

**FALLING SHORT: TEXAS MAKES AN
INSIGNIFICANT IMPROVEMENT WITH THE
DURABLE POWER OF ATTORNEY ACT WHEN
COMPARED TO THE UNIFORM POWER OF
ATTORNEY ACT**

Comment

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I. INTRODUCTION

For years, Texas legislation has failed to improve its Durable Power of Attorney Act, and many common issues remain unattended. Although the changes that were made to the Texas Durable Power of Attorney Act (DPOAA) in the new Texas Estates Code (effective as of January 1, 2014) are a small step in the right direction, the changes are not nearly sufficient when compared to the Uniform Power of Attorney Act of 2006 (UPOAA).¹ There are reasons why the Durable Power of Attorney Act in the Texas Estates Code is inadequate and why Texas should follow the Uniform Power of Attorney Act more closely.² This Comment will dissect the DPOAA by magnifying its weaknesses while showing how the UPOAA solves the many issues that trouble Texas, as well as other states that have not enacted the UPOAA.

A. A Scary Scenario

Bob is forty years old, and he has two children under the age of ten. The children's mother died when they were very young. Bob has a steady job where he has worked for over fifteen years. His children are smart and attend private school. Overall, Bob is just an average man with a strong work ethic. However, something unexpected suddenly happens to our average man. Bob is involved in a car accident and falls into a coma from which he will most likely never awake. If Bob does awake, then he will be mentally incapacitated for the rest of his life because of serious brain injuries suffered during the accident. Several issues soon arise that Bob never before considered.

Bob's doctors face serious medical decisions in which Bob is unable to make due to his incapacitation. What kind of treatment, if any at all, does Bob want? It also turns out that Bob is deeply invested in the stock market, and he has many financial decisions that need to be made on his behalf. Also, Bob currently has many bills that are due. What about Bob's children? Should his money continue to go towards their private schooling? How would Bob handle the situation? Who can make these decisions for him?

Though this hypothetical seems tragic and unlikely to happen to most people, the fact is that many people run into these same or similar types of issues at some point in their lives. Whether someone becomes incapacitated through a terrible car accident or simply suffers from common mental deterioration due to old age, questions arise that, if unprepared for, can have a serious effect on the incapacitated person and their loved ones. The key is preparation. There are several ways in which one can plan for such

1. See Tex. H.B. 2918, 83d Leg., R.S. (2013) (accumulating a unanimous 177 votes for the changes made to the Texas Durable Power of Attorney Act in May of 2013).

2. See *infra* Part 3.

occasions, but one of the best and perhaps most common ways to plan is by making someone your agent and granting him or her the power of attorney.³ Particularly in these types of situations, one would want either the springing power of attorney or the more immediate durable power of attorney.⁴

However, while there are many positives about the durable power of attorney, there are many concerns as well.⁵ Texas is making changes to its durable power of attorney statute in an effort to help prevent people that grant the power from making poor decisions in deciding who to appoint on their behalf.⁶ Yet, these minor changes are not nearly sufficient when compared to the Uniform Power of Attorney Act. Furthermore, Texas legislation remains silent on many of the most common issues across the nation that revolve around the durable power of attorney.⁷

B. A Basic Understanding

The power of attorney is defined as “[a]n instrument granting someone authority to act as agent or attorney-in-fact for the grantor.”⁸ This allows someone to give another person the power to make important financial and legal decisions on their behalf.⁹ The grantor of the power is known as the “principal,” and the person acting on behalf of the principal is known as the “agent.”¹⁰ There are different types of powers of attorney, and many issues can arise between principals, agents, and even third parties depending on what type of power is asserted.¹¹ One of the key distinctions between the different types of powers is the difference in when the power begins and how long the power may last.¹²

For starters, “[a]n ordinary power of attorney is revocable and automatically terminates upon the death or incapacity of the principal.”¹³ General powers of attorney are used to permit “an agent to transact business for the principal.”¹⁴ There is also the special or limited power of attorney that “limits the agent’s authority to only a specified matter.”¹⁵ Thus, a principal can give very broad power to an agent with the general power of attorney, or

3. See *infra* note 18.

4. See *infra* note 15.

5. See *infra* Part 3.

6. *Id.*

7. See *infra* Part 3.

8. BLACK’S LAW DICTIONARY 1290 (9th ed. 2009).

9. Rania Combs, *What is a Durable Power of Attorney?*, TEXAS WILLS & TRUSTS ONLINE (Apr. 5, 2010), <http://www.texaswillsandtrustslaw.com/2010/04/05/texas-durable-power-of-attorney/>.

10. See *id.*

11. See *id.*

12. See Legal Hotline for Texans, *Powers of Attorney*, LAWHELP.ORG, <http://texaslawhelp.org/resource/powers-of-attorney> (last visited Oct. 4, 2013, 2:19 PM).

13. BLACK’S LAW DICTIONARY 1290 (9th ed. 2009).

14. *Id.*

15. *Id.*

the power of the agent can be restricted to the specific matters that are stipulated by the principal with a limited power of attorney.¹⁶ There are two other powers of attorney that are quite different in that they continue beyond the moment when the principal becomes incapacitated.¹⁷ These two powers are called the “springing power of attorney” and the “durable power of attorney.”¹⁸

The springing power of attorney is unique when compared to all of the other types of powers in that it only begins once it is triggered, which is usually when the principal becomes incapacitated.¹⁹

In the case of a springing durable power of attorney, the principal may define the disability that would trigger the durable power of attorney to take effect. If the disability is not defined, then the principal is considered disabled if a physician certifies in writing that the principal is incapable of managing his or her financial affairs. This can sometimes cause delays in allowing your agent or attorney-in-fact to act for your benefit.²⁰

The springing power of attorney is similar to the durable power of attorney in that they both exist beyond the principal’s inability to take care of their own matters.²¹

However, they are different in that the durable power of attorney begins as soon as the principle signs the instrument granting the power.²² Thus, the durable power of attorney lasts from the time the power is granted to beyond the incapacitation of the principal. With either the springing or durable power of attorney, principals must be extremely careful in choosing an agent because the majority of abuse associated with the power of attorney occurs when the principal cannot adequately manage the agent’s actions and decisions, which normally happens after the principal’s decline in mental health.²³

16. *See supra* note 6.

