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Rethinking Powers of Attorney in Real Estate Transactions

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RETHINKING POWERS OF ATTORNEY IN REAL ESTATE TRANSACTIONS

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* Associate Provost and Professor of Law, Southern Methodist University. I wish to thank Richard Crow, Lora Davis, Wilson Freyermuth, and Paul Rogers for their helpful comments on drafts of this article as well as Benjamin Orzeske and Linda Whitton for their time spent discussing the Uniform Power of Attorney Act. I also wish to thank Underwood Law Library Associate Dean Greg Ivy, Research and Faculty Services Librarian Timothy Gallina, and students Alexis Swanzy and Zachery Weber for their research assistance. Finally, I acknowledge and appreciate the research grant provided by the Fred E. Tucker Endowment for Faculty Excellence and the SMU Dedman School of Law.

This issue of the SMU Law Review honors Professor Joe McKnight, and this article discusses recent legislation. Professor McKnight was known for his legislative work. He worked with the State Bar of Texas Family Law Section on the Marital Property Rights Act of 1967, which gave married women in Texas the right to own property, and on the Texas Family Code, finalized in 1979, which made Texas the first state to have a unified Family Code. He was also involved in drafting the Debtor-Exemption Reform Act of 1973 and the Texas Homestead and Personal Property Laws of 1985. *See* Julia Patterson Forrester, *Home Equity Loans in Texas: Maintaining the Texas Tradition of Homestead Protection*, 55 SMU L. REV. 157, 157–58 (2002); Bill Hicks, *Joseph W. McKnight: Man of Scholarship and Service*, TEX. BAR BLOG (Apr. 21, 2015), http://blog.texasbar.com/2015/04/articles/people/joseph-w-mcknight-man-of-scholarship-and-service [https://perma.cc/CE3V-YMYX]. Professor McKnight was a great mentor to his colleagues, and he is sorely missed.

I. INTRODUCTION

POWERS of attorney[1] are often used in real estate transactions for the convenience of parties who may be traveling or otherwise unavailable on the date of the closing of a transaction.[2] In other situations, an agent may be acting under a durable power of attorney on behalf of an elderly or incapacitated principal. A durable power of attorney is one that is intended to continue in effect despite the principal's incapacity.[3]

As part of an estate plan, lawyers often recommend that a client execute a durable power of attorney to provide a plan for the possibility of later incapacity. The client may execute a durable power of attorney granting authority to an agent, often the client's adult child, to act for the client in the event that the client later becomes incapacitated.[4] The reason is to avoid an expensive guardianship proceeding. However, financial institutions and others have often refused to accept powers of attorney or to deal with an agent,[5] thus necessitating a guardianship proceeding.

In 2006 the National Conference of Commissioners on Uniform State Laws approved and recommended the Uniform Power of Attorney Act, replacing the original Uniform Durable Power of Attorney Act.[6] The new Act was designed to address the divergence of various states from the original act as well as problems identified by a survey of attorneys prac-

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1. A power of attorney is an instrument that grants authority for an agent to act on behalf of a principal. UNIF. POWER OF ATT'Y ACT § 102(7) (UNIF. LAW COMM'N 2006); RESTATEMENT (THIRD) OF AGENCY § 1.04(7) & cmt. g (AM. LAW INST. 2006). The law governing powers of attorney is a combination of common law and statutory law. *Id.* at 1, pref. note.

2. A power of attorney may give an agent, sometimes called an attorney-in-fact, very broad powers to act on behalf of the principal, UNIF. POWER OF ATT'Y ACT § 201(c), including the authority to transfer an interest in real estate on behalf of the principal, *id.* § 204.

3. *See* UNIF. POWER OF ATT'Y ACT § 102(2) ("'Durable,' with respect to a power of attorney, means not terminated by the principal's incapacity."). The traditional common law rule was that a power of attorney would terminate on the incapacity of the principal. *See* RESTATEMENT (THIRD) OF AGENCY § 3.08(1). *But see* Trepanier v. Bankers Life & Cas. Co., 706 A.2d 943, 944 (Vt. 1997) (because a coma was not a permanent incapacity, agent's act was voidable, not void.); Cole v. McWillie, 464 S.W.3d 896, 902 (Tex. App.—Eastland 2015) (finding the power of attorney voidable).

4. The power of attorney may be effective immediately or may be drafted to become effective at the time the principal is incapacitated. *See id.* § 109(a). *See also* John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard*, 44 U. BALT. L. REV. 407, 464–65 (2015) (arguing that the springing power of attorney is preferable and should be the default rule).

5. *See id.* § 119 cmt.; Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 352 (2008) [hereinafter Whitton, *Striking a Balance*]; Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 12–13 (2002), http://www.uniformlaws.org/shared/docs/power%20of%20attorney/dpasurveyreport_102902.pdf [https://perma.cc/3NMX-XRE9] [hereinafter Whitton, *Survey Results*].

6. UNIF. POWER OF ATT'Y ACT at 1, pref. note. The original Uniform Durable Power of Attorney Act, promulgated in 1979, was widely adopted by the states. *Id.*

ticing in the area,[7] including the problem of parties refusing to accept powers of attorney.[8]

The Texas Legislature recently adopted amendments to the Texas Durable Power of Attorney Act[9] based on the Uniform Power of Attorney Act.[10] The legislation was sponsored by the State Bar of Texas and originated in the Real Estate, Probate, and Trust Law Section (REPTL) of the State Bar.[11]

The push to amend the Texas Durable Power of Attorney Act came from the probate side of REPTL based on problems that Texas attorneys had seen in the use of durable powers of attorney. Texans have "been unable to effectively use DPOAs due to their rejection for arbitrary or unexplained reasons."[12] Clients would execute a durable power of attorney as part of an estate plan, but when the agent tried to act on behalf of the principal, other parties would refuse to deal with the agent, thus necessitating a guardianship proceeding.

Attorneys on the real estate side of REPTL became involved because a durable power of attorney may give an agent authority to execute a deed or other instrument transferring an interest in real estate on behalf of a principal. Powers of attorney are used in real estate transactions when an agent is acting on behalf of an elderly or incapacitated principal or more often for convenience. In either scenario, the Uniform Act and the amended Texas Act raise interesting questions regarding whether the acts change common law rules relating to the validity of a deed or other transfer of an interest in real estate by an attorney-in-fact. This article will address those issues relating to real estate.

Part II of the article examines some of the changes made by the Texas Legislature when it amended the Durable Power of Attorney Act and by the Uniform Law Commission when it promulgated the new Uniform Act. In Part III, the article discusses common law rules relating to defective deeds, defective powers of attorney, and deeds executed by an agent under a defective power of attorney. Part IV discusses the effect of the Uniform Act and the recent amendments to the Durable Power of Attorney Act on the law relating to real estate transactions.

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7. *Id.*

8. *Id.* § 119 cmt. In fact, 80% of attorneys surveyed reported occasional or even frequent difficulties. *Id.* (citing Whitton, *Survey Results, supra* note 5).

