Choosing Your Own "Adventure" and Navigating Self-Dealing Transactions Under the New Power of Attorney Rules

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I. Introduction

In many ways, the 2017 legislative changes to the Texas Durable Power of Attorney Act (the "Act") signaled a paradigm shift in litigation involving durable powers of attorney ("DPOA"). While there were many important changes to a variety of issues, this paper focuses on those legislative changes which affect an agent's self-dealing with his or her principal. For an excellent general overview of the legislative changes, these authors recommend reading *Highlights of the New and Improved Texas Durable Power of Attorney Act: A Panel Discussion*, written by Lora G. Davis and Donald L. Totusek.

Analyzing self-dealing transactions is no longer as simple as it may have once been. Under the old statutory scheme and case law, in many situations, applying the traditional fiduciary analysis was fairly straightforward. Now, the primary analysis appears to be one of agency authority – not necessarily fiduciary duty. For example, the POA may grant certain "hot powers" to an agent. The new statutory scheme does not lend itself to a quick reading and an easy answer. Many sections contain multi-layered exceptions and cross references to other sections. It can thus be very difficult to easily ascertain those circumstances by which an agent's self-dealing is permitted (or not permitted).

The primary purpose of this article is to provide a roadmap to navigate and understand the mechanics of both: (1) the new general statutory framework for analyzing self-dealing; and (2) those sections in the Act dealing with the most commonly encountered types of self-dealing transactions (i.e. self-dealing transactions where the bad agent created, amended, revoked or terminated an *inter vivos* trust; self-dealing transactions involving gifts; and self-dealing transactions involving changing certain beneficiary designations). Visual aids in the form of "choose your own adventure" charts are provided for ease of reference.

II. The Basics

A. The DPOA

A financial power of attorney is a written instrument that authorizes an agent to manage the principal's specified financial affairs.[1] A durable power of attorney is effective regardless of the principal's subsequent disability or incompetency.[2] The parties to this instrument are: (1) the principal and (2) the agent.[3] The principal is the

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[1] *See Hardy v. Robinson*, 170 S.W.3d 777, 780 (Tex. App.–Waco 2005, no pet.).

[2] TEX. EST. CODE § 751.0021; Gerry W. Beyer, *Estate Plans: The Durable Power of Attorney for Property Management*, 59 TEX. B.J. 314, 316 (1996).

[3] *Id.*

party who entrusts the management of his or her financial affairs to the agent.[4] The principal depends upon the agent.[5] The agent is the party authorized to act on the principal's behalf by and through the power of attorney.[6]

B. The Agent's Fiduciary and Other Legal Duties

A power of attorney creates an agency relationship.[7] "Agency is a consensual relation between two parties 'by which one party acts on behalf of the other, subject to the other's control.'"[8] The existence and nature of an agency relationship is generally a question of fact.[9] An executed power of attorney, however, creates an agency relationship as a matter of law.[10]

The agency relationship reflected by a DPOA is also a fiduciary relationship as a matter of law.[11] The term "fiduciary" is derived from the civil law and contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction.[12]

As a fiduciary, an agent consents, as a matter of law, to have courts of equity measure his conduct toward the principal by a standard of finer loyalties.[13] "A fiduciary owes her principal a high duty of good faith, fair dealing, honest performance, and strict accountability."[14]

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[4] Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 800 (1983).

[5] *Id.*

[6] *See* TEX. EST. CODE § 751.0021.

[7] *See Vogt v. Warnock*, 107 S.W.3d 778, 782 (Tex. App.–El Paso 2003, pet. denied); *In re Estate of Wallis*, 2010 WL 1987514, at *4 (Tex. App.–Tyler 2010, no pet.); *Sassen v. Tanglegrove Townhouse Condominium Assoc.*, 877 S.W.2d 489, 492 (Tex. App.–Texarkana 1994, writ denied).

[8] *Suzlon Energy Ltd. v. Trinity Structural Towers, Inc.*, 436 S.W.3d 835, 841 (Tex. App. – Dallas 2014, no pet.)(citing *Reliant Energy Servs., Inc. v. Cotton Valley Compression, L.L.C.*, 336 S.W.3d 764, 782–83 (Tex. App.–Houston [1st Dist.] 2011, no pet.)(internal quotation omitted).

[9] *Brown & Brown of Tex., Inc. v. Omni Metals, Inc.*, 317 S.W.3d 361, 377 (Tex. App. – Houston [1st Dist.] 2010, pet. denied); *Novamerican Steel, Inc. v. Delta Brands, Inc.*, 231 S.W.3d 499, 511 (Tex. App.—Dallas 2007, no pet.).

[10] *Sassen* at 492.