17. Combs, *supra* note 9.

18. *Id.*

19. BLACK’S LAW DICTIONARY 1290 (9th ed. 2009).

20. Combs, *supra* note 9.

21. Amelia Granger, *Springing v. Durable Power of Attorney*, NERDWALLET.COM (June 26, 2012), <http://www.nerdwallet.com/blog/finance/2012/springing-durable-power-attorney> (stating that “State laws differ on the particulars of power of attorney, and some financial institutions may require their own versions. If you do choose a springing power of attorney, you should be sure to define exactly what kind of event and incapacitation means the power of attorney goes into effect. Otherwise the process might have to be slowed down by court procedures to determine if the power of attorney has been triggered.”).

Id.

22. *Id.*

23. *Id.*

C. *What Are the Possible Options and Consequences?*

The durable power of attorney is not the only option when planning for life after incapacitation, and some people decide to approach such a morbid situation by using trusts and guardianships.²⁴ However, “[u]nlike a guardianship, where both the extent of the protected person’s property and the guardian’s actions are subject to court scrutiny, the power of attorney is a private arrangement between the principal and the agent.”²⁵ The durable power of attorney also has advantages over trusts because “[u]nlike a trust, where the settlor’s property must be retitled in the name of the trust, a power of attorney allows the principal to retain full legal and equitable ownership of his assets while delegating to the agent a defined scope of authority to act in the principal’s stead.”²⁶

The durable power of attorney is more flexible than other available options when it comes to planning for a future breakdown.²⁷ However, the durable power of attorney is not perfect by any means. Without the proper delegation of the exact powers being granted, the choosing of an agent who is trustworthy and faithful to the principal, and the willingness of third parties to accept the power, the durable power of attorney can bring on an entirely new list of issues that the principal had never bargained for when granting the power.²⁸ Thus, the durable power of attorney is private and flexible while allowing the principal to determine exactly how certain decisions will be made on their behalf.²⁹ However, there is danger in granting such a power if it is not done with the utmost care.³⁰

D. *The Texas Probate Code*

Valid through December 31, 2013, the Texas Probate Code, defined the durable power of attorney as

a written instrument that: (1) designates another person as attorney in fact or agent; (2) is signed by an adult principal; (3) contains: the words: “This power of attorney is not affected by subsequent disability or incapacity of the principal;” or “This power of attorney becomes effective on the disability or incapacity of the principal” [or similar words showing] the principal's intent that the authority conferred on the attorney in fact or agent

24. See Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHX. L. REV. 343, 345–46 (2008).

25. *Id.* at 345.

26. *Id.* at 346.

27. *Id.* at 345.

28. *Id.* at 346.

29. See generally *id.* at 345 (explaining the durable nature of the power of attorney).

30. See generally *id.* at 346 (explaining that the success of the power of attorney depends on how effectively scope is granted).

shall be exercised notwithstanding the principal's subsequent disability or incapacity; and (4) is acknowledged by the principal before an officer authorized under the laws of this state or any other state to: (A) take acknowledgments to deeds of conveyance; and to (B) administer oaths.³¹

Further, the durable power of attorney did not expire upon a specified time limit unless the instrument embodying the grant of power explicitly states otherwise.³²

The changes that were made to the DPOAA did not have any effect on the definition or the duration provisions in the Texas Probate Code.³³ In fact, most of the changes affected only the Statutory Form Durable Power of Attorney.³⁴ The Statutory Form Durable Power of Attorney was a form provided in the Texas Probate Code that can be used by anyone to grant the power of attorney.³⁵ If the form was used and significantly followed, then there was no problem in granting a valid durable power of attorney.³⁶ However, the form was completely optional since there are many other forms in various books or on the internet that are perfectly acceptable when trying to grant the power.³⁷

E. The Texas Estates Code

As of January 1, 2014, all of the provisions in the Texas Probate Code regarding the Durable Power of Attorney Act were transferred over to the Texas Estates Code, which includes the recent changes made to the DPOAA by Texas Legislation.³⁸ When looking at the new statutory form, one noticeable change in the Texas Estates Code is that the form now provides some advice for future principals in choosing a trustworthy agent.³⁹ Additionally, the statutory form in the Texas Probate Code included a list of common powers granted by the power of attorney, and principals crossed out the listed powers that they wished to withhold.⁴⁰ Now, however, the statutory

31. TEX. PROB. CODE ANN. § 482 (West 2011).

32. *Id.* at § 483.

33. Tex. H.B. 2918, 83d Leg., R.S. (2013).

34. *See supra* note 1.

35. TEX. EST. CODE ANN. § 752.002

36. *See id.*

37. *See id.* § 752.003 (stating that the following form is “not exclusive, and other forms of power of attorney may be used.”).

38. TEX. EST. CODE ANN. §§ 751–52 (placing the Statutory Form Durable Power of Attorney in § 752.051).

39. *Id.* at § 752.051 (stating that “[y]ou should select someone you trust to serve as your agent (attorney in fact). Unless you specify otherwise, generally the agent’s (attorney in fact’s) authority will continue until: (1) you die or revoke the power of attorney; (2) your agent (attorney in fact) resigns or is unable to act for you; or (3) a guardian is appointed for your estate.”).

40. *See* TEX. PROB. CODE ANN. (*repealed 2014*) § 490 (listing the following optional powers: real and tangible personal property transactions, stock and bond transactions, commodity and option

form in the Texas Estates Code requires the principal to initial each power they wish to grant.⁴¹

This seems to be an attempt to make sure that the principal actually reads and understands the granted powers.⁴² The statute requires the principal to initial next to each granted power which can also serve as a mechanism to prevent third parties from crossing out certain powers without the knowledge of the principal.⁴³ If the principal was not required to initial next to each power, then anyone could change the power by simply crossing out all of the powers on the list. Perhaps the greatest addition to the Statutory Form Durable Power of Attorney is the information specifically included for the agent or attorney-in-fact.⁴⁴ This information will be discussed in greater detail later in this Comment.⁴⁵

Despite the improvements made to the Statutory Form Durable Power of Attorney, many issues are still not mentioned in the Texas Estates Code.⁴⁶ The statutory form does a good job in helping the average person understand the power of attorney in basic terms. The form attempts to notify future principals of the importance in selecting someone trustworthy to be an agent.⁴⁷ However, when one takes a step back to look at the bigger picture, the statutory form is only optional.⁴⁸ The Texas legislators could have done much more to improve the DPOAA rather than simply making improvements to a form that is merely optional.⁴⁹

F. Comment Purpose

This Comment will briefly delve into specific issues that arise when deciding to use the power of attorney.⁵⁰ More importantly, the Comment will focus on the durable power of attorney and changes in Texas law between the Texas Probate Code and the new Texas Estates Code that became effective on January 1, 2014.⁵¹ The amendments made to the Texas Durable Power of Attorney Act will be examined in detail and critically compared to the Uniform Power of Attorney Act of 2006.⁵² The Texas amendments are a

transactions, banking transactions, business operations, estate transactions, litigation, personal and family matters, benefits from governmental programs, retirement plan transactions, and tax matters).