9. H.B. 1974, 2017 Tex. Sess. Law Serv. Ch. 834 (codified in scattered sections of TEX. EST. CODE ANN. Ch. 751 (West 2017)).

10. *See* Committee Report Relating to Durable Powers of Attorney, H.B. 1974, 58th Leg. (Tex. May 28, 2017).

11. The State Bar of Texas supports legislative action in accordance with State Bar Board Policy 8.01. State Bar sections may propose legislation within their respective areas to be included within the State Bar's legislative program. Tex. St. Bar Bd. Policy § 8.01.09 (2017). Professor McKnight worked with the State Bar Family Law Section on numerous legislative initiatives.

12. Committee Report Relating to Durable Powers of Attorney, H.B. 1974, 58th Leg. (Tex. May 28, 2017).

II. UNIFORM AND TEXAS STATUTORY PROVISIONS

The Texas Legislature made a number of changes to the Durable Power of Attorney Act in 2017, but the most important change—the one that is the subject of this article—is intended to require parties to act reasonably in accepting a durable power of attorney.[13] The legislature added Subchapter E entitled "Acceptance of and Reliance on Durable Power of Attorney."[14]

The Act as amended requires that a party accept a power of attorney unless one of the enumerated exceptions to the requirement applies.[15] The party may require a certification by the agent, an opinion of counsel, or an English translation before accepting the power of attorney.[16] Exceptions to the requirement that a party accept a power of attorney include circumstances in which:

1. the party "would not otherwise be required to engage in a transaction with the principal under the same circumstances" (if, for example, the principal would be a new customer);
2. entering into a transaction with the agent would be inconsistent with a federal or state law or regulation;
3. the party has filed a suspicious activity report for the principal or agent, believes in good faith that the principal or agent has committed financial crimes, or has had a previous bad experience with the agent resulting in litigation or a material loss;
4. the party has actual knowledge that the power of attorney has been terminated;
5. the agent refused to provide a requested certification, opinion or translation or, if provided, it is in some way deficient;
6. the party "believes in good faith" that the power of attorney is not valid or that the agent does not have authority; or
7. the party makes or knows of a report to law enforcement or another governmental agency of the agent's abuse or exploitation of the principal.[17]

The Act provides other exceptions as well.[18]

If a party refuses to accept a power of attorney under one of the exceptions, the party must provide the agent with a written statement of the reasons for the refusal.[19] However, if a party refuses to accept a power of

13. *See id.*

14. TEX. EST. CODE ANN. Ch. 751, subch. E (West 2017).

15. *Id.* § 751.201(a)(1). The requirements of the subtitle apply to most durable powers of attorney. *Id.* § 751.0015.

16. *Id.* § 751.201(a)(2); *see also* §§ 751.203 (agent's certification), 751.204 (opinion of counsel), 751.205 (English translation).

17. *Id.* § 751.206(1)–(6), (9).

18. *Id.* § 751.206(7)–(8), (10)–(11). These additional exceptions apply if the power of attorney is the subject of a pending litigation, *id.* § 751.206(7), if the power of attorney was found invalid in earlier litigation, *id.* § 751.206(8), if co-agents give conflicting instructions, *id.* § 751.206(10), or if the power of attorney is governed by the law of another state that would not require its acceptance, *id.* § 751.206(11).

19. *Id.* § 751.207. However, if the reason is under § 751.206(2) (inconsistency with law) or (3) (suspicious activity report), the party does not have to provide additional detail. *Id.*

attorney in violation of the Act, the statutory remedy available to the principal or agent is an order requiring the party to accept the power of attorney along with an award of reasonable attorneys' fees and court costs.[20]

If a party does accept a durable power of attorney in good faith without actual knowledge that the signature is forged, that the power of attorney is void, invalid, or terminated, or that the agent has exceeded the authority, the party may rely on the power of attorney as if it is valid and presently in effect and as if the agent is acting properly.[21] Actual knowledge is defined in the statute as "the knowledge of a person without that person making any due inquiry, and without any imputed knowledge . . . ."[22] Thus, although the Act requires acceptance of a power of attorney absent an exception to acceptance, it protects a party who accepts the power of attorney in good faith.

These provisions of the Texas Act are based on Sections 119 and 120 of the Uniform Power of Attorney Act.[23] Like the Texas Act, the Uniform Act requires that a party accept a power of attorney absent one of the enumerated exceptions[24] but allows the party to require a certification by the agent, an opinion of counsel, or an English translation.[25] And as in Texas, the Uniform Act allows a party who accepts a power of attorney in

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§ 751.207(b). This protects parties who have filed suspicious activity reports because federal law prohibits parties from disclosing any information about a suspicious activity report.

20. *Id.* § 751.212(c). If the written statement is provided after the commencement of an action, the only remedy is attorney's fees and court costs. *Id.* § 751.212(e). If a party who refused to accept a power of attorney prevails in a suit by the principal or agent, the court may award the party reasonable attorneys' fees and court costs incurred in defending the suit. *Id.* § 751.213.

21. *Id.* § 751.209. *See infra* Part IV.A. for a discussion of this section.

22. *Id.* § 751.002(1).

23. *See* UNIF. POWER OF ATT'Y ACT §§ 119, 120 (UNIF. LAW COMM'N 2006).

24. *Id.* § 120. The exceptions in the Uniform Act are not as extensive as those in the Texas Act. *Compare* TEX. EST. CODE ANN. § 751.206 (West 2017), *with* UNIF. POWER OF ATT'Y ACT § 120(b). Under the Uniform Act:

> A person is not required to accept an acknowledged statutory form power of attorney if:
>
> (1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;
>
> (2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;
>
> (3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;
>
> (4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;
>
> (5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested . . . ; or
>
> (6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective services office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent . . . .

Id.

25. *Id.* §§ 119(d), 120(a)(2).

good faith without actual knowledge of a defect to rely on it.[26] Similar to the Texas Act, if a party refuses to accept a power of attorney in violation of the Uniform Act, the remedy available to the principal or agent is an order requiring the party to accept the power of attorney along with an award of reasonable attorneys' fees and court costs.[27]

These provisions of the Uniform and Texas Acts are intended to address the problem of parties refusing to accept a power of attorney. The Acts require acceptance of a power of attorney absent an exception to the requirement, but protect parties who accept a power of attorney in good faith without actual knowledge of a defect. Thus, "[i]n exchange for mandated acceptance of an agent's authority, the Act[s] [do] not require persons that deal with an agent to investigate the agent or the agent's actions."[28] Although the Acts have other provisions designed to safeguard against abuse,[29] they change the balance between the conflicting policies of encouraging acceptance of powers of attorney and protecting against elder abuse or other misconduct by an agent.[30] In the past, a party who dealt with an agent had a duty to ascertain the agent's authority and assumed the risk if an agent acted without authority.[31] Under the Uniform and Texas Acts, however, parties dealing with an agent may have less incentive and less ability to conduct due diligence to determine the agent's authority.[32] This in turn may increase the likelihood of misconduct by an agent.

