 (citing *Harris v. Albrecht*, 86 P. 3d 728 (Utah 2004)). The insured has a duty to inform the agent of the information necessary to seek a formal policy of insurance, if not the specific coverage desired. Harnett, *op. cit.*, nn.38–41.

#### 3. Examples

Agents have been held liable in a variety of scenarios—

- failure to add landlord as additional insured
- accidental death policy with 180-day rather than industry standard 365-day incurrual period
- failure to obtain a waiver of a cancellation clause

- personal property policy required a “Class E” safe but agent provided a different safe
- car insured for purchase price rather than cash value
- agent’s mistake invalidated beneficiary designation
- failure to check for a gap between primary and excess coverages
- property party not named as insured

### C. Failure to Advise Promptly of Rejection or Lack of Coverage

What if the insured didn’t request or the agent didn’t promise specific coverage? Whatever the conversation, once an insured receives a binder or some other hope of coverage, the insured stops looking elsewhere and the agent does not discourage that, anticipating a commission.

#### 1. Standard of Care

An agent must advise his customer within a reasonable period of time that he has been unable to secure the requested coverage, even though he did not guarantee to get it. The basis for liability is the insured’s induced reliance on the representative, to the insured’s detriment. Harnett, *id.* § 3.04. Cf. Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 101.41 (2018 ed.), “Did Paul Payne substantially rely to his detriment on Don Davis’s promise, if any, and was this reliance foreseeable by Don Davis?” (Question on Promissory Estoppel).

#### 2. Elements

Texas applies the rules of waiver and estoppel differently in insurance cases. *Id.*, PJC 101.41 cmt. One case approved the following elements:

- Agent had actual or constructive knowledge of the facts not disclosed
- By its actions or silence agent worsened or prejudiced the position of insured
- Insured relied upon the actions or silence to his prejudice

*Riggs v. Sentry Insurance*, 821 S.W.2d 701, 705 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

#### 3. Examples

- Insured requested a survey and all necessary coverage; agent obtained worker’s comp and auto insurance but did not disclose that multiperil policy was unavailable
- Credit life quoted and requested on Regulation Z form but lender never applied for it

- Agent misinformed insured about extent of coverage

### D. Liability for Inadequate Coverage

#### 1. An Agent is Generally Not Liable

An agent’s primary duty, to act in good faith and to do as asked, does not include a duty to advise when more insurance than requested is needed. *See generally* 1 Bertram Harnett, *Responsibilities of Insurance Agents and Brokers* § 3.05 (1974 & Supp. Dec. 2016) (Liability for Giving Expert Advice). An agent generally has no duty to monitor an insured’s coverage to ensure that the requested coverage is adequate.” *Id.* n.19 (quoting *Bryce and Bryce v. Unitrin Preferred Ins. Co.*, 2010 Tex. App. LEXIS 2373 (Tex. App.—Austin 2010, no. pet.)). There is no duty to explain the terms or coverage of an insurance policy. *Hudspeth v. Enter. Life Ins. Co.*, 358 S.W.3d 373, 391 (Tex. App.—Houston [1st.] 2011, no pet.).

Absent a specific agreement to do so, an insured’s agent does not have a continuing duty to advise, guide, or direct the insured’s coverage after the agent has complied with his or her obligation to obtain coverage on behalf of the insured. Insurance agents do not have an independent duty to identify their clients’ needs and to advise them regarding whether they may be underinsured because it is the client’s responsibility or duty, not the insurance agent’s, to determine the amount of coverage needed and advise the agent of those needs. In addition, upon receiving the policy of insurance, the client has a duty to review the policy to ascertain that his or her needs are met.

3 *Couch on Insurance* § 46:38 (Jun. 2020) (Duty to keep insured informed).

#### 2. Duty to Advise

An agent has a duty to volunteer information only in limited circumstances. Whether an insured’s coverage is adequate is considered expert advice which falls within the duty to advise. Harnett, *op. cit.*, § 3.05.

##### a. Agreement

An agent has a duty to advise if he agrees to provide advice. Harnett, *op. cit.*, § 3.05 n.1 (No liability where broker advertised insurance expertise without agreeing or representing to provide the insured asset protection).

##### b. Reliance

An agent has a duty to advise if the insured reasonably expected such advice. *Id.* n.1.1 (Agent knew insured unsophisticated and that insured relying on his advice). Some courts consider whether the agent



received consideration beyond a premium payment. *Id.* n.6 (discussing *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 620 S.E.2d 326, 329 (2005) (no duty to sell the best flood insurance at the best price)) and n.13 at 3-81 (discussing *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465 (1988) (additional consideration, clear request, and extended course of dealings putting agent on notice that insured relied on his advice)).

### c. Special relationship

Harnett suggests a special relationship gives rise to a duty to advise and case law in other jurisdictions repeatedly references the lack of a special relationship in finding no liability. *Id.* There is no per se special relationship in Texas between an agent and an insured, but that does not preclude one arising under general principles of Texas law, e.g., an informal fiduciary relationship, discussed at III.D.7 above.