[11] *Vogt*, 107 S.W.3d at 782 (stating that "a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law").

[12] *Texas Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980)(citing *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509 (1942)).

[13] *Id.* at 508 (quoting *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938).

[14] *Estate of Wallis*, 2010 WL 1987514, at *4 (Tex. App.—Tyler 2010, no pet.) (mem. op.); *see also* RESTATEMENT (SECOND) OF AGENCY § 387 (1957) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."); RESTATEMENT (SECOND) OF AGENCY § 387 cmt. b (1957) ("The agent's duty is not only to act solely for the benefit of the principal in matters entrusted to him, but also to take no unfair advantage of his position in the use of information or things acquired by him because of his position as agents or because of the opportunities which his position affords. . . . His duties of loyalty to the interests of his principal are the same as those of a trustee to his beneficiaries.") (internal citations omitted).

"[A]n agent's duties of performance to the principal are subject to the terms of any contract between them."[15] Unless otherwise provided by statute or law, duties owed by an agent to his principal may be altered by agreement.[16]

The Texas Estates Code mandates that an agent shall timely inform the principal of each action taken under a durable power of attorney.[17] An agent has a statutory duty to maintain records of each action taken or decision made by the agent.[18] The agent must also maintain all records until delivered to the principal, released by the principal, or discharged by a court.[19]

(1). To Act Within the Scope of Authority

An agent has a duty to act within the scope of the authority granted.[20] Because one of the simplest methods to attack an agent's self-dealing transaction is to examine whether the agent was authorized to perform the transaction (either by the DPOA or by statute), it should never be assumed that a questionable transaction was within the agent's scope of authority. When the agency relationship is not in dispute, the scope of the agency relationship is a question of law.[21]

The scope of an agent's authority must be ascertained from the language of the power of attorney. Generally, an agent's ability to bind his principal is limited to the scope of authority the principal grants.[22]

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[15] *In re Estate of Miller*, 446 S.W.3d 445, 455 (Tex. App.–Tyler 2014, no pet.)(citing *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 702 (Tex. 2007) (quoting RESTATEMENT (THIRD) OF AGENCY § 8.07 cmt. a (2006)).

[16] *In re Estate of Miller*, 446 S.W.3d 445, 455 (Tex. App.–Tyler 2014, no pet.)(citing *Nat'l Plan Adm'rs, Inc.*, 235 S.W.3d at 700).

[17] TEX. EST. CODE § 751.102.

[18] TEX. EST. CODE § 751.103(a).

[19] TEX. EST. CODE § 751.103(b).

[20] RESTATEMENT (THIRD) OF AGENCY § 8.09 (2005).

[21] *See English v. Dhane*, 286 S.W.2d 666, 669 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds*, 294 S.W.2d 709 (Tex. 1956) ("It is only when the facts appertaining to the relation of principal and agent are in dispute that the issues as to agency and scope of agency need to be submitted to the jury."); *see also, e.g., Jerome I. Wright & Assocs. v. First Metro L.P.*, No. 03-04-00283-CV, 2004 WL 2186330, at *5–6 (Tex. App.—Austin Sept. 30, 2004, no pet.) (mem. op.) (noting that when the language of a statutory durable power of attorney form was unambiguous, the trial court could ascertain an attorney-in-fact's authority for the purpose of establishing personal jurisdiction).

[22] *See Gaines v. Kelly*, 235 S.W.3d 179, 185 n.3 (Tex. 2007) (restating the "general rule that [a] principal will not be charged with liability to a third person for the acts of the agent outside the scope of his delegated authority").

The RESTATEMENT (THIRD) OF AGENCY imposes a duty on the agent to interpret the principal's grant of authority reasonably:

> An agent's fiduciary position requires the agent to interpret the principal's statement of authority, as well as any interim instructions received from the principal, in a reasonable manner to further purposes of the principal that the agent knows or should know, in light of facts that the agent knows or should know at the time of acting. An agent thus is not free to exploit gaps or arguable ambiguities in the principal's instructions to further the agent's self-interest, or the interest of another, when the agent's interpretation does not serve the principal's purposes or interests known to the agent. This rule for interpretation by agents facilitates and simplifies principals' exercise of the right of control because a principal, in granting authority or issuing instructions to an agent, does not bear the risk that the agent will exploit gaps or ambiguities in the principal's instructions. In the absence of the fiduciary benchmark, the principal would have a greater need to define authority and give interim instructions in more elaborate and specific form to anticipate and eliminate contingencies that an agent might otherwise exploit in a self-interested fashion. That is, the principal would be at greater risk in granting authority and stating instructions in a form that gives an agent discretion in determining how to fulfill the principal's direction. RESTATEMENT (THIRD) OF AGENCY § 1.01, Comment e. (2006).