41. See TEX. EST. CODE ANN. § 752.051 (requiring that “[to grant a power, you must initial the line in front of the power you are granting. To withhold a power, do not initial the line in front of the power.]”).

42. *Id.* § 752.051.

43. *See id.*

44. *See id.*

45. *See id.*

46. *See* TEX. EST. CODE ANN. § 752.051.

47. *See id.*

48. *See id.* at § 752.003.

49. *Id.*

50. *See infra* Part II.

51. *See infra* Part III.B.

52. *Id.*

small step in the right direction. However, the door is still wide open to the many common issues plaguing jurisdictions across the United States related to the durable power of attorney.⁵³ This Comment will ultimately serve to point out the reasons why Texas fell short in improving its durable power of attorney provisions and why Texas should adopt the much more comprehensive Uniform Power of Attorney Act that eliminates or helps to prevent most of the issues that the Texas statute fails to address.⁵⁴

II. THE UNIFORM POWER OF ATTORNEY ACT

The National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commissioners (ULC), is a collection of representatives from each state that draws up and recommends statutes to be adopted and enacted by each state.⁵⁵ The ULC's purpose is to make the laws uniform among the states to allow for easier application of the law across the nation.⁵⁶ A uniform law is defined as “[a]n unofficial law proposed as legislation for all the states to adopt exactly as written, the purpose being to promote greater consistency among the states.”⁵⁷ Since being founded in 1892, the ULC has developed more than two hundred laws, and perhaps their most important creation to date is the Uniform Commercial Code.⁵⁸

A. *The Rise and Fall of the Original Uniform Act*

The state of Virginia put into statute the first durable power of attorney in 1954.⁵⁹ Now, every state has a statute dealing with the durable power of attorney.⁶⁰ The Uniform Durable Power of Attorney Act was the original uniform act dealing with the power of attorney; it was completed in 1979 with the purpose of achieving higher consistency among states regarding the durable power of attorney.⁶¹ However, over time, states began running into issues which the Uniform Durable Power of Attorney Act did not address.⁶²

53. *See infra* Part IV.

54. *See infra* Part II.B.

55. BLACK'S LAW DICTIONARY 881–82 (9th ed. 2009).

56. *Id.*

57. *Id.* at 1319.

58. *Id.* at 881–82.

59. Gerry W. Beyer, *The Uniform Power of Attorney Act: New Solutions to Old Problems*, Texas Tech Law School Research Paper No. 2009-03, SSRN, at 1 (last revised Nov. 30, 2009), available at <http://ssrn.com/abstract=1396502>.

60. *Id.*

61. *Id.*

62. *See* Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, 3 NAT'L ACAD. OF ELDER LAW ATT'Y J. 1, 3 (2007) (noting that “Areas of legislative divergence included, for example, the default rules governing multiple agents, the authority of later-appointed fiduciaries, gift-making authority, and agent fiduciary duties. There were also a number of areas where states had supplemented the basic provisions of the Uniform Durable Power of Attorney Act, but not necessarily in a divergent manner.”)

This sparked a national survey, known as the “JEB survey,” that was given to discover more about how the durable power of attorney differed in each state.⁶³

The JEB survey revealed many issues that states are now facing with the durable power of attorney.⁶⁴ Twenty-seven states had officially adopted the original Uniform Durable Power of Attorney Act, while seventeen others had adopted substantial portions of it into their own statutes.⁶⁵ However, notwithstanding the apparent uniformity among forty-four states, the JEB survey unveiled that those states often differed in their approaches towards the durable power of attorney.⁶⁶ Moreover, the states were essentially forced to make up their own rules regarding situations in which the Uniform Durable Power of Attorney Act remained silent.⁶⁷

As for springing durable powers of attorney, according to the 2002 survey, “[t]hirty-eight (38) jurisdictions follow[ed] the Uniform Act approach that a durable power of attorney can be designated to become effective upon the ‘disability or incapacity’ of the principal. Nine (9) jurisdictions provide[d] for other variations on springing powers, and four (4) [were] silent on the topic.”⁶⁸ Further non-uniformity appeared in the area of how states handled fiduciary standards of care and how those standards would be enforced on agents or attorneys in fact.⁶⁹ Issues that states had to address, because they are not addressed by the original Uniform Durable Power of Attorney Act, include provisions dealing with portability of the durable power of attorney as well as the liability of third parties for refusing to accept the durable power of attorney.⁷⁰

Specific statistics were gathered in the JEB survey that showed more than half of the participants prepared more than fifty power of attorney documents annually, and 93% of those were durable power of attorney documents.⁷¹ In addition, over 60% of clients preferred that their power of attorney requests take place immediately.⁷² Almost 90% of participants in

These included execution requirements, portability provisions, and the recognition of liability for unreasonable refusals of powers of attorney by third persons.”) *Id.*

63. *Id.*

64. See Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, UNIFORM LAW COMMISSION at 2 (Oct. 29, 2002), available at http://www.uniformlaws.org/shared/docs/power%20of%20attorney/dpasurveyreport_102902.pdf. This survey “was distributed to all probate and elder law sections of state bar associations, to the leadership of the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys, and the ABA Section of Real Property, Probate and Trust Law, as well as to special interest listserves [sic] of the ABA Commission on Law and Aging.” *Id.* at 4.

65. *Id.* at 2.