### 3. Fact Patterns

- Landlord's liability insurance inadequate to protect personal assets after tenant's child drowns
- Coverage adequate but homeowner overpays
- Agent fails to recommend umbrella policy
- Coverage inadequate and homeowner overpays
- Business replacement cost coverage inadequate
- Home construction coverage inadequate
- Boat not covered
- Snow damage excluded from business policy
- Policy adequate when placed but inadequate when renewed
- Liability on sale of alcoholic beverages not covered
- Agent served as ILIT trustee but did not review policy
- Coverage not increased for new, expensive car
- Agent fails to disclose coverage available from other insurers
- Agent fails to explain how replacement policy differs
- Insured needed coverage unique to contract for deed
- Water damage from burst pipes not covered
- Inventory fluctuations left personal property uncovered
- Dentist's overhead disability policy inadequate
- Elderly homeowner relied in vain on agent of many years to estimate the replacement cost of her home
- Standard flood insurance policy sold when cheaper preferred risk policy available

- "Best policy available" requested but not provided
- Failure to maintain or renew deceased insured's policy
- Failure to inspect homeowner's property or calculate replacement values
- Territorial exclusion of accident in Mexico
- Insured not advised of coverage in excess of the National Flood Insurance Act limits
- Loss of business income coverage not requested
- Off-site electronic data not disclosed and coverage not requested
- Business interruption/extra expenses coverage excluded flood damage

## VII. RISK MANAGERS

Brokers and agents are compensated by commissions paid by the insurance companies. Risk managers offer independent advice, if paid by the insured rather than through commissions from the insurer. A risk manager is uneconomical for insureds with small premiums. As with agents, the Insurance Code neither compels nor prohibits risk managers from assuming a duty to advise. If nothing else, licensed risk managers have more expertise than agents.

### A. **Defined**

In the Insurance Code, Chapter 4153—

"[R]isk manager" means a person who:

(1) represents to the public that the person is a risk manager; and

(2) *for compensation* examines or evaluates risks for and provides advice regarding reduction of risks to a person seeking to obtain or renew property and casualty insurance coverage in this state.

Ins. Code § 4153 (*emphasis added*).

### B. **Qualifications**

An exam is generally required. Ins. Code § 4153.054. Certain designations exempt the applicant from examination:

#### 1. CPCU

Chartered property casualty underwriter (CPCU) from the American Institute for Chartered Property Casualty Underwriters;

#### 2. CIC



Certified insurance counselor (CIC) from the national Society of Certified Insurance Counselors;

3. ARM

Associate in risk management (ARM) from the Insurance Institute of America; or

4. CRM

Certified Risk Manager (CRM) from The National Alliance for Insurance Education & Research.

*Id.* § 4153.055(a). Reciprocity, and without examination, is available to risk managers from states with substantially equivalent requirements. *Id.* § 4153.058.

**C. Licensing**

1. Exemptions

Independent risk managers must be licensed. Ins. Code § 4153.051. Other risk managers need not.

This chapter does not apply to a person who is employed as a risk manager by:

- (1) a liability insurance company authorized to engage in business in this state;
- (2) a single employer; or
- (3) a public self-insurance pool.

*Id.* § 4153.002. Exemptions.

Note that a risk manager avoids application of this chapter by declining to accept compensation for risk management service. An agent could hold themselves out as a risk manager, and without license as a risk manager, if compensation is limited to commissions or other compensation paid by an insurance company.

2. Public Location

If licensed, the principal place of business must be accessible to the public. *Id.* § 4153.101.

**D. Dual Compensation**

Licensed risk managers may double-dip, i.e., charge the insured for risk management service and receive a commission from the insurer. However, the risk management fee is forfeit absent full disclosure to the insured. A 24-month lookback period applies. 28 Tex. Admin. Code § 19.1318.

**E. Violations**

1. Civil Penalty

The civil penalty for violating the Insurance Code is up to \$10,000 per act, per day. Tex. Ins. Code. § 101.105.

2. Criminal Penalty

Intentional, knowing, or reckless Insurance Code violations are third degree felony. *Id.* § 101.106.

3. Reporting Required

Adjusters investigating a claim are required to report contracts with unauthorized insurers. *Id.* § 101.301.

4. Validity of Insurance Contract

Unauthorized insurers may not enforce their contracts (the insured may). Those who assist in procuring the contract are liable to the insured for the loss under the contract if the insurer fails to pay. *Id.* § 101.201.

**F. Terms of Engagement**

A written agreement will confirm whether or not the duty to advise has been accepted by an agent or licensed risk manager. It may also include representations of independence, i.e., whether commissions or other compensation are accepted on the sale of insurance.

1. One-Time Review

This form is excerpted from the Texas Transaction Guide. The duty to advise is accepted but without warranties of independence. See the source for the complete form and commentary.

This will confirm the agreement reached in our recent discussion concerning an analysis of your company's insurance coverage.

*We agree to make a thorough investigation of your entire insurance situation, and to analyze coverage, cost, insurable risks, and exposures to loss.*

**We will review and analyze the following policies: [specify types of insurance].** The analysis will consist of a *comparison of the cost of your insurance premiums with those of other reputable companies, an examination of current levels of coverage and corresponding exposure to loss, and an exploration of uninsured or underinsured risks.*

Based on our analysis, we will furnish a written report with information as to the *reduction of premiums, recommendations on a sound and efficient overall insurance*

*program, and suggestions concerning increased and decreased insurance coverage in all areas. The*

report will be presented in person at your office in approximately [number] days.

**The following types of insurance are excluded from this analysis: [specify].**

As compensation for the analysis, you will pay us a fee of \$ [amount] per day, subject to a minimum fee of \$ [amount] and a maximum fee of \$ [amount] for the entire analysis.

If the above meets with your complete approval, please date and sign the original of this letter where indicated and return it to this office. The enclosed copy is for your records. The analysis will begin within [specify length of time, e.g., two business days] after our receipt of the signed agreement.

Herbert S. Kendrick and John J. Kendrick, Jr., 10 *Texas Transaction Guide* § 56.301[2] (2020) (Agreement for Insurance Analysis in Letter Form) (*emphasis added*). The *italicized text* emphasizes the language accepting the duty to advise. The **bold text** emphasis language limiting the duty to advise.