Actions exceeding an agent's authority are voidable.[23] An agent's unauthorized actions do not bind the principal unless: (1) the principal ratifies those actions;[24] or

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[23] *See Morton v. Morris*, 66 S.W. 94, 98 (Tex. Civ. App.—San Antonio 1901, no writ) (holding deed void because attorney-in-fact under power of attorney exceeded the scope of his authority). Scope-of-authority issues are also important when determining whether the agent is personally liable for transactions he claims to perform with third parties. When an agent exceeds his authority under the agency agreement, he is personally liable. *See Albright v. Lay*, 474 S.W.2d 287, 291 (Tex. Civ. App.—Corpus Christi 1971, no writ); *see also Schwarz v. Straus-Frank Co.*, 382 S.W.2d 176, 178 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.). Similarly, if an individual purports to act as an agent, but has no authority, he is liable individually, and the principal is not liable. *See Gaines*, 235 S.W.3d at 185 (reversing court of appeals and affirming no-evidence summary judgment exonerating the principal because there was no evidence the agent had actual or apparent authority for acts). If the agent acts within the scope of authority, but does not disclose the agency, then both agent and principal are liable. *Medical Personnel Pool of Dallas, Inc. v. Seale*, 554 S.W.2d 211, 214 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

[24] A competent principal can ratify an unauthorized transaction if the agent acted on the principal's behalf, the agent provided all material facts to the principal, and the agent's actions did not amount to a fraud on the principal. A principal cannot ratify a transaction if he lacks the mental capacity required to engage in the transaction on his own. RESTATEMENT (SECOND) OF AGENCY § 86 (1958). When attempting to establish a principal's liability for his agent's unauthorized transaction, the party alleging ratification has the burden of proof. *BancTEXAS Allen Parkway v. Allied Am. Bank*, 694 S.W.2d 179, 181

(2) something estops the principal from denying the agent's authority to perform those actions.[25]

When a court interprets a power of attorney, it construes the document as a whole in order to ascertain the parties' intentions and rights.[26] In determining the limits of an agent's authority, two well established rules of construction set forth by the Texas Supreme Court are applied:

- First, the meaning of the general words in the document will be restricted by the context and construed accordingly.[27]

- Second, the authority will be construed strictly so as to exclude the exercise of any power that is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect.[28]

Under these rules of construction, powers of attorney, unlike deeds and wills, are to be strictly construed, and authority delegated is limited to the meaning of the terms in which it is expressed.[29] Where there is a "very comprehensive" grant of general power and an enumeration of specific powers, the established rules of construction limit the authority derived from the general grant of power to the acts authorized by the language

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(Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). If the agent fully and completely disclosed to the principal all material facts known to the agent regarding the transaction, a principal can choose to be bound by the agent's actions by making a definitive affirmation of the transaction. *Tex. First Nat'l Bank v. Ng*, 167 S.W.3d 842, 864 n.44 (Tex. App.—Houston [14th Dist.] 2005, pet. granted, judgm't vacated w.r.m.). A principal may also ratify the transaction by retaining the benefits of the transaction after learning of the unauthorized conduct. *Willis v. Donnelly*, 199 S.W.3d 262, 273 n.17 (Tex. 2006) (recognizing the general rule and finding it inapplicable); *Land Title Co. of Dall. v. F.M. Stigler, Inc.*, 609 S.W.2d 754, 757 (Tex. 1980) (applying the rule); *see also* RESTATEMENT (SECOND) OF AGENCY § 140 (1958). "Ratification of the results of conduct without full knowledge of the conduct does not constitute express or (implied) ratification of the conduct." *Crooks v. M1 Real Estate Partners, Ltd.*, 238 S.W.3d 474, 488 (Tex. App.—Dallas 2007, pet. denied). Because an agent must act to benefit his principal, Texas courts do not allow a principal to ratify a transaction where the agent's actions amount to a fraud upon the principal. *See Herider Farms-El Paso, Inc. v. Criswell*, 519 S.W.2d 473, 477–78 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.).

[25] *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224, 237 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (explaining how the doctrine of apparent authority—giving the agent the appearance of authority to do certain acts—can estop the principal from attempting to "subsequently avoid liability for the agent's acts by alleging the agent lacked authority to do them").

[26] *In re Estate of Miller*, 446 S.W.3d 445, 455 (Tex. App.—Tyler 2014, no pet.)(internal citations omitted).

[27] *Id.* (citing *Gouldy v. Metcalf*, 75 Tex. 455, 12 S.W. 830, 831 (1889)).