66. *Id.*

67. *Id.*

68. *Id.* at 3.

69. *Id.*

70. *Id.* at 4.

71. *Id.* at 6.

72. *Id.*

the JEB study preferred that the statute should actually set out a default standard of care that agents are to follow.⁷³ This default standard of care would seemingly provide a better understanding for both principals and agents as to what exactly to expect when the agent is acting on the principal's behalf. One of the most common issues across the nation was highlighted when 80% of participants said they have experienced difficulty in getting third parties to accept the power of attorney.⁷⁴ Almost 75% of participants were in agreement that remedies should be readily available if third parties refuse to acknowledge the power of attorney.⁷⁵

On the issue of portability, only 35% of participants reported that they have experienced difficulty getting their power of attorney recognized in another jurisdiction.⁷⁶ However, that could be due to the fact that most participants have never even run into the issue because a whopping 97% of all survey takers favored a portability provision in every single power of attorney statute.⁷⁷ No matter how many issues there are that revolve around the durable power of attorney, none are greater than that of agents abusing the power of attorney. Nearly 80% of all participants in the JEB study recounted that they are aware of agent abuse of the power of attorney outside of their own personal work and practice.⁷⁸ Mostly all of the survey takers agreed that statutes should be improved to include safeguards and remedies against agents who abuse the power of attorney.⁷⁹

One has to ask, "What do all of these statistics mean?" For one, they mean that the states are heading down a path to inconsistency involving the power of attorney. Secondly, the numbers proved that the states were, for the most part, unsatisfied with the original Uniform Durable Power of Attorney Act. The JEB study showed that the majority of states followed the original act, and thus those states are still subject to a great deal of problems that many of them are trying to handle on their own. The purpose of the JEB survey was fulfilled, and the need for a new uniform act was clearly expressed.

The results of the JEB survey proved that over 70% of participants felt that new legislation was required to address the non-uniformity among the states.⁸⁰ The survey concluded that a "[p]rovision should be made for a confirming affidavit to activate springing powers, [g]ift-making authority should be expressly stated rather than implied, [a]gent fiduciary duties should be specified, [a] principal should be permitted to alter agent fiduciary standards, [n]otice should be required for agent resignation, [r]emedies should be provided for unreasonable refusal of a power of attorney, [t]hird

73. *Id.* at 9.

74. *Id.* at 10.

75. *Id.*

76. *Id.* at 12.

77. *Id.*

78. *Id.* at 13.

79. *Id.*

80. Whitton, *supra* note 64.

person reliance on a power of attorney should be protected by a statutory presumption of validity, [a]n action for marital dissolution or annulment should revoke a spouse-agent's authority, [p]ortability provisions should address powers created under other law, and [r]emedies and safeguards should address financial abuse by agents."⁸¹ After viewing the results of the survey, the ULC decided to establish a committee to draft what is known today as the Uniform Power of Attorney Act.⁸²

B. *The New Uniform Power of Attorney Act*

The UPOAA was completed in 2006 and was subsequently introduced to several states across the nation.⁸³ So far, according to the Uniform Law Commission, thirteen states have enacted the UPOAA.⁸⁴ Texas was first introduced to the UPOAA in 2011.⁸⁵ However, despite the distinct improvement that the UPOAA would have on the power when compared to the current Texas statute, Texas never passed the House Bill 1858 to enact the UPOAA.⁸⁶

The issues presented in the JEB survey were addressed in the creation of the UPOAA.⁸⁷ A main improvement in the UPOAA is its incorporation of provisions dealing with portability, multiple agents, agent duties, agent liabilities, and liabilities of third parties who refuse to accept the power of attorney.⁸⁸ The rest of this comment will discuss in detail the UPOAA provisions and then compare them to the current Texas DPOAA.⁸⁹

1. *Portability*

A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:
(1) the law of the jurisdiction that determines the meaning and effect of the

81. *Id.*

82. *Id.* at 4.

83. UNIFORM LAW COMMISSION, available at <http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney> (last visited Oct 5, 2013, 4:32 PM).

84. *Id.* (including Alabama, Arkansas, Colorado, Idaho, Maine, Montana, Nebraska, Nevada, New Mexico, Ohio, Virginia, West Virginia, and Wisconsin).

85. H.B. 1858, 82d Leg., Reg. Sess. (Tex. 2011).

86. TEXAS LEGISLATURE ONLINE, available at <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB1858>.

87. UNIF. POWER OF ATT'Y. ACT 8A U.L.A. 233 §§ 101–23, UNIFORM LAW COMMISSION (2006), available at http://www.uniformlaws.org/shared/docs/power%20of%20attorney/upoaa_final_may08.pdf (providing the final Uniform Power of Attorney Act, including commentary and definitions for each section, proposed for enactment in all of the states).

88. *See id.*

89. *See infra* Parts II.B.1–IV.

power of attorney pursuant to Section 107; or (2) the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b.⁹⁰

One of the main purposes for developing the UPOAA was to enhance the portability of the power of attorney by making the validation process easier for powers of attorney created out-of-state seeking to be effective in-state.⁹¹ Section 106 also handles issues surrounding validity of powers of attorney that became effective before the enactment of the UPOAA by stating: “A power of attorney executed in this state before [the effective date of this [act]] is valid if its execution complied with the law of this state as it existed at the time of execution.”⁹²

The act of moving from one state to another state is not an uncommon occurrence in the United States.⁹³ Thus, the importance of a portability provision in any state’s power of attorney act is extremely important. The key, as with all of the sections in the UPOAA, is to have uniformity among the states by having everyone enact the UPOAA so that the durable power of attorney will be completely portable to any state.⁹⁴ In cases where the durable power of attorney was created in another state before the enactment of the UPOAA, section 107 defers to the law of the state in which the power was created.⁹⁵ Sections 106 and 107 were included in the UPOAA in order to eliminate the difficulties in enforcing the power of attorney in a different state, and the UPOAA will be more successful in fighting the portability issues facing principals and agents as more and more states eventually enact the UPOAA.⁹⁶

2. Multiple Agents

“A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently.”⁹⁷ Naming coagents, as seen in the comment to section 111, is not a practice that the UPOAA encourages, but this provision

90. See Unif. Power of Att’y Act 8A U.L.A. 233 § 106 (2006).

91. *Id.* (explaining the purpose of section 106 in the comment).