## 2. Continuing Review

This form is also excerpted from the Texas Transaction Guide. The duty to advise is accepted and on an ongoing basis, though interim reviews are limited to so much time per month. This form also includes warranties of independence. See the source for the complete form and commentary.

### Recitals

A. The Client is engaged in the business of [specify] and has its principal place of business at [address].

B. The Client has numerous insurable risks and exposures to loss in the course of its business, and carries several policies of insurance, including [specify types of insurance].

C. The Client desires to engage the services of the Analyst *to monitor the status of its insurance coverage and to advise the Client concerning adequate insurance coverage at the most economical rate.*

D. *The Analyst practices insurance analysis in the State of Texas, and desires to render [his or her] services for the Client as provided in this agreement.*

E. The Analyst warrants that [he or she] is an independent insurance analyst and does not sell insurance or accept commissions on the sale of insurance from any source.

THEREFORE, the Client engages the services of the Analyst, and in consideration of the mutual promises contained in this contract, the parties agree as follows:

### Term

1. This agreement will last for a period of [specify term, e.g., three years], commencing on [date], and may be terminated by either party by giving [number] days' written notice to the other party.

### Services

2. *On a year-round basis, the Analyst will [specify services to be provided for the monthly retainer, e.g., consult with the Client by telephone on all insurance matters except (specify); review new policies, endorsements, and changes as issued; verify the accuracy of premium rates quoted and billed to the Client by insurance companies; and advise the Client on changes in the insurance market that affect the Client's coverage, liability, and premiums]. In [specify month] of each year, the Analyst will analyze the Client's entire insurance situation, and will provide the following services in connection with that analysis: [specify, e.g., a review of all current levels of coverage and corresponding risks and exposure to loss, a comparison and quotation of premiums available from other insurance companies, and a recommendation as to increased and decreased insurance coverage].*

### Excluded Services

**3. This agreement does not cover the following types of insurance: [specify]. This agreement also does not cover the following analysis services: [specify].**

### Fees

4. For the year-round services to be rendered under this agreement, the Analyst will be entitled to a monthly retainer of \$ [amount], due and payable in advance, by the first day of each month. For the

yearly insurance analysis described in Paragraph 2, above, the Analyst

will receive an additional fee of \$ [amount] per hour, subject to a minimum fee of \$ [amount] and a maximum fee of \$ [amount] for the entire analysis. If the Client requires additional services not included in this agreement, the fee for those services must be negotiated and paid separately.

#### Devotion of Time

5. The Analyst will devote the time to the performance of [his or her] duties under this agreement that is reasonably necessary for a satisfactory performance, except that **the Analyst will not be required to spend more than [number] hours per month on the services for which the monthly retainer is paid. If the Client requires additional services not included in this agreement, the performance of those services will be governed by a separate agreement [to be] negotiated between the Client and the Analyst. [The Analyst is not required to provide the additional services].**

Herbert S. Kendrick and John J. Kendrick, Jr., 10 *Texas Transaction Guide* § 56.302[2] (2020) (Agreement for Continuing Insurance Analysis Services in Contract Form) (*emphasis added*). The *italicized text* emphasizes the language accepting the duty to advise. The **bold text** emphasis language limiting the duty to advise.

## VIII. TIPS AND OBSERVATIONS

### A. An Editorial Regarding Insurance Agent vs. Insurance Analyst vs. Risk Manager

This is subjective, but there may be three tiers of insurance service, distinguished as much by economics as by the duties assumed or any statutory license or professional credential. None necessarily impose a duty to advise on the agent (though a contract could). None are per se adequate or inadequate for Trust Code Section 117.011 delegation.

#### 1. Insurance Agent

An insurance agent is a merchant whose stock in trade is insurance. An agent cannot sell and might not suggest a product that is not in stock. If an agent has an appropriate product, the agent will not hesitate to let the

client know. If available elsewhere at a better price, the agent is not obligated to inform the client. If the agent's inventory does not meet the client's needs, the client may never know. If asked for a specific insurance product, the agent is obligated to provide it or timely advise it cannot. The agent will be licensed but will be certified only in limited areas, e.g., personal but not commercial lines of property and casualty insurance. The agent may have no professional credentials or one, e.g., CLU (Chartered Life Underwriter), that may not be relevant to property and casualty insurance. An insurance agent is compensated exclusively by commissions paid by the insurer, and so has an incentive to suggest lower deductibles than economical or more coverage than prudent.

The existing agent should always be informed of the named insured's death, and asked about existing and additional coverage. If contracts or support duties impose specific insurance obligations, even if beyond the agent's usual experience, communicating those specific requirements suffices to share liability with the agent that fails to provide the requested coverage or timely communicate it is unavailable. An insurance agent may or may not carry errors or omission insurance.

#### 2. Insurance Analyst

Insurance analysts are often employed by insurers to review applicants and claims or by mid-sized to large companies to coordinate standard commercial policies with specialized lines. I mean something different here. By "insurance analyst," I mean an agent that purports to optimize the client's insurance coverage. Sometimes marketed as a private risk advisor, an insurance analyst serves high net worth individuals, represents more than one insurer, and holds themselves out as able to identify coverage gaps and excessive insurance. They typically will not be a licensed risk manager, but will have a professional designation such as a CPCU, CIC, ARM, or CRM.

Unless practicing as a licensed risk manager, they need not disclose commission compensation. Like "mere" agents, their compensation tends to come exclusively from the insurer. However, the competition for high net worth clients, their own access to multiple insurers, and the greater overall compensation per client leads to fuller disclosure and more robust advice.

The profile client may have an expensive home, domestic employees, watercraft, a farm or ranch, art or other collections, alternate ownership structures (trusts, LLCs, FLPs), and exposure as a profit or non-profit director.