In reviewing the Texas bill before its enactment, real estate lawyers raised concerns about how the Act would affect buyers and sellers of interests in real estate, mortgage lenders, and title companies.[33] In particular, a question arose as to how the Texas Act would affect the validity of a

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26. *Id.* § 119(b), (c). The Act provides alternate sections, one applicable to all acknowledged powers of attorney and the other applicable only to acknowledged powers of attorney in the statutory form. *Id.* § 120(a), alt. A, B.

27. *Id.* § 120(c).

28. *Id.* at 2, pref. note. *See also* TEX. EST. CODE ANN. § 751.002(1) (West 2017) (defining actual knowledge to exclude any requirement of due inquiry).

29. *See* UNIF. POWER OF ATT'Y ACT at 2, pref. note (The Uniform Act has "safeguards against abuse . . . provided through heightened requirements for granting authority that could dissipate the principal's property or alter the principal's estate plan (Section 201(a)), provisions that set out the agent's duties and liabilities (Sections 114 and 117) and by specification of the categories of persons that have standing to request judicial review of the agent's conduct (Section 116)."); TEX. EST. CODE ANN. §§ 751.031(b) (requiring an express grant of authority to exercise so-called "hot powers" such as making a gift or changing a beneficiary designation), 751.121–122 (imposing new duties on an agent), 751.251 (listing parties with standing to request review of the agent's conduct).

30. *See* Craft, *supra* note 4, at 432–38; Andrew H. Hook & Lisa V. Johnson, *The Virginia Uniform Power of Attorney Act*, 44 U. RICH. L. REV. 107, 127–32 (2009); Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 ELDER L.J. 165, 180–82 (2009); Whitton, *Striking a Balance*, *supra* note 5, at 343.

31. *See* Jarvis v. Parnell, 167 S.E.2d 3, 6 (N.C. App. 1969); Kern v. J.L. Barksdale Furniture Corp., 299 S.E.2d 365, 367 (Va. 1983).

32. *See infra* Part IV.C.2.

33. In response to some of these concerns, drafters added a provision to the bill, which was included in the final Texas Act. TEX. EST. CODE ANN. § 751.007(2) (West 2017). *See infra* Part IV.C.1.

deed or other conveyance of an interest in real estate executed by an agent without authority to make the conveyance. In order to explain the questions that the Act raises in real estate transactions, this article will first discuss common law regarding defective deeds, defective powers of attorney, and deeds executed by an attorney-in-fact under a defective power of attorney.

III. COMMON LAW

A. Defective Deeds

Many factors in the drafting or execution of a deed can cause the deed to be defective. For example, a deed that is forged or altered is defective,[34] as is a deed that is not delivered.[35] Other defective deeds include those obtained by fraud, undue influence, or duress, and deeds executed by a grantor who is incompetent, incapacitated, or a minor.[36]

The validity of a defective deed depends upon the defect and the circumstances. Deeds with minor inadvertent errors, such as mistakes in the property description, can be corrected by the parties[37] or reformed by a court.[38] However, in other cases, the defect may be caused by a wrongdoer. The grantee may be the wrongdoer seeking to take title to property—for example, if a grantee fraudulently induces the transfer, exerts undue influence on the grantor, or forges the deed. In other circumstances, the grantee may be an innocent party, or a wrongdoing grantee may have transferred the property to a good faith purchaser. In litigation between a grantor and a good faith purchaser from the original grantee, one will be awarded the property and the other will be left with a cause of action against the wrongdoer, who may be missing or judgment-proof. The result in this type of dispute depends upon whether the defect makes the deed void or voidable.[39]

A void deed is one that passes no title whatsoever to the grantee.[40]

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34. Forgery is the making or alteration of an instrument "by one who purports to act as another." Nobles v. Marcus, 533 S.W.2d 923, 925–26 (Tex. 1976). Thus, the term forgery includes alteration.

35. *See infra* note 52 and accompanying text.

36. *See infra* notes 44–50 and accompanying text.

37. Myrad Props., Inc. v. LaSalle Bank Nat'l Ass'n, 300 S.W.3d 746, 750 (Tex. 2009) (citing Doty v. Barnard, 47 S.W. 712, 713 (Tex. 1898)) ("[A] correction deed may be used to correct a defective description of a single property when a deed recites inaccurate metes and bounds."). *See also* Gallups v. Kent, 953 So. 2d 393, 394 (Ala. 2006); Beckius v. Hahn, 207 N.W. 515, 517 (Neb. 1926); Johnson v. Hovland, 795 N.W.2d 294, 301 (N.D. 2011).

38. *See* Dixon v. Dixon, 898 N.W.2d 706, 712 (N.D. 2017); Nelson v. Daugherty, 357 P.2d 425, 432 (Okla. 1960); Simpson v. Curtis, 351 S.W.3d 374, 377–78 (Tex. App.—Tyler 2010, no pet.).

39. The rules relating to void and voidable deeds also apply to other transfers of an interest in real estate. They are similar to rules relating to contracts in general. *See* Restatement (Second) of Contracts § 7 & cmts. a & b (Am. Law Inst. 1981) (differentiating void and voidable contracts and listing circumstances that typically make a contract voidable).

40. *See* Slaughter v. Qualls, 162 S.W.2d 671, 674 (Tex. 1942); Kline v. Mueller, 276 P. 200, 206 (Okla. 1928).

Thus, even a good faith purchaser from the grantee will lose in a suit over title as between the good faith purchaser and the original owner.[41] The result is that the grantor still has title to the land that the deed purported to convey.

A voidable deed on the other hand is valid until it is set aside.[42] As between the grantor and grantee, the grantor has the right to ask a court to void the deed. However, if the grantee in the meantime has transferred the property to a good faith purchaser, the good faith purchaser gets title through the voidable deed in the chain of title.[43] Thus, in a suit over title to the property between the original grantor and the good faith purchaser, the good faith purchaser will prevail.

Defects that make a deed voidable include fraud,[44] undue influence,[45] duress,[46] incompetence,[47] incapacity,[48] and infancy.[49] For example, if a grantee makes misrepresentations in order to procure a deed, the deed will be voidable due to fraud in the inducement.[50]

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41. *See* Lighthouse Church of Cloverleaf v. Texas Bank, 889 S.W.2d 595, 601 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Graves v. Wayman, 859 N.W.2d 791, 801 (Minn. 2015); *Kline*, 276 P. at 206.

42. Logue v. Von Almen, 40 N.E.2d 73, 81-82 (Ill. 1941); *Lighthouse Church of Cloverleaf*, 889 S.W.2d at 601.

43. *Logue*, 40 N.E.2d at 82; *Lighthouse Church of Cloverleaf*, 889 S.W.2d at 601.

44. Ford v. Exxon Mobil Chem. Co., 235 S.W.3d 615, 618 (Tex. 2007); Nobles v. Marcus, 533 S.W.2d 923, 925–26 (Tex. 1976); Morlock, L.L.C. v. Bank of New York, 448 S.W.3d 514, 519 (Tex. App.—Houston [1st Dist] 2014, no pet.). *See also* Fishman v. Murphy, 72 A.3d 185, 193 (Md. 2013).