[28] *Id.*

[29] *Id.*

employed in granting the special powers.[30] Construction of an unambiguous power of attorney is a question of law.[31]

Scope of authority questions will likely take center stage in litigation concerning self-dealing transactions, especially in light of the complex "hot powers" a principal can now grant to an agent. In many cases, the traditional fiduciary self-dealing analysis may be supplanted by the new statutory scheme

(2). To Refrain from Self-Dealing

Generally, an agent has a duty "to act loyally for the principal's benefit in all matters connected with the agency relationship."[32] Texas case law establishes that if the agent gains a benefit from the unauthorized use of his position or the principal's property, he engages in self-dealing.[33] Self-dealing is generally defined as an occurrence in which the fiduciary uses the advantage of his position to gain a benefit at the expense of those to whom he owes a fiduciary duty.[34] A "benefit" can be an advantage, a privilege, profit, or gain.[35] Similarly, an "advantage" is a "relatively favorable position."[36] A contract between an agent and his principal is subject to the same scrutiny as any other transaction between them.[37]

Generally, an agent's duty to refrain from self-dealing or an agent's duty of loyalty can be altered.[38] The following cases and authorities support the proposition that an agent can authorize his or her fiduciary to engage in self-dealing:

- Absent the principal's consent, an agent must refrain from using his position or the principal's property to gain a benefit for himself at the principal's expense.[39]

- "Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with

[30] *Id.* (citing *Gouldy,* 12 S.W. at 831).

[31] *Id.*

[32] *In re Estate of Miller*, 446 S.W.3d 445, 453 (Tex. App.–Tyler 2014, no pet.)(citing RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006)).

[33] *Id.* (citing *Tex. Bank & Trust,* 595 S.W.2d at 508–09); *see also Cohen v. Hawkins,* 2008 WL 1723234, at *6 (Tex. App.–Houston [14th Dist.] Apr. 15, 2008, pet. denied) (mem. op.).

[34] *Mims-Brown v. Brown,* 428 S.W.3d 366, 374 (Tex. App.–Dallas 2014, no pet.).

[35] *In Re Estate of Miller*, 446 S.W.3d. at 453.

[36] *Jordan v. Lyles*, 455 S.W.3d 785, 795 (Tex. App.–Tyler 2015, no pet.).

[37] *In re Estate of Miller*, 446 S.W.3d 445, 453 (Tex. App.—Tyler 2014, no pet.).

[38] *See* RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006).

[39] *In re Estate of Miller*, 446 S.W.3d 445, 453 (Tex. App.—Tyler 2014, no pet.). (citing *Tex. Bank & Trust Co. v. Moore,* 595 S.W.2d 502, 508–09 (Tex. 1980); *Mims–Brown v. Brown,* 428 S.W.3d 366, 374 (Tex. App.–Dallas 2014, no pet.); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006)

his agency."[40]

Determining whether an agent's traditional fiduciary duty to refrain from self-dealing has been altered has become complex under the new statutory scheme. But even when the duty of loyalty is altered by agreement, an agent's power to self-deal still appears to be subject to certain conditions. For example, the RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006) states:

(1) Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 does not constitute a breach of duty if the principal consents to the conduct, provided that

(a) in obtaining the principal's consent, the agent

(i) acts in good faith,

(ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(iii) otherwise deals fairly with the principal; and

(b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.

(2) An agent who acts for more than one principal in a transaction between or among them has a duty

(a) to deal in good faith with each principal,

(b) to disclose to each principal

(i) the fact that the agent acts for the other principal or principals, and

(ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the

[40] *In re Estate of Miller*, 446 S.W.3d at 453 (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (quoting Restatement (Second) of Agency § 387 (1958)).

principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and

(c) otherwise to deal fairly with each principal.

Similarly, even when an agent is authorized to make gifts, the Texas Estates Code states that unless the DPOA provides otherwise, the power to make a gift is limited or subject to certain conditions:

> An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if the agent actually knows those objectives. If the agent does not know the principal's objectives, the agent may make a gift of the principal's property only as the agent determines is consistent with the principal's best interest based on all relevant factors, including the factors listed in Section 751.122 and the principal's personal history of making or joining in making gifts.[41]

An agent now also has the duty to preserve the principal's estate plan in certain situations.[42]

C. The Presumption of Unfairness that Applies to Self-Dealing

When a plaintiff alleges self-dealing by the fiduciary as part of a breach-of-fiduciary-duty claim, a presumption of unfairness automatically arises, which the fiduciary bears the burden to rebut.[43] All transactions between a fiduciary and his principal are presumptively fraudulent and void; therefore, the burden lies on the fiduciary to establish the validity of any particular transaction in which he is involved.[44] Even in the case of a gift between parties with a fiduciary relationship, equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity of the transaction that it is fair and reasonable.[45]

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[41] TEX. EST. CODE § 751.032(d).