An insurance analyst will both identify specific insurance needs and provide the necessary policies. An insurance analyst may or may not quantify uninsured risks.

If the insurance analyst has not expressly assumed the duty to advise, there may be no liability for inadequate coverage. Insurance analysts usually carry their own errors and omissions insurance.

An insurance analyst should be consulted or suggested both for estate planning and estate administration of the high net worth individual, in addition to if not instead of the named insured's agent.

### 3. Risk Manager

I reserve the term "risk manager" for those insurance analysts that also participate in contract negotiation and interpretation.

Risk managers identify and reduce or transfer risks to:

- A party on the other side of a transaction through contractual indemnities and waivers;
- A third party through a guaranty of payment or performance;
- An insurance company by purchasing insurance; and
- An insurance company by becoming a loss payee, additional insured, or beneficiary.

State Bar of Tex., Texas Real Estate Forms Manual §§ 17.1, 17.2 (3d ed. 2017 & Supp. 2020) (Risk Allocation Methods and Definitions; Indemnities and Waivers). A risk manager's job is done when insurance and contracts are optimized, and the retained risks identified and quantified.

Expect a true risk manager to volunteer a written contract addressing (yes, and limiting) the duty to advise. Do not entertain a risk manager without an errors and omissions policy.

Risk managers are common on major construction projects, and are compensated by the client rather than an insurer. A licensed risk manager may accept commission compensation but must disclose it.

The code definition of risk manager is much broader, and includes anyone holding themselves out as a risk manager for compensation. Ins. Code § 4153. However, licensure is easily avoided by accepting compensation solely from the insurer, which may be the case with the typical insurance analyst.

Although not licensed as such, some insurance analysts hold themselves out as risk managers, based perhaps on additional services, such as risk reduction program design and ongoing management.

Note that a client who engages a licensed risk manager to review an ILIT policy may have made a grave mistake: no life insurance expertise is needed to become a licensed risk manager in Texas.

A risk manager is indicated for any client engaged in construction, e.g., a new home, as well as for an estate with an executory construction contract.

Residential construction contracts are notorious for incompetent risk allocation.

When concerns warrant engaging an insurance analyst who will assume a duty to advise, it may be necessary to use a risk manager, as an insurance analyst may not be willing to accept an engagement that imposes the duty.

### 4. Choosing

A fiduciary is subject to a duty of extraordinary fidelity, but only ordinary skill, prudence, and diligence. Bogert, Handbook of the Law of Trusts, Section 97 (1921). A licensed risk manager, assuming the duty to advise, with errors and omissions insurance, and with professional credentials in every relevant area (property and casualty, life insurance and annuities, health insurance) may be indicated in some cases, but for the most part is excessive.

It probably suffices for most fiduciaries to inform the named insured's agent of their appointment, and to respond completely to the agent's questions and suggestions.

If the named insured used an insurance analyst previously, the fiduciary should certainly update the analyst as well as any insurance agent.

An insurance analyst rather than a "mere" insurance agent is indicated i) for high net worth individuals, and ii) for any individual with contractual or support insurance obligations that are not explicitly articulated (insurance type, coverage, deductible, effective date, etc.). Any fiduciary responsible for a construction contract should probably always consider a risk manager.

### 5. The Problem with Tips

The Insurance Services Office, Inc. (ISO) templates dominate commercial lines of insurance, but the American Association of Insurance Services and others offer competing, necessarily different "standard" forms. The Texas Department of Insurance (TDI) promulgates forms, e.g., Homeowner's A, B, and C coverages. "Manuscripted," i.e., custom, forms, also abound. State Bar of Tex., Texas Real Estate Forms Manual § 17.3:3 (3d ed. 2017 & Supp. 2020) (Policy Forms). Assumptions about a "standard" form may not bear out in practice. In other words, in some cases, the following advice is worse than no advice.

## B. When the Named Insured Dies

### 1. Don't Remove the Deceased's Name from Any Policy

A named, deceased insured should remain on the policy until the decedent's interest has been transferred out of the estate.

**2. Add the Personal Representative as Named Insured**

Unless the personal representative is the surviving spouse, it's typically necessary to name the executor or administrator as an additional or co-insured to preserve the decedent's rights to add or modify coverage or adjust policy limits. This rule of thumb is no more reliable than any other without reading the actual policy.

**3. Coverage May Lapse on Death Anyway**

Some policies expressly survive death, and for the benefit of the estate's representative, and yet key coverages can lapse on death. *Spurlock v. Beacon Lloyds Ins. Co.*, 494 S.W.3d 148, 154 (Tex. App.—Eastland 2015, pet. denied) (personal property coverage lapsed immediately on original insured's death). ISO and TDI homeowner forms have death clauses with similar results.

My own homeowner's policy provides:

**9. Death. If the named insured dies, we insure:**

- a. the named insured's spouse, if a resident of the same household at the time of death.
- b. the legal representative of the deceased. However, if this legal representative was not an insured at the time of death of the named insured, this policy will apply to such legal representative only with respect to the premises of the original named insured.
- c. any person who is an insured at the time of such death, while a resident of said premises.

Texas Homeowners Policy Form HO-A (10-04)  
(Policy Conditions Applying to Sections I and II)  
(emphasis added).

**C. The Residence**

**1. Actual Residence**

The standard homeowners policy does not cover the house if the insured does not actually reside there. Claims may be denied if the homeowner's child resides there instead, even if the [un]insured intended to move in later. See generally Bill Locke, *Annotated Insurance Specifications*, in 13 *State Bar of Tex. Prof. Dev. Program*, 33rd Ann. *Advanced Real Est. L.* 140 (2011) (*Standard Homeowners Property Policies*).