45. McCary v. Robinson, 130 So. 2d 25, 29 (Ala. 1961); Rentfro v. Cavazos, 2012 WL 566364, at *10 (Tex. App.—San Antonio 2012, pet. denied); First Interstate Bank v. First Wyo. Bank, N.A., 762 P.2d 379, 382 (Wyo. 1988).

46. *See* Kline v. Kline, 128 P. 805, 809 (Ariz. 1912); Lyon v. Bargiol, 47 S.E.2d 625, 628 (S.C. 1948); Cook v. Moore, 39 Tex. 255, 255 (1873); Dyer v. Dyer, 616 S.W.2d 663, 665 (Tex. Civ. App.—Corpus Christi 1981, writ dism'd).

47. *See* Salliotte v. Dollarhite, 178 N.W. 694, 695 (Mich. 1920); Scott v. Swank, 273 N.W. 25, 29 (Neb. 1937); Gaston v. Copeland, 335 S.W.2d 406, 408–09 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.). Parties often allege more than one defect. *See, e.g.*, Kramer v. Leinbaugh, 259 N.W. 20, 21 (Iowa 1935) (fraud, incompetence, and undue influence).

48. *See* TEX. PROP. CODE ANN. Tit. 2, App., § 10.20, cmt. (West Supp. 2017) (citing Williams v. Sapieha, 61 S.W. 115, 116 (Tex.1901)); Williamson v. Lowe, 241 S.W. 333, 335 (Ky. 1922); Bragdon v. Drew, 658 A.2d 666, 668 (Me. 1995). Incompetence is one type in incapacity. Modern courts tend to use the term incapacity. *See infra* note 71 (discussing the term "incapacitated person").

49. *See* City of Jackson v. Jordan, 202 So. 3d 199, 203 (Miss. 2016); Lewis v. Stephens, 362 S.W.2d 564, 567 (Mo. 1962); Holden v. Murphy, 62 S.W.2d 189, 192 (Tex. Civ. App.—Texarkana 1933, writ ref'd) (citing Askey v. Williams, 11 S. W. 1101 (Tex. 1889)). *See also* TEX. PROP. CODE ANN. Tit. 2, App., § 10.10, cmt. (West 2009) ("[D]eeds executed by minors are voidable, not void, and convey title until set aside.").

50. *See* Spikes v. Clark, 411 S.W.2d 148, 152–53 (Mo. 1967); Ford v. Exxon Mobil Chem. Co., 235 S.W.3d 615, 618 (Tex. 2007); Jones v. Comer, 13 S.E.2d 578, 582 (W. Va. 1941).

A forged deed is void[51] as is a deed that is not delivered.[52] Such deeds have no effect. In addition, deeds obtained by fraud in the factum are treated as void in many jurisdictions.[53] Fraud in the factum is fraud by which a grantee tricks a grantor into signing an instrument without the grantor knowing the nature of the instrument.[54] Most cases in which a court voids a deed based on fraud in the factum involve an elderly, illiterate, or disabled grantor.[55]

Texas courts have discussed fraud in the factum in contexts other than deeds, distinguishing fraud in the factum, which makes an agreement void, from fraud in the inducement, which makes it merely voidable.[56] Texas courts have not used the term "fraud in the factum" in the context of a deed, but they have applied the concept to declare a deed void.

For example, in *Stephenson v. Arceneaux*,[57] a grantee fraudulently misrepresented the contents of a deed to two grantors, one of whom did not speak English. The grantors relied on the representation of the grantee that the document was an oil and mineral lease when in fact it was a deed. A court of civil appeals affirmed the judgment of the trial court, which had concluded that the deed was null and void and was never a binding document upon the grantors.[58]

In *Reyes v. De la Fuente*,[59] an illiterate grantor was entitled to cancellation of a deed after the grantee obtained the deed under the false pretense that it was a mortgage. The Texas Court of Civil Appeals affirmed the decision of the trial court, which had declared the deed null and void.[60] Thus, Texas courts seem to have applied the doctrine that fraud in

51. OC Interior Servs., LLC v. Nationstar Mortg., LLC, 7 Cal. App. 5th 1318, 1331–32 (Cal. App. 4th Dist. 2017); Smith v. Smith, 438 A.2d 842, 843 (Conn. 1981); Faison v. Lewis, 32 N.E.3d 400, 403 (N.Y. 2015); Hennessy v. Blair, 173 S.W. 871, 874 (Tex. 1915); Dyson Descendant Corp. v. Sonat Exploration Co., 861 S.W.2d 942, 947 (Tex. App.—Houston [1st Dist.] 1993, writ refused n.r.e.); Rasmussen v. Olsen, 583 P.2d 50, 52–53 (Utah 1978).

52. *See* Smith v. Lockridge, 702 S.E.2d 858, 862 (Ga. 2010); Seay v. Seay (In re Estate of Hardy), 910 So. 2d 1052, 1055 (Miss. 2005); Estes v. Reding, 398 S.W.2d 148, 149–50 (Tex. Civ. App.—El Paso 1965, writ refused n.r.e.).

53. STOEBUCK & WHITMAN, THE LAW OF PROPERTY 817 (3d ed. West 2000). *See, e.g.*, Delsas v. Centex Home Equity Co., LLC, 186 P.3d 141, 144 (Colo. App. 2008); Chen v. Bell-Smith, 768 F. Supp. 2d 121, 135 (D.D.C. 2011).

54. *See* Langley v. Federal Deposit Ins. Corp., 484 U.S. 86, 93 (1987); Bellamy v. Resolution Trust Corp., 469 S.E.2d 182, 184 (Ga. 1996); FDIC v. Jahner, 506 N.W.2d 57, 61 (N.D. 1993).

55. STOEBUCK & WHITMAN, *supra* note 53, at 817. *See, e.g.,* Mangum v. Surles, 187 S.E.2d 697, 700 (N.C. 1972); McNac v. Brown, 208 P. 268, 270 (Okla. 1922).

56. *See, e.g.*, Dewey v. Wegner, 138 S.W.3d 591, 598 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); Commonwealth Land Title Ins. Co. v. Nelson, 889 S.W.2d 312, 321 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citing Langley v. Fed. Deposit Ins. Corp., 484 U.S. 86, 93–94 (1987).

57. Stephenson v. Arceneaux, 227 S.W. 729 (Tex. Civ. App.—Beaumont 1920, no writ).

58. *Id.* at 731.

59. Reyes v. De La Fuente, 15 S.W.2d 702 (Tex. Civ. App.—San Antonio 1929, writ dism'd w.o.j.).

60. *Id.* at 703.

the factum makes a deed void.[61] Courts in other jurisdictions are more explicit in holding a deed void due to fraud in the factum.[62]

The distinction between a void deed and a voidable deed arises in the treatment of a good faith purchaser from the grantee.[63] A deed that is forged or undelivered is void and wholly ineffective to pass title.[64] Both the grantor and a good faith purchaser from the grantee are innocent parties, but the grantor wins. A purchaser can obtain title insurance to protect against the risk that a deed in her chain of title is void but will likely receive only damages under the terms of the policy. Voidable deeds are treated differently. As between a grantor who is fraudulently induced to sign a deed or lacks capacity and a good faith purchaser from the grantee, the law favors the good faith purchaser as more innocent. The grantor's cause of action is against the wrongdoer.