92. See UNIF. POWER OF ATT’Y ACT § 106.

93. Beyer, *supra* note 59, at 6 (stating that “[a]ccording to census reports, about one in six Americans moves each year, and the average American moves almost a dozen times in his or her lifetime. Accordingly, the drafters of the UPOAA believed that it was important to make durable powers of attorney as portable as possible.”).

94. See generally Beyer, *supra* note 59 (expressing the importance of portability of powers of attorney).

95. See UNIF. POWER OF ATT’Y ACT § 107, 8A U.L.A. 233 (2006) (stating that “[t]he meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.”).

96. See *id.* §§ 106–107.

97. See *id.* at § 111(a).

is included to prevent situations where there are multiple powers of attorney vested in different agents.⁹⁸ This section also helps to enable the power of attorney to remain effective even if other parties choose to accept the power from only one of many different agents.⁹⁹

However, due to the difficulties that face principals when trying to monitor multiple agents, especially if the principal is incapacitated, section 111(b) of the UPOAA states that

A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function.¹⁰⁰

Section 111 also addresses the issue of agent liability in cases of multiple agents.¹⁰¹ Agents are generally not liable for the actions of other agents unless they participate in the act or help to conceal the actions of another agent.¹⁰² However, section 111 holds agents liable for reasonably foreseeable damages if the agents have knowledge of another agent's breach of the fiduciary relationship between that agent and the principal and fail to notify the principal or take reasonable action if the principal is incapacitated.¹⁰³

3. Agent Duties

As stated earlier, almost 90% of participants in the JEB study preferred that the statute should actually set out a default standard of care that agents are to follow.¹⁰⁴ The UPOAA meets this request in section 114.¹⁰⁵ A fiduciary relationship exists between the agent and principal in the power of attorney, but statutes differ across the states as to what exactly the standard of care in a fiduciary relationship means.¹⁰⁶

Section 114 provides the basic, minimum requirements of agents as fiduciaries in the power of attorney.¹⁰⁷ Agents who accept the power of attorney are required to act in the best interest of the principal, and agents must also meet the principal's reasonable expectations provided that the agent is aware of those expectations.¹⁰⁸ Agents are also required to act in

98. *See id.* § 111 cmt. (2006).

99. *See id.* § 111.

100. *See id.* § 111(b) (establishing that it is preferred for practitioners to use successor agents as opposed to coagents in order to avoid several issues that arise when assigning multiple agents).

101. *See id.* § 111(c)–(d).

102. *See id.* § 111(c).

103. *See id.* § 111(d).

104. Whitton, *supra* note 64, at 9.

105. *See UNIF. POWER OF ATT'Y ACT* § 114, 8A U.L.A. 233 (2006).

106. *See id.*

107. *See id.*

108. *See id.* § 114(a).

good faith, and each agent must make sure that they do not act beyond the authority that has been granted to them.¹⁰⁹

Additionally, the UPOAA further requires agents to remain loyal to the principal and must not in any way create a conflict of interest which would act to impair the agent's ability to act in the principal's best interest.¹¹⁰ The standard of care is a reasonable one that is compared to how other agents in similar situations would act.¹¹¹ Other expectations of agents performing their duties include: keeping track of all transactions completed on the principal's behalf; cooperating with others who have the power to make difficult decisions regarding the principal's health; and maintaining and carrying through with the expectations of the principal when handling the principal's estate plan.¹¹²

Having a statute define the precise standard of care that agents must follow is extremely important because the statute can prevent costly litigation by making liability, or non-liability, more obvious.¹¹³ For example, the UPOAA specifically proclaims that “[a]n agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.”¹¹⁴ Thus, agents can avoid liability by simply referring to the language of the statute and using the provisions listed out in the UPOAA as guidelines.¹¹⁵

4. Agent Liabilities

Before discussing the liabilities of agents in breaching their fiduciary duties, it is important to note that the UPOAA allows for principals to relieve the agent of any liability by including an exoneration provision in the power of attorney.¹¹⁶ The UPOAA devises a remedy for when an agent is liable for breach of duty.¹¹⁷ The remedy in section 117 provides that agents who breach their duties are liable “for the amount required to: (1) restore the value of the principal's property to what it would have been had the violation not

109. *See id.*

110. *See id.* § 114(b). It should be noted that the requirements in section 114(b) of the UPOAA are capable of being waived with the authorization of the principal, unlike section 114(a), and the principal may effectively lower the standard of care for the agent. Beyer, *supra* note 59, at 4–5.

111. *See* UNIF. POWER OF ATT'Y ACT § 114(b)(3), 8A U.L.A. 233 (2006) (requiring the “care, competence, and diligence ordinarily exercised by agents in [same or] similar circumstances”).

112. *See id.*

113. *See generally id.* § 114(b)(3) (stating the standard of care that agents required to follow).

114. *See id.* § 114(d).

115. *See id.* § 114.

116. *See id.* § 115 (relieving the agent of liability unless the provision “(1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or (2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.”).

117. *See id.* § 117.

occurred; and (2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf."¹¹⁸

One should pay close attention to the comment pertaining to section 117. The comment explains that, while it is a steep penalty to require expectation damages and court costs, those seeking a remedy are not limited to section 117.¹¹⁹ Several advantages exist for having a provision stating the exact remedy for when an agent breaches their duty in the power of attorney.¹²⁰ The remedy puts an agent on notice as to what might happen if one fails to comply with their fiduciary duties.¹²¹ Principals have a solid solution to their problems that they know they can count on in case of a breach.¹²² Overall, the remedy serves as an enforcer to ensure that agents fulfill their duties and obey their principal's wishes because, at times, knowing the consequences of one's actions can cause one to act more carefully in their line of duty.¹²³

5. Third Party Refusal

One of the main problems plaguing the durable power of attorney in every state is the issue of third parties refusing to accept the power of attorney.¹²⁴ Referring back to the JEB survey discussed earlier, 80% of participants said they have experienced difficulty in getting third parties to accept the power of attorney.¹²⁵ The UPOAA attempts to counteract this commonly notorious issue with § 120 which has two main parts to it: alternative A and alternative B.¹²⁶ Section 120 essentially provides certain circumstances in which a third party may legally refuse to accept the power of attorney, but it also provides a sanction in cases in which a third party wrongfully refuses to accept the power of attorney.¹²⁷

Section 120 provides avenues for third parties to refuse the power of attorney by stating the following:

A person is not required to accept an acknowledged power of attorney if:
(1) the person is not otherwise required to engage in a transaction with the

118. *See id.* § 117.