[42] TEX. EST. CODE § 751.122.

[43] *Cluck v. Mecom*, 401 S.W.3d 110, 114 (Tex. App.–Houston [14th Dist.] 2011, pet. denied).

[44] *Jordan*, 455 S.W.3d at 792 (citing *Lesikar*, 33 S.W.3d at 298); *see also Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980); *Lee v. Hasson*, 286 S.W.3d 1, 22 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (explaining that the burden rested on fiduciary to show payments he received constituted fair and reasonable compensation for the services rendered and having failed to meet his burden, the contract was void). "*All* transactions between the fiduciary and his principal are presumptively fraudulent and *void*, which is merely to say that the burden lies on the fiduciary to establish the validity of any particular transaction in which he is involved." *Chien v. Chen*, 759 S.W.2d 484, 495 (Tex. App.—Austin 1988, no writ) (emphasis on "void" added).

[45] *Estate of Townes v. Townes*, 867 S.W.2d 414, 417 (Tex. App.–Houston [14th Dist.] 1993, writ denied).

The agent may rebut the presumption.[46] In other words, fiduciaries in Texas are not strictly prohibited from self-dealing.[47] To the contrary, Texas courts have upheld the validity of some self-dealing transactions.[48] Self-dealing transactions, therefore, are not void *ab initio*.[49] The terms "voidable" and "void" have distinct legal meanings.[50] If a transaction is void *ab initio*, it is null from its inception, of no legal effect.[51]

In other words, self-dealing is not a breach of fiduciary duty, but it creates a presumption that the fiduciary failed to comply with specific duties, which the fiduciary must disprove.[52] In a recent trust case, the U.S. Fifth Circuit Court of Appeals pointed out that in Texas "[a] fiduciary's self-dealing transaction is not void *per se*, but is instead *voidable* at the election of the beneficiary."[53] Texas fiduciary case opinions often use the term "presumed void" when they mean "voidable."[54] Texas law allows the principal both to recover damages ***and*** avoid the self-dealing transaction, provided the relief does not constitute double recovery.[55]

III. Important Travel Tips Before Your Adventure Begins

A. Judicial Review and the Expansion of Standing

Prior to the Act, only a guardian or personal representative of the principal's estate had the required legal standing to challenge an agent's conduct. Under Texas Estates Code § 751.251, the following class of persons and agencies may bring an action requesting a court to construe, or determine the validity or enforceability of, a durable power of attorney, or **to review an agent's conduct under a durable power of attorney and grant appropriate relief**:

(1) the principal or the agent;

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[46] *See Stephens Cnty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974).

[47] *See Chien*, 759 S.W.2d at 495 (explaining that, while such transactions are presumptively void, the fiduciary is given the opportunity to rebut that presumption).

[48] *See Vogt v. Warnock*, 107 S.W.3d 778, 785 (Tex. App.—El Paso 2003, pet. denied) (donor established fairness of gifts as a matter of law).

[49] *See id.*

[50] *Swain v. Wiley Coll.*, 74 S.W.3d 143, 146 (Tex. App.—Texarkana 2002, no pet.).

[51] *Poag v. Flories*, 317 S.W.3d 820, 825–26 (Tex. App.—Fort Worth 2010, pet. denied) (quoting *Slaughter v. Qualls*, 162 S.W.2d 671, 674 (Tex. 1942) ("That which is void is without vitality or legal effect. That which is voidable operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared.")); *cf. In re Morgan Stanley & Co.*, 293 S.W.3d 182 (Tex. 2009) (orig. proceeding) (explaining at length the distinction between contract formation and contract defenses in the context of arbitration).

[52] *See Chien*, 759 S.W.2d at 495.

[53] *Fisher v. Miocene Oil & Gas Ltd.*, 335 F. App'x 483, 487 (5th Cir. 2009) (emphasis in original).

[54] *See, e.g.*, *Coon v. Ewing*, 275 S.W. 481, 486 (Tex. Civ. App.—Beaumont 1925, writ dism'd) ("A contract between attorney and client . . . is not per se void, but is presumptively invalid . . . ."); *see also* 14 Tex. Jur. 3d *Contracts* § 113 (2006).

[55] *Fisher*, 335 F. App'x at 487.

(2) a guardian, conservator, or other fiduciary acting for the principal;

(3) a person named as a beneficiary to receive property, a benefit, or a contractual right on the principal's death;

(4) a governmental agency with regulatory authority to protect the principal's welfare; and

(5) a person who demonstrates to the court sufficient interest in the principal's welfare or estate.