B. Deeds Executed Under Defective Power of Attorney

Similar to the rules governing deeds[65] and contracts,[66] a defective power of attorney can be void or voidable depending upon the circumstances. A forged power of attorney is void,[67] and a power of attorney becomes void at the death of the principal[68] or upon revocation.[69] Powers of attorney that are voidable include those obtained by fraud,[70] those ex-

61. *See also* Tijerina v. Tijerina, 290 S.W.2d 277, 278 (Tex. Civ. App.—San Antonio 1956, no writ) (involving an illiterate grantor) ("This is not a case 'where the grantor knew the contents of the deed he executed, but was induced to execute it by the fraudulent representations of the grantee or of someone in privity with the grantee * * *.' [16 Am. Jur. 20, Deeds, § 31 (2017); U. S. Royalty Ass'n Stiles, 131 S.W.2d 1060 (Tex. Civ. App.—Amarillo 1939, writ dism'd)]. This is a case where the plaintiff signed a deed under the fraudulently induced belief that it was a mere power of attorney.").

62. *See, e.g.* Delsas v. Centex Home Equity Co., LLC, 186 P.3d 141, 144 (Colo. App. 2008); Williams v. Mentore, 115 A.D.3d 664, 665 (N.Y. Sup. Ct. 2014).

63. Lighthouse Church of Cloverleaf v. Texas Bank, 889 S.W.2d 595, 601 (Tex. App.—Houston [14th Dist.] 1994). *See also* Bardin v. Grace, 52 So. 425, 426 (Ala. 1910); Bank of America v. Adamson, 391 P.3d 196, 203 (Utah 2017).

64. And courts in many jurisdictions treat cases involving fraud in the factum like the cases of forgery or non-delivery. *See supra* notes 53–56 and accompanying text.

65. *See supra* Part III.A.

66. *See* Restatement (Second) of Contracts § 7 & cmts. a & b (Am. Law Inst. 1981) (differentiating void and voidable contracts and listing circumstances that typically make a contract voidable). "The legal relations that exist after avoidance vary with the circumstances. In some cases the party who avoids the contract is entitled to be restored to a position as good as that which he occupied immediately before the formation of the contract; in other cases the parties may be left in the same condition as at the time of the avoidance." *Id.* § 7 cmt. c.

67. *See* Neuman v. Neumann, 971 N.Y.S.2d 322, 323–24 (N.Y. App. Div. 2013). *See also* Ruiz v. Stewart Mineral Corp., 202 S.W.3d 242, 248–49 (Tex. App.—Tyler 2006, pet. denied) (defendant alleged that power of attorney was forged, but court found no evidence to support the allegation).

68. Long v. Schull, 439 A.2d 975, 977 (Conn. 1981); Dallam v. Sanchez, 47 So. 871, 871 (Fla. 1908); Wall v. Lubbock, 118 S.W. 886, 888 (Tex. Civ. App.—Austin 1908, writ ref'd).

69. Scroggins v. Meredith, 131 S.W.2d 195, 195 (Tex. Civ. App.—Beaumont 1939, no writ); Lazov v. Black, 567 P.2d 233, 234–35 (Wash. 1977).

70. Dybvik v. Behrends, 8 Alaska 544, 546 (D. Alaska 1935). *See also* Broadway v. Miller, 288 S.W. 627 (Tex. Civ. App.—El Paso 1926, writ ref'd).

ecuted by a party who is incompetent or incapacitated,[71] and those executed by a minor.[72] Courts in some jurisdictions, however, hold that a power of attorney executed by an incompetent person is void.[73]

The capacity of an agent to act depends upon the capacity of the principal.[74] Thus, an act by an agent is void if the power of attorney is void, and an act by an agent is voidable if the power of attorney is voidable.

What if a deed is executed by an agent under a defective power of attorney? The Texas Supreme Court held in *Williams v. Sapieha* that there is "no difference in principle between the act of making a deed which passes the title and making an instrument which authorizes another person to do the same thing."[75] In that case, a landowner signed a power of attorney authorizing his attorney-in-fact to execute a deed on his behalf; however, the landowner lacked mental capacity at the time he executed the power of attorney.[76] The Court held that both the power of attorney and deed were voidable, rather than void.[77]

In *Ferguson v. Houston, East & West Texas Railway Co.*,[78] the plaintiff executed a power of attorney to his brother when he was twenty, and the

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71. *See* Parrish v. Rigell, 188 S.E. 15, 19 (Ga. 1936) ("When a power of attorney is executed by one insane at the time, it is voidable."); O'Neal by and through Small v. O'Neal, 803 S.E.2d 184, 188 (N.C. Ct. App. 2017) ("[W]hen a mentally incompetent person executes a contract or deed before their condition has been formally declared, the resulting agreement or transaction is voidable and not void."); Williams v. Sapieha, 61 S.W. 115, 116 (Tex. 1901); Houston Oil Co. v. Biskamp, 99 S.W.2d 1007, 1010 (Tex. Civ. App.—Beaumont 1936, writ dism'd).

Courts use the term "incompetence" as well as "incapacity" or "lack of capacity" in cases where a party does not have mental capacity. The Texas Estates Code defines an "incapacitated person" as:

> (1) a minor;
> (2) an adult who, because of a physical or mental condition, is substantially unable to:
> (A) provide food, clothing, or shelter for himself or herself;
> (B) care for the person's own physical health; or
> (C) manage the person's own financial affairs; or
> (3) a person who must have a guardian appointed for the person to receive funds due the person from a governmental source.

TEX. EST. CODE ANN. § 1002.017 (West 2014). Thus, incapacity is a more general term including infancy as well.

72. Nettleton v. Morrison, 18 F. Cas. 14, 15 (C.C.D. Minn. 1877); Ferguson v. Houston, E. & W. Tex. Ry. Co., 11 S.W. 347 (Tex. 1889). *But see* Philpot v. Bingham, 55 Ala. 435, 439 (1876) (holding a power of attorney executed by a minor to be void).

73. *See Williams*, 61 S.W. at 118; O'Neal by and through Small v. O'Neal, 803 S.E.2d at 188 ("[A] contract or deed executed after a person has been adjudicated incompetent is absolutely void . . . .").

74. *See* RESTATEMENT (THIRD) OF AGENCY § 3.04(1) & cmt. b (AM. LAW INST. 2006). "Capacity to do an act through an agent is characterized as 'coextensive' with legal capacity to do the act oneself . . . ." *Id.* cmt. b (citing FRANCIS M.B. REYNOLDS, BOWSTEAD & REYNOLDS ON AGENCY 34 (17th ed. 2001)).

Note that a durable power of attorney creates an exception to this general rule because the authority granted the agent continues despite the principal's subsequent incapacity. *See supra* note 3 and accompanying text.

75. *Williams*, 61 S.W. at 116.

76. *Id.* at 117.