**2. Vacant vs. Unoccupied**

Vacancy issues occur frequently in the context of estates. In *Estate of Higgins v. Wash. Mut.*, 838 A.2d 778 (Pa. 2003), the court held that a 60-day vacancy clause precluded coverage where the policy was renewed by named insured's estate after she died.

A home may be "unoccupied" but not "vacant." My own homeowner's policy provides:

13. Vacancy. If the insured moves from the dwelling and a substantial part of the personal property is removed from that dwelling, the dwelling will be considered vacant. Coverage that applies Coverage

A (Dwelling) will be suspended effective 60 days after the dwelling becomes vacant. The coverage will remain suspended during such vacancy.

Texas Homeowners Policy Form HO-A (10-04)  
(Section I – Conditions) (emphasis added).

A home may be considered vacant unless it has kitchen appliances, a table and chairs, at least one bed on which to sleep, and somewhere to sit. The owner may rent furniture short term, a real estate agent might stage the home, or it might even be occupied and furnished by a resident manager, e.g., Showhomes. Best practice for an unoccupied property is to install a central alarm monitored for burglar and fire/smoke and to add a temperature sensor to protect pipes from freezing. *Bill Locke, op. cit.* (citing Jack Hungelmann, author of *Insurance for Dummies* (2d ed. 2009)). See also <https://www.irmi.com/articles/expert-commentary/showhomes-solve-home-vacancy-problem> (last visited Oct. 27, 2020).

**3. Observations**

Clients need to know whether the clock is ticking on a grace period. Although 60-day may be standard, I've heard of 30-day clauses. I've also heard of policies that lapse, after a grace period, unless the property is owner-occupied, regardless whether or not vacant.

What does the client's policy say? Good luck getting a complete copy. On renewal, clients tend to receive little more than a new declarations page. Years after the policy first issued, they may not have a copy. Worse, if they do, critical clauses may have been amended by subsequent documents they do not have. I don't think it's practical to expect the client to produce a complete copy of a policy, as amended. I hesitate to request a confirmed complete copy, as amended, from the insurer. If they provided it, do I want to read and take responsibility for it?

And what of idiosyncratic results, such as Spurlock, op. cit. 494 S.W.3d 148, where the personal representative read the policy to include personal property, and was wrong? Unless a lawyer is competent to interpret an entire policy, it seems a mistake to take up part of it.

#### 4. Suggestions

Simply ask the client to update the agent and to confirm coverage. The 60-day grace period is a helpful anecdote to explain the need, but it may be broader or narrower than the actual policy. Any lawyer can review policies for benefits and for scheduled property, but coverage is not always self-evident. I would not ask to review the client's policy for coverage. Instead, I would leave that for the agent.

### D. The Agent under a Power of Attorney

#### 1. Learn from Corporate Agents

Corporate fiduciaries are not prohibited from acting as agents under a power of attorney, but they seldom do. A telling exception: they will use a power of attorney to transfer assets to a management trust. Why the reluctance to do more with a power of attorney? The duties of a trustee are far better developed than those of an agent under a power of attorney. As Bill Pargaman points out, a recent *Johanson's Texas Estates Code Annotated* devoted 71 pages to the Trust Code and annotations, but only 25 pages to the Durable Power of Attorney Act. William D. Pargaman, *What Death Lawyers Want Dirt Lawyers to Know About Powers of Attorney—Part Deux* 23, in 5 State Bar of Tex. Prof. Dev. Program, 26th Annual Advanced Real Estate Drafting Course 23 (2015) (13.10 Corporate Agents).

#### 2. Minimize an Agent's Exposure to the Duty to Insure

Suppose Dad has a home, an IRA at Fidelity, and a bank account at Frost Bank. This is an extreme example, but an agent might limit exposure to the duty of care and duty to insure by managing the IRA with Fidelity's proprietary power of attorney (limited to the account), and managing the bank account using a promulgated account agreement designating an agent. The home could be contributed to a revocable trust using a special power of attorney with no powers other than one to fund a pre-existing trust. See, e.g., *Davis's Texas Estate Planning Forms* 2:6 (2020) (Durable Limited Power of Attorney) and 2:5 (Durable General Power of Attorney; 3.9 Estate, Trust, and Beneficiary Transactions).

If a less limited or even general durable power of attorney existed, the agent should take care not to accept it unless necessary, e.g., to enter a skilled nursing or other personal care contract. Ideally, a power of attorney

to which the duty to insure might attach would not be accepted until the revocable trust had been fully funded, shifting responsibility for those assets to the trustee.

Consider having Dad execute a revocable trust instrument now, rather than depending on the agent to execute one later. Prior to September 1, 2017, it is not clear that an agent can always create a revocable trust following the principal's disability. See the discussion of *Filipp*, The Statutory Form is a Special Power of Attorney, above.

### E. Trustees May Shift Risk

Trustees have statutory authority to shift the risk of the duty to insure. See Delegation to Non-Trustees III.D.3.d above III.D.3.d above. I would suggest a written contract expressly imposing the duty to advise on a credentialed advisor, e.g., a CPCU, who carries errors & omissions insurance. A licensed risk manager will happily accept such an engagement, for a fee. For most estates, this is not likely warranted absent unusual circumstances, e.g., an executory construction contract. An executor or administrator that anticipates funding then serving as trustee of a testamentary trust should consider negotiating this issue with the estate and trust beneficiaries before accepting either appointment.

### F. The Executor

Model language for communicating with an executor is attached at Appendix D, including text to insert into form letters on initial contact, at engagement, and when transmitting letters testamentary. Model language for communicating with a decedent's insurance agent is attached at Appendix E. All are excerpted or adapted from State Bar of Tex., *Texas Probate System* (4th ed. 2014 & Supp. 2020).