119. *See id.* (explaining in the comment that section 123 provides that remedies under the UPOAA are not exclusive, and an agent may face additional liability if the jurisdiction that the parties are located in allows for more extensive remedies for the situation at hand).

120. *See id.* § 117.

121. *See id.*

122. *See id.*

123. *See id.*

124. Beyer, *supra* note 59, at 6.

125. Whitton, *supra* note 64, at 10.

126. *See* UNIF. POWER OF ATT'Y ACT § 120, 8A U.L.A. 233 (2006). Alternative B pertains to powers of attorney that are acknowledged in the use of the provided statutory form, and alternative A concerns any other acknowledged powers of attorney. *Id.*

127. *See id.*

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, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; 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 or a person acting for or with the agent.¹²⁸

If a third party is unable to find a way through §120(b), he or she must accept the power of attorney within seven days under 120(a).¹²⁹ If a third party fails to comply with § 120(a) or § 120(b), the UPOAA further states that any third party who wrongfully refuses and acknowledged power of attorney might be required to accept the power of attorney by court order, and may also be subject to any costs incurred during proceedings that uphold the power of attorney.¹³⁰

6. *Statutory Form*

To conclude this discussion of the highly comprehensive Uniform Power of Attorney Act, §§ 301 and 302 deal with the statutory form for the UPOAA.¹³¹ This is, for the most part, a standard statutory form for the durable power of attorney; and the form includes a section of important information specifically made for the agent.¹³² This section includes: the agent's duties; instructions for when an agent's authority terminates; and a brief paragraph addressing the liability of an agent.¹³³ After careful examination of the UPOAA, the next section of this Comment delves into more detail about the Texas Durable Power of Attorney Act.¹³⁴ After exploring the Texas Act, the UPOAA and DPOAA are be compared and contrasted to show why Texas legislation fell short by failing to enact the UPOAA.¹³⁵

128. *See id.* § 120(b) (pertaining to alternative A).

129. *See id.* § 120 (pertaining to alternative A).

130. *See id.* § 120(c) (pertaining to alternative A).

131. *See id.* §§ 301–02.

132. *See id.* §§ 301.

133. *See id.*

134. *See infra* Part III.

135. *See infra* Part III.B.

III. THE TEXAS DURABLE POWER OF ATTORNEY ACT

Although positive changes have been made to its statutory form, the Texas Durable Power of Attorney Act fails to address the many common issues surrounding the durable power of attorney.¹³⁶ Portability, agent liability, agent duties, multiple agents, and refusal by third parties are all controversial topics that are left untouched by the DPOAA in the new Estates Code but that are addressed in the UPOAA.¹³⁷ However, Texas did improve its statutory form for the durable power of attorney by closely modeling it after the Uniform Power of Attorney Act's statutory form.¹³⁸ The statutory form, as stated earlier, is not required, but it is merely a guideline for those who are granting the durable power of attorney.¹³⁹

A. *The Estates Code*

Before comparing the DPOAA with the UPOAA, it is necessary to become familiar with the current and relevant provisions of the new Estates Code regarding the durable power of attorney.¹⁴⁰ Chapter 751 of the Estates Code deals with the durable power of attorney, and Chapter 752 provides the statutory form.¹⁴¹ Under Chapter 751, Subchapter A deals with the general provisions of the DPOAA such as the definition of the durable power of attorney and the extent to when durable power of attorney applies.¹⁴² Subchapter B discusses how the acts and relations of the principal and agent affect the durable power of attorney.¹⁴³ Subchapter C highlights that an agent is a fiduciary and that he or she must conform to specific duties that are legally required.¹⁴⁴

136. Compare TEX. EST. CODE ANN. §§ 751.001–52.115, with TEX. PROB. CODE ANN. §§ 481–90 (showing that while the statutory form was improved in the new Estates Code, the rest of the Durable Power of Attorney Act was left substantially unchanged).

137. Compare TEX. EST. CODE ANN. § 752.051, with UNIF. POWER OF ATT'Y ACT § 301, 8A U.L.A. 233 (2006), available at http://www.uniformlaws.org/shared/docs/power%20of%20attorney/upoaa_final_may08.pdf (illustrating the absence of provisions in the DPOAA that are located in the UPOAA that address common issues affecting the durable power of attorney). See *supra* Part II.B (explaining in greater detail the common issues affecting the durable power of attorney across the United States).

138. Compare TEX. EST. CODE ANN. § 752.051, with UNIF. POWER OF ATT'Y ACT § 301, 8A U.L.A. 233 (2006), available at http://www.uniformlaws.org/shared/docs/power%20of%20attorney/upoaa_final_may08.pdf (highlighting the similarities between the statutory forms of the DPOAA and the UPOAA).

139. See TEX. PROB. CODE ANN. § 490 (West 2013); see also TEX. EST. CODE ANN. § 752.003 (West 2014) (stating that “[t]he form prescribed by Section 752.051 is not exclusive, and other forms of power of attorney may be used.”).