The last class of persons specified above represents a substantial expansion of the class of persons who can now seek to hold an agent responsible for self-dealing with an incompetent agent. Texas Estates Code § 751.251 also protects the principal from unwanted or unwarranted litigation, as that section states that on the principal's motion, the court shall dismiss the action unless the court finds that the principal lacks capacity to revoke the agent's authority or the durable power of attorney.[56]

B. Removal of Agent

In addition, there is now a statutory mechanism to remove an agent an appoint a successor trustee.[57] In addition to injunctive relief, the ability to remove an agent also precludes the agent from potentially further using the agent's assets to pay attorney's fees to defend any challenged self-dealing transactions. Certain persons may petition a probate court to grant this relief.[58] After a hearing, the Court may enter an order:

(1) removing a person named and serving as an attorney in fact or agent under a durable power of attorney;

(2) authorizing the appointment of a successor attorney in fact or agent who is named in the durable power of attorney if the court finds that the successor attorney in fact or agent is willing to accept the authority granted under the power of attorney; and

(3) if compensation is allowed by the terms of the durable power of attorney, denying all or part of the removed attorney in fact's or agent's compensation.[59]

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[56] TEX. EST. CODE § 751.251(c).
[57] TEX. EST. CODE § 753.001.
[58] TEX. EST. CODE § 753.001(b).
[59] TEX. EST. CODE § 753.001(c).

A court may enter an order granting the above referenced relief if the court finds:

(1) that the attorney in fact or agent has breached the attorney in fact's or agent's fiduciary duties to the principal;

(2) that the attorney in fact or agent has materially violated or attempted to violate the terms of the durable power of attorney and the violation or attempted violation results in a material financial loss to the principal;

(3) that the attorney in fact or agent is incapacitated or is otherwise incapable of properly performing the attorney in fact's or agent's duties; or

(4) that the attorney in fact or agent has failed to make an accounting:

(A) that is required by Section 751.104 within the period prescribed by Section 751.105, by other law, or by the terms of the durable power of attorney; or

(B) as ordered by the court.[60]

IV. Causes of Action

A. Breach of Fiduciary Duty

To prevail on a breach of fiduciary duty claim, a plaintiff must show: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant.[61]

A plaintiff who wishes to recover monetary damages must prove not only a breach of fiduciary duty, but also causation and damages.[62] Monetary damages, however, are not the only possible legal injury that may result from a breach of fiduciary duty, so they are not the only available remedy.[63] A principal does not need to prove damages to

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[60] TEX. EST. CODE § 753.001(d).

[61] *Mims-Brown v. Brown*, 428 S.W.3d 366, 374 (Tex. App.–Dallas 2014, no pet.); *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.–Dallas 2006, pet. denied).

[62] *Fisher v. Miocene Oil & Gas Ltd.*, 335 F. App'x 483, 486–87 (5th Cir. 2009) (concluding that since Texas law does not require proof of damages as an element of a claim for breach of fiduciary duty, judgment should be entered voiding challenged self-dealing transactions).

[63] *Id.*

avoid the fiduciary's self-dealing transaction.[64] The principal can avoid the self-dealing transaction even though the fiduciary has acted in good faith.[65] "[A] self-dealing transaction itself constitutes an injury *vel non*, the undoing of which is an available remedy."[66]

B. Declaratory Relief

Texas Civil Practices & Remedies Code § 37.004 states:

> A person interested under a deed, will, written contract, or other writings constituting a contract ***or whose rights***, status, or other legal relations ***are affected by a statute***, municipal ordinance, ***contract***, or franchise may have determined any question of construction or validity arising under the ***instrument***, ***statute***, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Note that a contract may be construed either before or after there has been a breach.[67] Under the right conditions, it is possible that a DPOA could constitute a contract, especially where the agent is entitled to compensation.[68]

Texas Civil Practices and Remedies Code § 37.005 provides:

> ***A person interested as or through*** an executor or administrator, including an independent executor or administrator, a trustee, guardian, ***other fiduciary***, creditor, devisee, legatee, heir, ***next of kin***, or cestui que trust in the administration of a trust ***or of the estate of*** a decedent, an infant, ***mentally incapacitated person***, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate:
>
> (1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

---

[64] *Id.* at 487.

[65] *Id.*

[66] *Id.*

[67] TEX. CIV. PRAC. & REM. CODE § 37.004(b).

[68] *See Smith v. Wachovia Bank, N.A.*, 33 So. 3d 1191, 1199 (Ala. 2009)(holding POA did not constitute a contact but noting in its consideration analysis that "there is no other instrument or contract coupled with the power of attorney indicating that the wife was paid for her services or received anything from the husband other than the ability or authority to perform."); *see also* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 (1995).