## IX. CONCLUSION

A fiduciary has a duty to insure. An insurance agent has no duty to advise when coverage is adequate. The attorney's job is not to fill this gap, but to identify it and to help the client manage it effectively. Only on rare occasion will an attorney, typically one versed in construction law, play an active role in policy review and risk analysis. More often, it is sufficient if the attorney can identify when the duty to insure attaches to the fiduciary, determine the scope and limits of the fiduciary's authority with respect to insurance, recognize when contracts and support obligations expand insurance duties beyond the usual property and casualty analysis, and know how to contractually impose a duty to advise on an insurance expert.

A fiduciary should communicate the estate's assets, activities, and changes to the insurance agent. Responding to the agent's annual questionnaire is a good start. Depending on the size of the estate, the

fiduciary may consult an independent agent or, rarely, a licensed risk manager to review the estate's insurance program. Investment and distribution plans should be reconsidered as risks are discovered that cannot be insured at reasonable cost.

And what about the client that called about postmortem premiums on a decedent's automobile insurance? Does she have an insurable interest? What's at risk? The value of the car? Maybe. Liability if someone's driving it? Maybe not. Is it encumbered? What's the equity? Is there credit life insurance on the car note? Is it co-owned? Was there a survivorship agreement? A beneficiary designation? Who has an insurable interest? Is it reasonable to insure the car? At what cost? If insurance is unreasonable, is a fiduciary likely to reimburse the client expense? Is the existing policy still in force? Can she provide a copy? What does it cover? When does it lapse? What are the requirements to continue coverage? Has she already informed the agent of decedent's death? Pending qualification of a personal representative, perhaps the best she can do is communicate with the agent and consider his advice. What should she do? It depends.

## Fiduciary Checklist

	Agent	Trustee	Guardian	Administrator with Will Annexed or Executor	Administrator
<b>Controlling Instrument</b>	Power of Attorney	Trust Agreement/ Declaration, or Probated Will	Order Appointing Guardian	Order Admitting Will, Authorizing Letters	Order Authorizing Letters
<b>Date</b>					
<b>Choice of Law</b>	per instrument else recited domicile else place of execution. EC 751.0024				
<b>Controlling Authority</b>	(Reference Appendix B when reviewing instrument)	Instrument, Trust Code, and common law, in order	Court Order, EC Title 3, EC Title 2, and common law, in order	Will, Court Order, EC Title 2, and common law, in order	Court Order, EC Title 2, and common law, in order
<b>Estate Assets</b>					
<b>Estate Activities</b>					
<b>Insurance Obligations and Unfunded Indemnities</b>					
<b>Powers</b>	(Reference Appendix B when reviewing instrument)	Per Instrument, excluding those prohibited by TC 111.0035	Per Order, plus EC 1151.103 powers	All powers presumed (except power of sale), unless withheld by Will; if dependent, court approval req.	Only those listed
<b>Power to Insure</b>	(Reference Appendix B when reviewing instrument)	Yes. TC 113.013	Yes. EC 1151.103(4), EC 1151.103(5)	Yes. EC 351.052	Yes, except temp. admin. requires prior order. EC 351.052, EC 452.101
<b>Duty to Diversify</b> Required, Prohibited, Waived	Generally no, but consider duty to preserve estate plan	Diversification required unless settlor altered or beneficiaries waived	Part of 180-day investment plan	No, but for common law duty of care	No, but for common law duty of care
<b>Diversification Plan</b>					
<b>Distribution Plan</b>					
<b>Date Appointment Accepted</b>					
<b>Conditions Precedent</b>	Certification of Disability				

EC = Estates Code; IE = Independent Executor; TC = Trust Code



## Power of Attorney Summary

	Statutory Durable	Durable	Common Law
<b>Current Statutes</b>	Estates Code, Chapters 751–753	Estates Code, Chapters 751, 753	None
<b>Historical Statutes</b> See Appendix C Durable Power of Attorney Legislative History	Durable Power of Attorney Act, Probate Code, Chapter XII, eff. Sep. 1, 1993 (form at Section 490), codified at Estates Code, Chapters 751 and 752, eff. Jan. 1, 2014 (form at Section 752.051).	Probate Code, Section 36A, eff., Jan. 1, 1972, substantially revised eff. Aug. 28, 1989.	None
<b>Form</b>	<p>Promulgated form:</p> <ol style="list-style-type: none"> <li>1. Substantial compliance required,</li> <li>2. Properly completed, and</li> <li>3. P’s signature acknowledged.</li> </ol>	<p>No particular form, except:</p> <ol style="list-style-type: none"> <li>1. Writing/record identifying A,</li> <li>2. Signed by adult P, or by another in P’s conscious presence/direction</li> <li>3. “This power of attorney is not affected by subsequent disability or incapacity of the principal,” or “This POA becomes effective on the disability or incapacity of the principal,” or similar language,</li> <li>4. Acknowledged by P.</li> </ol>	<p>Written instrument not required:</p> <p>But real estate transactions require:</p> <ol style="list-style-type: none"> <li>1. Writing,</li> <li>2. Signed by P, and</li> <li>3. Acknowledged (to enable recording)</li> </ol>
<b>Powers</b>	Form lists standard powers that P initials to grant A; custom limits/extensions authorized. Broad statutory explanations incorporated by reference.	All powers custom drafted. “General” or “special” as agreed by the parties; in absence of clear intent, “general” agency presumed.	
<b>Statutory Duties</b>	<p>Disclosed on promulgated form:</p> <p>Duties arise on acceptance of appointment, and are limited to acts as agent: 1. Promptly inform P of each action, 2. Make/maintain records of each action/decision, 3. Account on demand, 4. Notify P of other A’s breach; protect the incapacitated P, 5. Preserve P’s estate plan, re value, maintenance, taxes, and government benefits</p>	No disclosure:	None
<b>Common Law Duties</b>	<p>Disclosed on promulgated form:</p> <p>1) good faith, 2) do not exceed authority, 3) loyalty, 4) avoid conflicts), and 5) disclose identity</p>	No disclosure:	No disclosure:
<b>Revocable or Irrevocable?</b>	Revocable, but execution of new durable POA does not automatically revoke prior durable POA’s unless subsequent POA provides for revocation		Most are revocable; irrevocable if coupled with an interest in the property subject to the POA
<b>Termination</b>	<p>P dies, P revokes POA, POA provides for termination, purpose of POA accomplished, POA does not provide for replacement of A and A dies/incapacitated/no longer qualified/resigns, A’s marriage to P terminates (divorce/annulment/declared void), permanent guardian of P’s estate qualified to serve.</p> <p>Survives incapacity of principal.</p>		Term expires, specified acts performed/results achieved, after “reasonable” amount of time (if no term specified), subsequent marriage of P, resignation of A, revocation by P, death or disability of P.