140. See TEX. EST. CODE ANN. §§ 751.001–52.115 (West 2014).

141. See *id.*

142. See *id.* § 751.001–.006.

143. See *id.* §§ 751.051–.058.

144. See *id.* § 751.101–.106.

Overall, there is no significant change between the old Probate Code and the new Estates Code in handling the durable power of attorney.¹⁴⁵ The lack of change is the main issue that this Comment sets out to expose.¹⁴⁶ The issues of portability, agent liability, agent duties, multiple agents, and refusals by third parties are all still open to create problems in Texas and many other states that have yet to adopt the Uniform Power of Attorney Act.¹⁴⁷ The one main adoption from the UPOAA that has been incorporated into the new Estates Code is the updated, yet optional, statutory form.¹⁴⁸

B. Comparing the DPOAA and UPOAA Statutory Forms

Like the UPOAA, the Texas statutory form for the durable power of attorney now requires the grantor of the power to initial next to each power granted to the agent or attorney.¹⁴⁹ This is different from Texas's old statutory form, which merely required a principal to scratch out the powers that he or she wished to withhold from granting.¹⁵⁰ Under the old scratch-out form, the door was left wide open for fraudulent parties to potentially adjust the power of attorney; thus, the requirement of an initial should prove to be much more reliable.¹⁵¹

Another minor addition to the Texas statutory form that is taken from the UPOAA is the warning provided to the grantor of the power.¹⁵² The form provides that “[y]ou should select someone you trust to serve as your agent (attorney in fact).”¹⁵³ Further, the form states that “[u]nless you specify otherwise, generally the agent’s (attorney in fact’s) authority will continue until: (1) you die or revoke the power of attorney; (2) your agent (attorney in fact) resigns or is unable to act for you; or (3) a guardian is appointed for your

145. Compare TEX. EST. CODE ANN. §§ 751.001–52.115, with TEX. PROB. CODE ANN. §§ 481–90 (repealed 2011).

146. See *supra* Part I.F.

147. See *supra* Part II.B.1–5 (explaining how these issues are having a nationwide impact on the durable power of attorney).

148. Compare TEX. EST. CODE ANN. § 752.051 (West 2014), with UNIF. POWER OF ATT’Y ACT § 301, 8A U.L.A. 233 (2006), available at http://www.uniformlaws.org/shared/docs/power%20of%20attorney/upoaa_final_may08.pdf (revealing the clear adoption of certain provisions from the UPOAA statutory form into the DPOAA statutory form in the new Estates Code).

149. Compare TEX. EST. CODE ANN. § 752.051 (adopting into the DPOAA the UPOAA provision that requires the principal’s initials to grant certain powers of attorney), with UNIF. POWER OF ATT’Y ACT § 301, 8A U.L.A. 233 (2006) available at http://www.uniformlaws.org/shared/docs/power%20of%20attorney/upoaa_final_may08.pdf (requiring the principal’s initials to grant certain powers of attorney).

150. See TEX. PROB. CODE ANN. § 490 (WEST 2011).

151. *Id.*

152. Compare TEX. EST. CODE ANN. § 752.051 (adopting into the DPOAA the UPOAA provision that warns principals to carefully select their agents or attorneys in fact), with UNIF. POWER OF ATT’Y ACT § 301, 8A U.L.A. 233 (2006) available at http://www.uniformlaws.org/shared/docs/power%20of%20attorney/upoaa_final_may08.pdf (providing the UPOAA provision that warns principals to carefully select their agents or attorneys in fact).

153. See TEX. EST. CODE ANN. § 752.051.

estate.”¹⁵⁴ Though it might be self-explanatory to some that a principal should select an agent that he or she trusts, the updated form enforces the idea that principals should always be extremely cautious when selecting an agent.¹⁵⁵ The final—and, perhaps, most significant—change adopted from the UPOAA statutory form into the DPOAA statutory form is the important information directed towards the agent or attorney-in-fact that seeks to ensure that the agent knows of his or her duties as an agent as well as the timing and effect of terminating the durable power of attorney.¹⁵⁶

C. Important Information for the Agent

The new information section of the statutory form helps to embody the provisions of the DPOAA into the form by providing that “[w]hen you accept the authority granted under this power of attorney, you establish a ‘fiduciary’ relationship with the principal.”¹⁵⁷ The section further defines a fiduciary relationship as “a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated or revoked by the principal or by operation of law.”¹⁵⁸ However, what are the legal duties that a fiduciary duty imposes on the agent?

1. General Agent Duties

Listed in the section of important information for agents are the common duties that are generally required when there is a creation of a fiduciary relationship.¹⁵⁹

A fiduciary duty generally includes the duty to: (1) act in good faith; (2) do nothing beyond the authority granted in this power of attorney; (3) act loyally for the principal’s benefit; (4) avoid conflicts that would impair your ability to act in the principal’s best interest; and (5) disclose your identity as an agent or attorney in fact when you act for the principal by writing or printing the name of the principal and signing your own name as “agent” or “attorney in fact.”¹⁶⁰

In short, the agent must always act in the best interest of the principal and must act within the powers granted to him or her by the principal.¹⁶¹

154. *Id.*

155. *See id.*

156. *See id.*

157. *Id.*

158. *See* TEX. EST. CODE ANN. § 752.051 (West 2014).

159. *See id.*

160. *See id.*

161. *See* TEX. EST. CODE ANN. § 751.103 (West 2014).

2. *Duty to Maintain Records*

Furthermore, the information provided for agents in the statutory form reminds the agent of the duty to keep records under Subchapter C of Chapter 751 in the Estates Code.¹⁶² An agent is required to maintain records of all actions taken on the behalf of the principal.¹⁶³ Also, an agent “shall maintain all records until delivered to the principal, released by the principal, or discharged by a court.”¹⁶⁴ In addition to maintaining records, an agent may also be asked by the principal to render an accounting.¹⁶⁵

3. *Request for Accounting*

Under the Durable Power of Attorney Act, an accounting must include a listing of all property that belongs to the principal that becomes known by or placed in the possession of the agent.¹⁶⁶ Accountings require that the agent notify the principal of each action taken on their behalf.¹⁶⁷ Moreover, a complete accounting must reveal the entire “account of receipts, disbursements, and other actions of the attorney in fact or agent that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately.”¹⁶⁸ Lastly, the accounting must adequately identify all assets, show cash on hand, and list all liabilities.¹⁶⁹ While accountings require mandatory information by law, it should be noted that the principal retains the ultimate power to adjust the accounting’s contents.¹⁷⁰

4. *Effect of Termination on Agent*

The final information given to the agent in the new statutory form serves as a reminder of the effect of a principal-agent relationship upon termination.¹⁷¹ If any event terminates the relationship between the principal and agent, or terminates the power given to the agent, then the agent must

162. *See id.*

163. *See id.* § 751.103.

164. *See id.* Note that the provisions in Subchapter C of Chapter 751 of the Estates Code are expressed in the information for agents section of the new statutory form. This is to ensure that agents know the rules of the Durable Power of Attorney Act and that the principal is also aware of the duties that the agent is supposed to follow. *Compare* TEX. EST. CODE ANN. § 751.103 (stating the duty to maintain records), *with* TEX. EST. CODE ANN. § 752.051 (showing how the new statutory form incorporates the laws of the DPOAA).