77. *Id.*

78. *Ferguson*, 11 S.W. at 347.

brother, pursuant to the power of attorney, sold land in which the plaintiff held an interest as tenant in common. The purchaser was not aware that the plaintiff was a minor, and the plaintiff received his share of the sale proceeds. More than two years after reaching the age of majority, the plaintiff sued to set aside the sale without offering to return the purchase price. The Texas Supreme Court held the power of attorney voidable, but affirmed the trial court's holding denying relief on the ground that the plaintiff, in order to set aside the sale, should have acted within a reasonable time and offered the return of the purchase money.[79]

The Texas Court of Appeals recently followed the reasoning of *Williams* to declare a deed voidable. In *Cole v. McWillie*,[80] the court examined the issue of whether a deed is void or voidable when executed by an attorney-in-fact who was acting on behalf of an individual who was competent at the time of the execution of the power of attorney but was incompetent at the time of the execution of the deed. Because the power of attorney was not a durable power of attorney, the subsequent incompetence of the principal rendered the power of attorney voidable. The court concluded that *Williams* was controlling and held that the deed was voidable.[81] The court further ruled that any action to disavow the deed was subject to a four-year statute of limitations.

In these cases, the courts treat the deed executed by an agent as being in the same category as the power of attorney. If the power of attorney is voidable, then the deed is voidable.[82] If the power of attorney is void, then the deed would also be void.[83] If void, the deed is of no effect, and the grantor will win as against a grantee and a good faith purchaser from the grantee. If voidable, the grantor will win as against the grantee, even if the grantee purchased in good faith from the grantor's agent. Only a good faith purchaser from the grantee can prevail over the grantor. Thus, in the case of a voidable power of attorney and deed, the good faith of the grantee in dealing with an agent would be irrelevant. But both the Uniform Power of Attorney Act and the Texas Durable Power of Attorney Act might arguably change some of these common law rules.

IV. UNIFORM ACT AND TEXAS DURABLE POWER OF ATTORNEY ACT AMENDMENTS APPLICATION TO REAL ESTATE TRANSACTIONS

A. Reliance on a Power of Attorney

The Uniform and Texas Acts impose an obligation on parties to accept

79. *Id.* at 348–49.
80. Cole v. McWillie, 464 S.W.3d 896, 898 (Tex. App.—Eastland 2015, pet. denied).
81. *Id.* at 902.
82. *See supra* notes 75–77 and accompanying text.
83. *See* Neuman v. Neumann, 971 N.Y.S.2d 322, 323–24 (N.Y. App. Div. 2013). *See also* Ruiz v. Stewart Mineral Corp., 202 S.W.3d 242, 248–49 (Tex. App.—Tyler 2006, rev. denied) (defendant alleged that power of attorney was forged, but court found no evidence to support the allegation).

powers of attorney,[84] but provide that a party who accepts a power of attorney "in good faith" "without . . . actual knowledge" of a defect, "may rely" on the power of attorney as if it is genuine, valid, and still in effect.[85] It is not clear what the statute means in allowing a party to "rely" on the power of attorney. The language raises the question of whether that reliance could in some way give validity to a deed that would otherwise be void or voidable under common law.

The reliance language in the Texas Act is based on Section 119 of the Uniform Act.[86] The Prefatory Note to the Act states: "Section 119 provides *protection from liability* for persons that in good faith accept an acknowledged power of attorney."[87] This implies that the section merely protects against liability and could not make a defective deed valid by validating otherwise invalid acts of an agent. However, the comment to Section 119 provides that "the Act places the risk that a power of attorney is invalid upon the principal rather than the person that accepts the power of attorney."[88] This comment, carried to an extreme, could imply that the section does validate a defective deed, transferring title in order to place the risk of loss on the principal rather than on the party who accepts a power of attorney and a deed executed by an agent thereunder. The Act does not otherwise shed any light on what it means to say that a party "may rely." Parties involved in drafting the Uniform Act said that reliance was discussed in the context of protecting the party who accepts a power of attorney from liability and that the issue of the validity of a deed executed under a defective power of attorney was not considered.[89]

The Uniform Power of Attorney Act has been adopted in more than twenty states,[90] and at least two states have made substantive modifications to Section 119 to clarify its meaning. The Alabama legislature changed the language to provide that a party who "effects a transaction in reliance upon" a power of attorney without actual knowledge of a defect "is fully exonerated from any liability for effecting the transaction in reli-

84. UNIF. POWER OF ATT'Y ACT § 120 (UNIF. LAW COMM'N 2016); TEX. EST. CODE ANN. § 751.201(a)(1) (West 2017).

85. UNIF. POWER OF ATT'Y ACT § 119(b), (c); TEX. EST. CODE ANN. § 751.209 (West 2017).

86. UNIF. POWER OF ATT'Y ACT § 119(b), (c). Subsection (c) provides: "A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect, and the agent had not exceeded and had properly exercised the authority." Subsection (b) has similar language with regard to the genuineness of the signature.

87. *Id.* at 2, pref. note (emphasis added).

88. *Id.* § 119 cmt.

89. Telephone interviews with Benjamin Orzeske, Chief Counsel, Uniform Law Comm'n (Sept. 28, 2017) and Linda Whitton, Reporter for the Unif. Power of Att'y Act (Nov. 2, 2017).

90. *See Power of Attorney*, UNIFORM LAW COMM'N (Sept. 28, 2017), http://www.uniformlaws.org/Act.aspx?title=power%20of%20Attorney [https://perma.cc/EQB8-5C89].

ance on the power of attorney . . . ."[91] A comment states: "Alabama determined that this change more clearly expressed the intent of Section 119."[92]

Pennsylvania revised the language to provide that "[a] person who in good faith accepts a power of attorney without actual knowledge of [a defect] may, without liability, rely upon the power of attorney . . . ."[93] The comment provides that the section "is designed to encourage third parties to follow the instructions of an attorney-in-fact and to be relieved of liability for doing so."[94] In both Alabama and Pennsylvania, the revisions to the Uniform Act make clear that the party's reliance merely protects the party from liability rather than validating the acts of an agent under a defective power of attorney. For the reasons discussed below, the reliance provisions of the Texas and Uniform Acts should be limited to protecting a party from liability to the principal.[95]

To further explore the interpretation of Section 119 of the Uniform Act, it is useful to consider different scenarios in which a power of attorney is presented. Much of the discussion of the Act relates to banking transactions, as opposed to real estate transactions, so we will first consider the application of the Act to banking transactions.