## Durable Power of Attorney Legislative History

Eff. Date	Jan. 1, 1972	Aug. 28, 1989	Sep. 1, 1993	Sep. 1, 1997	Sep. 1, 2001	Jan. 1, 2014	Jan. 1, 2014	Jan. 1, 2014	Sep. 1, 2017
<b>Summary</b>	<b>MAJOR REVISION</b> PC 36A <sup>1</sup> enabled durable powers of attorney (2 elements) (no form)	<b>MAJOR REVISION</b> PC 36A revised (3 elements added for a total of 5) (no form) (recording required)	<b>MAJOR REVISION</b> Durable Power of Attorney Act, former Probate Code Chapter XII, replaces PC 36A (4 different elements); Optional form PC 490; Initial to grant powers	<b>MINOR REVISIONS</b> PC 485A added re divorce; General power enabled; Gift powers added; Cross out to withhold powers	<b>MINOR REVISIONS</b> PC 489B duty to inform and account added. PC 487A added re bankruptcy. PC 485 added re guardian.	<b>CODIFICATION</b> Durable Power of Attorney Act transferred from PC to EC; Form moved to § 752.051	<b>CODIFICATION</b> Former Probate Code, Chapter XII, repealed, and EC enacted.	<b>MINOR REVISION</b> Form reverts to initial to grant powers; language enabling a general power deleted.	<b>ACCEPTANCE ENHANCEMENTS</b> Acceptance and rejection procedures added (before, on, or after Sep. 1, 2017); EC 751.0015 added re POA coupled with an interest; EC 751.135 added re second POA; Ch. 753 added re removal of agent (“A”); hot powers added; numerous other changes
<b>Session laws</b>	Acts 1971, 62 <sup>nd</sup> Leg., p. 971, Ch. 173 (S.B. 225), § 3	Acts 1989, 71 <sup>st</sup> Leg., Ch. 404 (H.B. 1517), § 1	Acts 1993, 73 <sup>rd</sup> Leg., Ch. 49 (S.B. 176), §§ 1–3	Acts 1997, 75 <sup>th</sup> Leg., Ch. 455 (S.B. 620), §§ 1–4, 8	Acts 2001, 77 <sup>th</sup> Leg., Ch. 217 (H.B. 1883), §§ 1, 2, (PC 489B); Acts 2001, 77 <sup>th</sup> Leg., Ch. 73 (H.B. 1083), §§ 1, 2, (PC 487A); Acts 2001, 77 <sup>th</sup> Leg., Ch. 1056 (H.B. 1132), §§ 1, 40 (PC 485).	Acts 2009, 81 <sup>st</sup> Leg., Ch. 680 (H.B. 2502), § 4, 12	Acts 2011, 82 <sup>nd</sup> Leg., R.S., Ch. 823 (H.B. 2759), § 1 et seq.	Acts 2013, 83 <sup>rd</sup> Leg., Ch. 700 (H.B. 2918), §§ 1, 2	Acts 2017, 85 <sup>th</sup> Leg., Ch. 834 (H.B. 1974), § 1 et seq.

<sup>1</sup> PC = Probate Code Section; EC = Estates Code Section

Eff. Date	Jan. 1, 1972	Aug. 28, 1989	Sep. 1, 1993	Sep. 1, 1997	Sep. 1, 2001	Jan. 1, 2014	Jan. 1, 2014	Jan. 1, 2014	Sep. 1, 2017
<b>Durabil- ity</b>	1. In writing, and 2. Contain words (or simi- lar expressing intent of dura- bility) “this power of attor- ney shall not terminate on disability of principal.”	1. In writing, 2. Contain words (or simi- lar expressing intent of dura- bility) “this power of attor- ney shall not terminate on disability of P,” 3. Signed by adult P, 4. Witnessed and signed by two W’s at least 18 years old, and 5. Recorded in the county of P’s residence (except POA for medical care).	1. In writing, 2. Designate another person as A, 3. Signed by adult P, 4. Contain words (or similar expressing intent of durability) “this power of attorney is not affected by the subsequent disability or incapacity of P” or “this power becomes effective upon the disability or incapacity of P,” and 5. Acknowledged by P.  Recording no longer required (except in real property transactions).  After 2017 amendments, the instrument may be “a writing or other record,” and may be signed by another person in the conscious presence of and at direction of P.						
<b>Dura- tion</b>		Does not lapse on passage of time unless in- strument specif- ically states a time limitation							
<b>Duty to Inform and Ac- count</b>					1. Actions taken by A, 2. Maintain rec- ords of each ac- tion and deci- sion until deliv- ered to P or dis- charged by court 3. Provide ac- counting on P’s demand			Duties inform and account and lays out fiduciary duties	