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;

(3) to determine any question arising in the administration of the trust or estate, ***including questions of construction of*** **wills** and ***other writings***; or

(4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

The advantage of bringing a claim for declaratory relief is that it provides a basis to recover attorney's fees. The disadvantage of bringing a claim for declaratory relief is that the court has the power to award costs and reasonable and necessary attorney's fees as are equitable and just.[69]

V. Understanding What Law Applies

Because of the complexity of the new analysis now applicable to self-dealing transactions, it is critical to first understand whether the new or old law applies to any particular set of facts. The new Act became effective on September 1, 2017. Section 16 of the enrolled version of House Bill 1974, outlines the enabling provisions of new Act and states:

> (a) Except as otherwise provided by this Act, this Act applies to:
>
> (1) a durable power of attorney, including a statutory durable power of attorney, ***created before, on, or after*** the effective date of this Act; **and**
>
> (2) a judicial proceeding concerning a durable power of attorney ***pending on***, ***or commenced on or after***, the effective date of this Act.
>
> (b) The following provisions apply ***only*** to a durable power of attorney, including a statutory durable power of attorney, ***executed on or after*** the effective date of this Act:
>
> (1) Section 751.024, Estates Code, as added by this Act (dealing with compensation of agents);

[69] TEX. CIV. PRAC. & REM. CODE § 37.009.

(2) Subchapter A-2, Chapter 751, Estates Code, ***as added by this Act*** (which includes §§ 751.031, 751.032, and 751.033);

(3) Subchapters B, C, and D, Chapter 751, Estates Code, ***as amended by this Act***; and

(4) Chapter 752, Estates Code, ***as amended by this Act***.

(c) A durable power of attorney, including a statutory durable power of attorney, ***executed before the effective date of this Act*** is governed by the provisions specified in Subsections (b)(3) and (4) of this section ***as those provisions existed on the date the durable power of attorney was executed***, and the ***former law is continued in effect for that purpose***.

(d) If the court finds that application of a provision of this Act would substantially interfere with the effective conduct of a judicial proceeding concerning a durable power of attorney commenced before the effective date of this Act or would prejudice the rights of a party to the proceeding, the provision of this Act does not apply and the former law continues in effect for that purpose and applies in those circumstances.

(e) ***An act performed by*** a principal or ***agent*** with respect to a durable power of attorney ***before the effective date of this Act*** is ***not affected by this Act***.[70]

[70] Available online at: https://legiscan.com/TX/text/HB1974/2017

VI. Choose Your Own Adventure in Self-Dealing Transactions

The charts included in the following sections are intended to help navigate the most commonly encountered sections which apply, or at least potentially apply, to self-dealing transactions. Choose your adventure carefully.

A. An Adventure in Applicability: The Initial Analysis

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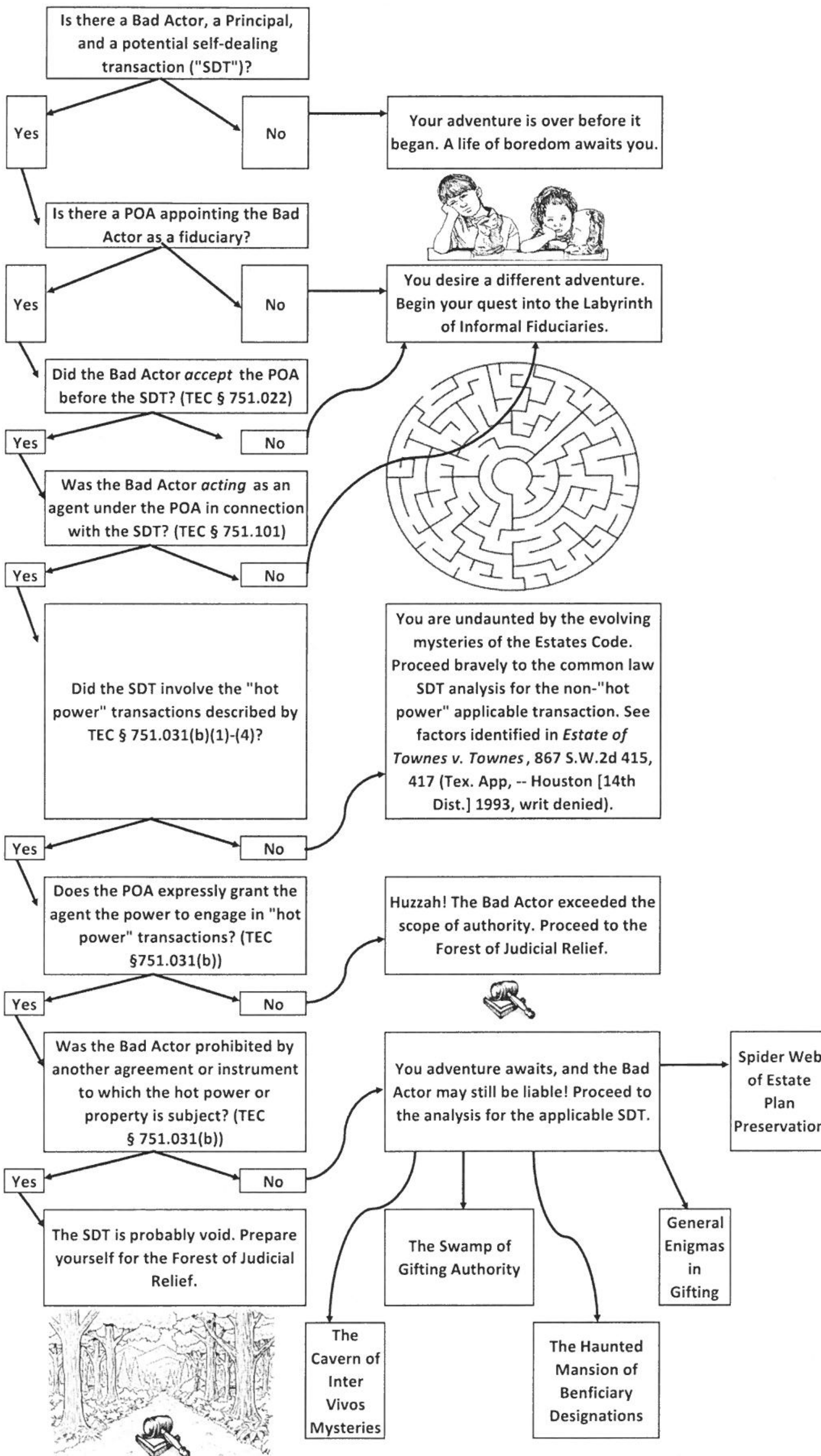
An Adventure in Applicability - The Initial Analysis