165. *See* TEX. EST. CODE ANN. § 751.104(b) (West 2014).

166. *See id.* § 751.104(b)(1).

167. *See id.* § 751.104(b)(2).

168. *See id.* § 751.104(b)(3).

169. *See id.* § 751.104(b)(4)–(6).

170. *See id.* § 751.104.

171. *See id.* § 752.051.

immediately stop acting on the principal's behalf.¹⁷² Such a termination can occur in many different ways.¹⁷³ The principal can die or actually revoke the power of attorney.¹⁷⁴ Also, an event defined in the power of attorney may trigger termination.¹⁷⁵ Divorce, provided that the principal and agent are married, can cause the power of attorney to terminate.¹⁷⁶ Finally, the power of attorney can terminate if a permanent guardian is appointed or a court orders the power to be terminated.¹⁷⁷

5. Agent Liability

The statutory form provided by the DPOAA now concludes by warning the agent.¹⁷⁸ The form states that

The authority granted to [an agent] under this power of attorney is specified in the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under Chapter 32 of the Texas Penal Code.¹⁷⁹

D. Insignificant Changes

While the DPOAA has undergone a vast improvement to its statutory form in the Texas Estates Code, the overall effect of that change is relatively meaningless.¹⁸⁰ Those who use the statutory form may be aided to a greater extent now in creating a safe power of attorney.¹⁸¹ However, the statutory form is completely optional.¹⁸² Many other forms can be easily found on the internet that can also be used to grant the durable power of attorney.¹⁸³ Texas

172. *See id.*

173. *See id.*

174. *See id.*

175. *See* TEX. EST. CODE ANN. § 752.051 (West 2014).

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See* TEX. EST. CODE ANN. § 752.003 (West 2014) (emphasizing that the statutory form is optional). That in effect makes any additions or subtractions to the form non-binding on anyone who decides to use any form other than the statutory form. *See* Bouchard v. Crystal Coin Shop, Inc., 843 F.2d 10, 17–18 (5th Cir. 1988) (finding that optional contractual language to be non-binding).

181. *See supra* Parts B–C (explaining how the new statutory form is superior to the old statutory form in the DPOAA in that it provides greater protection for the principal, greater awareness of the fiduciary duties of the agent to both the agent and principal, and the notification to the agent of the effect of a termination of the power of attorney).

182. *See* TEX. EST. CODE ANN. § 752.003 (2014).

183. *See* ROCKET LAWYER, <http://www.rocketlawyer.com/form/durable-power-of-attorney.r1> (last visited Jan. 8, 2014); LAWDEPOT.COM, <http://www.lawdepot.com/contracts/power-of-attorney-forms> (last visited Jan. 8, 2014); TOTAL LEGAL, <http://www.totallegal.com/poa2.asp> (last visited Jan.

has essentially done nothing new to have a solid impact in the fight to create a more effective durable power of attorney.¹⁸⁴

IV. CONCLUSION

The durable power of attorney was first put into statute in 1954 by the state of Virginia, and the power is now present in state statutes across the nation.¹⁸⁵ The majority of states adopted or closely modeled their statutes after the original Uniform Act.¹⁸⁶ However, the original Uniform Act was flawed, and individual states amended their own statutes over time to deal with many issues involving the durable power of attorney.¹⁸⁷ Thus, there is now a lack of uniformity across the states.¹⁸⁸

The two main problems that the UPOAA was created to address were the issues of portability and refusal by third parties.¹⁸⁹ Texas failed to sufficiently revise the DPOAA because the statute remains completely silent with regard to the issues of portability, refusal by third parties, and other common issues.¹⁹⁰ The UPOAA is comprehensive and well organized, but it is ineffective unless more states incorporate the act into their own statutes. Texas decided to model its optional statutory form for the durable power of attorney after the UPOAA statutory form, yet Texas refuses to incorporate the more important aspects of the UPOAA.¹⁹¹

In conclusion, Texas made a small step in the right direction by updating its statutory form, but Texas has ultimately failed because the form is merely optional.¹⁹² If Texas and other states want to make the durable power of attorney a better, safer option for people to use when planning for future incapacitation, then all states must adopt the UPOAA to achieve true uniformity. Until then, the durable power of attorney remains subject to the many issues discussed in this Comment, and principals and agents must use the utmost care in granting the power in the state of Texas.¹⁹³ Texans must

8, 2014); EXPERTLAW, http://www.expertlaw.com/library/estate_planning/durable_power_of_attorney.html (last visited Jan. 8, 2014); *see also* *Power of Attorney Forms*, USLEGAL, <http://www.uslegalforms.com/powerofattorney> (last visited Jan. 8, 2014) (emphasizing the reality that there are an abundance of durable power of attorney forms on the internet that easily substitute for the Texas statutory form).

184. *See supra* Part III.D.

185. Beyer, *supra* note 59, at 1.

186. Whitton, *supra* note 64, at 2.

187. *Id.*

188. *See supra* Part II.A.

189. *Power of Attorney Summary*, UNIFORM LAW COMMISSION, available at <http://www.uniformlaws.org/ActSummary.aspx?title=Power%20of%20Attorney> (last visited Sept. 29, 2014).

190. *See* TEX. EST. CODE ANN. §§ 751–52 (West 2014).

191. *Compare* TEX. EST. CODE ANN. § 751, with UNIF. POWER OF ATT’Y ACT §§ 101–23, 8a U.L.A. 233 (2006), available at http://www.uniformlaws.org/shared/docs/power%20of%20attorney/upoaa_final_may08.pdf (proving that Texas remains silent on the many issues that the UPOAA succeeds in addressing).

192. TEX. EST. CODE ANN. § 752.003 (West, 2014).

193. *See supra* Parts II–III.

be aware of the lack of statutory law handling the issues surrounding the durable power of attorney.¹⁹⁴ Finally, every power of attorney that is granted must be individually tailored to meet the needs of the principal and to protect all parties involved.¹⁹⁵

194. *See supra* Part III.

195. *See supra* Part I.C.