B. Banking Transactions

Provisions of the Uniform and Texas Acts seem to work as intended in the context of banking transactions. A bank may be required to accept a durable power of attorney when an agent withdraws the principal's funds or removes items from the principal's safe deposit box, and the bank is then protected against liability to the principal if the power of attorney is later determined to be defective or the agent is otherwise acting without authority. Thus, although banks are required to accept durable powers of attorney, they are protected against liability as long as they act in good faith without actual knowledge of a defect. The Texas statute in particular has a number of provisions negotiated by representatives of the banking community to protect banks presented with a power of attorney.[96]

One consequence of the Uniform Act is that it may discourage banks from investigating abuse by an agent. However, in Texas, banks and other financial institutions have an obligation to report suspected financial exploitation of a vulnerable adult.[97] Thus, banks cannot blindly accept a power of attorney and rely on the statutory protection against liability if a

91. Ala. Code § 26-1A-119(b), (c) (West 2015).
92. *Id.* § 26-1A-119 cmt.
93. Tit. 20 Pa. Cons. Stat. Ann. § 5608(c), (d) (West 2014).
94. *Id.* § 5608 cmt.
95. *See infra* Part IV.C.
96. For example, banks are not required to list the specific reason for rejecting a power of attorney when the reason is that the bank has filed a suspicious activity report and is prohibited by law from disclosing the report even to a judge. *See* Tex. Est. Code Ann. § 751.207(b) (West 2017).
97. *See* Tex. Fin. Code Ann. § 280.002 (West 2017); Tex. Hum. Res. Code Ann. § 48.051(a) (West 2015).

bank employee suspects financial abuse. If a bank has reported suspected financial exploitation, the bank is not required to accept a power of attorney from the suspect agent.[98]

C. Real Estate Transactions

The statutory provisions raise different issues in the context of a real estate transaction. If a purchaser of real estate and the purchaser's title company accept a power of attorney in good faith without actual knowledge of a defect, what does it mean to say that they are entitled to rely on the power of attorney as if it is valid? The purchaser and title company are protected against liability to the principal for entering into the transaction. But could the provision potentially validate an otherwise void or voidable deed?

1. Void Powers of Attorney

The Texas Durable Power of Attorney Act includes a provision to make it clear that a void deed is still void. It provides that the Act does not validate a conveyance if it is executed by an agent under a void power of attorney.[99] Thus, if a power of attorney is forged and a grantee accepts a deed delivered by the "agent" under that power of attorney, then the grantee's good faith in dealing with the agent will not in any way validate the deed. This is the best result because the grantee can purchase title insurance to protect against the risk of a forged power of attorney.[100] The grantor, an innocent party, retains title to the property.[101] A good faith grantee has a claim under the grantee's title policy. The title company is subrogated to any claim that the grantee may have against the agent or other wrongdoer. And, of course, title companies collect premiums to offset their losses resulting from payment of claims.

In Texas, a deed executed by an "agent" under a void power of attorney is clearly void. Courts in both Alabama and Pennsylvania would reach the same result because of their modifications to the Uniform Act.[102] The Uniform Act does not have any specific provision regarding the effect of a conveyance executed by an agent under a void power of attorney, nor does it define or modify the reliance language. The Act does, however, provide that "[u]nless displaced by a provision of [the Act], principles of law and equity supplement [the Act]."[103] Thus, a court could reasonably find that the common law rule that a deed is void if executed by an "agent" under a forged or otherwise void power of attor-

98. *See* Tex. Est. Code Ann. § 751.206(9) (West 2017).
99. *Id.* § 751.007(b).
100. Title insurance protects a grantee if a deed is forged or otherwise void. *See* Stoebuck & Whitman, *supra* note 53, § 11.14, at 917.
101. A grantor has no means to protect against a forged deed or forged power of attorney. The grantor's title policy would not cover such an event, which is subsequent to the policy. *See id.* at 918.
102. *See supra* notes 91–94 and accompanying text.
103. Unif. Power of Att'y Act § 121.

ney is not displaced by the language of the Act that allows a party to rely on a power of attorney. This result is supported by the prefatory note to the Uniform Act.[104]

The better result keeps the risk of a forged or otherwise void power of attorney on the grantee (or the grantee's title company) where it falls under common law rules. However, the acceptance requirements of the Uniform and Texas Acts could potentially obligate a purchaser and title company to accept a void power of attorney.

2. The Obligation to Accept a Power of Attorney

In the past, title companies and purchasers could question the validity of a power of attorney and refuse to accept it. Title companies could serve as the watchdog against fraudulent transactions by a purported agent and would often require that a power of attorney specifically authorize the transaction being insured. Title companies could exercise due diligence to provide protection against misconduct by an agent, but they could also delay a transaction with an honest agent trying to sell a property for an elderly relative.

A title company or purchaser may no longer require a particular form of power of attorney or require that it specifically authorize the transaction absent an exception to the acceptance requirement. However, purchasers and title companies can ask for the agent's certification and for an opinion of an attorney. Furthermore, a purchaser may refuse to enter into a transaction and the title company may refuse to insure the transaction if it fits within one of the exceptions to the requirement of accepting a power of attorney. The first exception would permit a title company or purchaser to refuse to accept a power of attorney if the title company or purchaser "would not otherwise be required to engage in a transaction with the principal under the same circumstances."[105] They may also refuse to accept a power of attorney if they believe in good faith that the power of attorney is not valid or that the agent does not have authority.[106]

The application of the first exception to the acceptance requirement in the context of a real estate transaction requires more discussion. Because of this exception, a purchaser's or title company's obligation to accept a power of attorney would depend in part on the stage of the transaction when the power of attorney is presented. If an agent under a power of attorney is acting for the seller in negotiating and executing a contract of sale, then a prospective purchaser, who has no obligation to purchase any particular property, also has no obligation to work with an agent who is selling property on behalf of a principal. In addition, a title company would have no obligation to issue a title commitment to a new customer. On the other hand, if a purchaser is already obligated to purchase prop-

104. *See supra* note 87 and accompanying text.
105. TEX. EST. CODE ANN. § 751.206(1) (West 2017).
106. *Id.* § 751.206(6).

erty under a contract of sale executed by the seller and purchaser, the purchaser may be obligated to accept a deed to the property executed by the seller's agent absent another exception to the acceptance requirement. Similarly, if a title company has already issued a title commitment to a purchaser, the title company may be obligated to accept a deed to the property executed by the seller's agent and insure the purchaser's title absent some other exception to the acceptance requirement.

Interestingly, when the power of attorney is presented after execution of the contract of sale, it is more likely a power of attorney for convenience rather than one intended as an estate planning tool. Thus, it is not likely to be the circumstance in which the Uniform and Texas Acts are intended to encourage acceptance of a power of attorney. Conversely, if the agent is involved in the negotiation of the contract of sale, the power of attorney is more likely one that was executed at an earlier date in contemplation of the possibility of incapacity. These issues regarding the acceptance requirement arise when a power of attorney is determined to be voidable as well as void.

3. Voidable Powers of Attorney

What is the result if a conveyance is executed by an agent under a power of attorney that is voidable rather than void? Neither the Texas nor the Uniform Act directly addresses this scenario. Section 751.209 of the Texas Act and Section 119(c) of the Uniform Act refer to powers of attorney that are void, invalid, or terminated,[107] but do not include the term "voidable." A grantee who accepts a voidable power of attorney in good faith without notice may argue that she is entitled to rely on the agent's authority under these provisions. This right to rely may simply protect the grantee from liability, but it might arguably validate the voidable deed. To explore which is the better result, it is helpful to consider some hypothetical situations.