Eff. Date	Jan. 1, 1972	Aug. 28, 1989	Sep. 1, 1993	Sep. 1, 1997	Sep. 1, 2001	Jan. 1, 2014	Jan. 1, 2014	Jan. 1, 2014	Sep. 1, 2017
Termination		POA terminates on P’s revocation in writing and filing for record in the county where POA recorded.		A’s authority terminates on P’s divorce or marriage annulment from A	New: POA is not terminated on filing of voluntary or involuntary bankruptcy petition				
Effect of appointment of guardian	If guardian appointed – upon qualification of guardian.	If guardian appointed – upon qualification of guardian.	If guardian appointed – upon qualification of guardian of estate; new in 2001: if temporary guardianship, court may suspend POA until expiration of temporary guardianship.						
Duties if guardian appointed	Deliver all assets and make accounting to guardian.	Deliver all assets and make accounting to guardian.							
Statutory Form	No	No	Yes – initial to grant powers	Yes – cross out to strike powers				Yes – initial to grant powers	Yes – initial to grant powers; “hot powers” added

## Communicating with the Executor

### Initial contact<sup>1</sup>

Please inform each insurance agent of Decedent's date of death and ask for a list of the insurance policies in place on the date of death, the steps and deadlines to keep each policy in force, and whether to add or change insurance coverage.

Until an asset is distributed, it is customary to leave the decedent's name on homeowner's and automobile policies and to add the executor or administrator as an additional named insured.

[Include the following paragraphs if no administration is desired.]

Ask Decedent's insurance agent whether the estate's insurance needs can be managed without appointment of an executor or administrator and without issuance of letters to a personal representative. If insurance has lapsed or is inadequate, who can request coverage?

Ask for the declarations page of each policy in which Decedent has an interest, the tasks and deadlines to keep each policy in force, and a list of any coverage changes needed immediately. Ask whether an heir or another person can be added as a named insured to Decedent's homeowner's and other insurance policies. Do not remove Decedent's name from any policy. On request, we can contact each agent for you.

[Continue with the following]

If you anticipate estate employees, please ask your agent about workers' compensation and similar insurance.

### Engagement<sup>2</sup>

On appointment, the executor's duty of care will require you to insure the estate, typically with property and liability insurance on real property, automobiles, and personal property of significant value. Decedent's contracts and support obligations might require other insurance. Construction and unusual activities may require specialized insurance.

We are not insurance experts, and you cannot rely on our insurance advice. These suggestions may not be appropriate or adequate in your situation, and we offer them only to help you start a conversation with your insurance agent.

Unless you describe the necessary insurance with great specificity, an insurance agent is not liable for inadequate coverage. It may be wise to have an expert investigate the estate's insurance situation and analyze coverage, cost, insurable risks, and exposures to loss. Before you sign, we can review any insurance analysis contract.

### With Letters Testamentary<sup>3</sup>

The executor's duty of care requires you to insure the estate promptly, typically with property and liability insurance on real property, automobiles, and personal property of significant value. Decedent's contracts and support obligations might require other insurance. Construction and unusual activities may require specialized insurance.

If you have not already, please inform each insurance agent of Decedent's date of death and your appointment as executor and ask for the declarations page of each policy in which Decedent has an interest, the tasks and deadlines to keep each policy in force, and a list of any coverage changes needed immediately. Please ask to be added as a named insured to Decedent's homeowner's and other insurance policies. Do not remove Decedent's name from any policy. On request, we can contact each agent for you.

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<sup>1</sup> Excerpted from State Bar of Tex., Texas Probate System (4<sup>th</sup> ed. 2014 & Supp. 2020), Letter 1—Probate Information List to Client.

<sup>2</sup> *Id.*, Letter 3—Confirm Representation and Fee and Outline Anticipated Services (IA).

<sup>3</sup> *Id.*, Letter 23—Advise of Duties and Actions to Follow (IA).

## Communicating with the Agent<sup>1</sup>

[Today's date]

[Insurance agent name]

[Company represented]

[Address]

[City, state, zip]

Re: Your policy number(s) [Homeowners/Vehicle/Fire and extended coverage/Liability/Umbrella policy number(s)]

Insured: [D's full name]

Date of death: [Date of D's death]

Gentlemen:

This office represents [Name of applicant], the prospective independent executor of the estate of [D's full name] ("Decedent").

This letter is to advise you of the fact and date of death of the above-named insured. A death certificate is enclosed.

As appropriate, please add [Name of applicant] as a named insured to Decedent's homeowners' and other insurance policies. Do not remove Decedent's name from any policy until informed that Decedent's interest has been transferred out of the estate.

Please provide me the declarations pages of each insurance policy in which Decedent had an interest, the tasks and deadlines to keep each policy in force, and a list of any coverage changes needed immediately.

Please also advise me of your requirements to make a thorough investigation of the estate's insurance situation, and to analyze coverage, cost, insurable risks, and exposures to loss.

[Optional: The estate may have individual employees. Please call [Name of applicant] at [Applicant's phone number] regarding workman's compensation and similar insurance.]

Thank you very much.

Yours very truly,

[Attorney's name]

Enclosure

Death certificate

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<sup>1</sup> Adapted from State Bar of Tex., Texas Probate System (4th ed. 2014 & Supp. 2020), Letter 130—Insurance Agent.