First assume that A1, a fraudster, makes fraudulent representations to an elderly homeowner, O1, to induce her to execute a durable power of attorney making A1 her agent and giving him very broad authority, including the authority to transfer real estate on her behalf. A few days later, A1 executes a deed as agent for O1 transferring title to a grantee, G1, who pays the purchase price to A1. G1 does no due diligence to determine the validity of the power of attorney, but he has no actual knowledge of A1's fraud. O1 is in possession of the home when the deed is delivered. A1 takes the money and leaves town. G1 sues O1 for possession of the home.

Under common law, the power of attorney and deed would be found voidable, and a court could set aside the sale.[108] O1 would retain title to the property, and G1 would have a cause of action against A1. G1 might

107. UNIF. POWER OF ATT'Y ACT § 119(c); TEX. EST. CODE ANN. § 751.209(b) (West 2017).

108. *See supra* notes 70 and 82 and accompanying text.

argue pursuant to Section 119(c) of the Uniform Act or Section 751.209(b) of the Texas Act that because he is entitled to rely on the power of attorney, the deed is valid to transfer title. O1 would argue that the statute only protects G1 from liability to O1 for accepting the power of attorney. O1 may also argue that G1 did not accept the power of attorney in good faith because the purchase price was going to A1 rather than O1.

This hypothetical illustrates some of the weaknesses of the Uniform and Texas Acts in the context of a real estate transaction. The Acts allow a party without actual notice of a defect to rely on the power of attorney. Under real estate law, a party's possession gives inquiry notice of the party's interest in the property so that a purchaser is deemed to have notice of the interest of the party in possession.[109] However, the Acts require no investigation on the part of a purchaser to determine the validity of the power of attorney.[110] Further, the Acts fail to take account of the fact that G1 can protect himself with the purchase of title insurance.

Now assume that an elderly homeowner, O2, has a will leaving her house to her son and other property to her daughter. O2 executes a durable power of attorney to her daughter, A2, giving her very broad authority, including the authority to transfer real estate. After O2 moves to an assisted living center, A2 enters into a contract with G2 to sell O2's home. G2 and G2's title company ask for and receive A2's certification regarding the power of attorney and an attorney's opinion as to its validity. The sale closes and sale proceeds go into O2's bank account, which A2 uses to pay for O2's assisted living. After G2 moves into the home, O2 dies and O2's son brings suit to set aside the deed, arguing undue influence and that O2 was not mentally competent at the time of execution of the power of attorney. If a jury agrees that O2 was incapacitated at the time of execution of the power of attorney, then under common law both the power of attorney and deed are voidable.[111]

Under common law, the court could set aside the sale,[112] returning the home to O2's estate and leaving G2 a claim under G2's title policy. Or the court might find that O2's son is estopped from setting aside the deed if he failed to act within a reasonable time.[113] G2 might also argue, pursuant to Section 119(c) of the Uniform Act or Section 751.209(b) of the

109. *See* Martinez v. Affordable Hous. Network, Inc., 123 P.3d 1201, 1207 (Colo. 2005); EDWARD E. CHASE & JULIA PATTERSON FORRESTER, PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS 642 (LEXISNEXIS 2010); STOEBUCK & WHITMAN, *supra* note 53, at 885.

110. *See* UNIF. POWER OF ATT'Y ACT § 119 cmt. ("[A] person is not required to investigate whether a power of attorney is valid. . . ."); TEX. EST. CODE ANN. § 751.002(1) (West 2017) (Actual knowledge is defined as being knowledge without "any due inquiry, and without any imputed knowledge.").

111. *See supra* notes 71 and 82 and accompanying text.

112. *See supra* note 82 and accompanying text. G2's title company in defending the suit should argue that sale proceeds must be returned in order for the court to set aside the sale.

113. *See infra* note 114 and accompanying text.

Texas Act, that he is entitled to rely on the power of attorney, and that the statute means that the power of attorney and the deed are valid. If that argument were successful, G2 could keep the house and O2's children could argue over any remaining sale proceeds. O2's son could also argue that the statute only protects G2 from liability for accepting the power of attorney.

This hypothetical shows that in some circumstances the equities may favor a good faith grantee over the principal. If the Acts are designed to place the risk of loss on the principal rather than on parties who deal with an agent, then giving title to the grantee does so. But the common law can be applied with more flexibility. Courts sometimes use equitable principles to reach the desired result,[114] which in this hypothetical could give title to the grantee based on an estoppel argument.

These hypotheticals illustrate the many factors involved in determining who should be awarded title to the property in these types of disputes. One such factor is the relative fault or contribution of the principal and the grantee to the problem that made the power of attorney defective. Common law rules governing the validity of deeds consider the relative fault of the parties, but leave title in the grantor if both parties are innocent.[115] Another factor is imputed knowledge from inquiry notice. The Uniform and Texas Acts do not impute any knowledge of a defect, but longstanding property rules impose a duty on a purchaser to ask reasonable questions based on parties in possession of property or other factors visible on the property.[116]

Another relevant consideration is the availability of title insurance. A grantee can purchase title insurance to protect against the risk of a defective deed caused by an invalid power of attorney. A principal cannot purchase insurance to protect against events occurring after the issuance of the policy. Title companies formerly served as the watchdog in preventing fraudulent transactions. We want title companies to continue to exercise due diligence while balancing the competing policy of encouraging parties to accept powers of attorney. The relative weight of these factors depends in part on whether a power of attorney is being used merely for the convenience of the parties or as an estate planning tool.

V. CONCLUSION

Durable powers of attorney are intended to allow individuals to plan for the possibility of becoming incapacitated and, thus, to avoid an expensive guardianship. The Uniform Act and the Texas Durable Power of Attorney Act are designed to require parties to be reasonable in the

114. *See, e.g.*, Link v. Page, 10 S.W. 699 (Tex. 1889) (estoppel); Ferguson v. Houston, East & West Texas Ry. Co., 11 S.W. 347 (Tex. 1898) (failure to act within a reasonable time).

115. *See* Methonen v. Stone, 941 P.2d 1248, 1252 (Alaska 1997); CHASE & FORRESTER, *supra* note 109, at 642; STOEBUCK & WHITMAN, *supra* note 53, at 817 n.72, 818.

116. *Id.* 882–83.

acceptance of powers of attorney. However, the Acts are not clear as to how they should be applied in the case of real estate transactions. Additional legislation would be helpful to clarify the application of the Acts and to make them more compatible with solving the problems that may arise in the context of real estate transactions.[117]

Considerations in designing a statutory scheme should include the relative fault or contribution of the parties in creating the defect in the power of attorney, the availability of title insurance to cover losses, the real property concept of inquiry notice, the reason for the use of a power of attorney (for convenience or because the principal is incapacitated), encouraging due diligence, and of course encouraging the acceptance of powers of attorney. In the meantime, courts can and should use the flexibility of the common law to reach the best result in each case in light of these factors. In addition, because of the uncertainty of these issues, title companies should continue to exercise caution in accepting a power of attorney to the extent that they are able.

117. For the Uniform Act, additional commentary would be useful.