(1). The Issues – What Can We Learn from Your Adventure?

Issue: Was Your Agent a Statutory Fiduciary? The Texas Estates Code now states that a person who accepts appointment as an agent under a durable power of attorney is a fiduciary as to the principal *only when acting as an agent under the power of attorney* and has a duty to inform and to account for actions taken *under the power of attorney.*[71]

Under former law, a party who knew that he or she had been named under a DPOA owed the principal fiduciary duties regardless of whether he or she ever exercised such authority under the DPOA.[72] Texas Estates Code § 751.101 was enacted, in part, to overrule *Vogt v. Warnock*. Texas Estates Code § 751.101 provides that "a person who accepts appointment as an agent under a durable power of attorney as provided by Section 751.022 is a fiduciary as to the principal ***only when acting as an agent under the power of attorney*** and has a duty to inform and to account for actions taken under the power of attorney."

The statute does not define it means when it states that an agent is a fiduciary "as to the principal <u>only</u> <u>when</u> <u>acting</u> under the power of attorney."

Does the word "only" eliminate a fiduciary relationship being imposed on an agent under a DPOA under some other legal theory like, for example, a confidential relationship?	It is doubtful this section eliminates a fiduciary relationship being imposed on an agent under a DPOA under some other legal theory like, for example, a confidential relationship. Texas Estates Code § 751.006 states that "the <u>remedies</u> under this chapter are <u>not exclusive</u> and do <u>not abrogate</u> any <u>right</u> or <u>remedy under any law of this state</u> <u>other than this chapter</u>. Black's Law Dictionary (10th ed. 2014) defines abrogate to mean, "to abolish (a law or custom) by formal or authoritative action; to annul or repeal."
Does the word "when" imply that fiduciary duties are imposed on a transaction or act by act basis?	Note the subtle difference in effect if the statute had included "once" or "after" instead of "when."

[71] TEX. EST. CODE § 751.101.

[72] *Vogt v. Warnock*, 107 S.W.3d 778 (Tex. App.–El Paso 2003, writ denied).

What does it mean to "act" under a power of attorney?	With respect to "acceptance", Texas Estates Code § 751.022 provides that "Except as otherwise provided in the durable power of attorney, a person accepts appointment as an agent under a durable power of attorney by ***exercising authority*** or ***performing duties as an agent*** or by any other assertion or conduct indicating acceptance of the appointment. What if an agent "exercises authority" to take all the substantial steps to coordinate and set up an SDT only to "get the principal to sign" the documents? Has the agent "acted" under the POA?

It seems the issue of whether an agent had "acted" under the POA is largely a factual analysis heavily dependent on the documents. Potential defenses may arise under the unique factual circumstances of the agent's and principal's respective involvement in the transaction. To the extent the agent signs a document as the principal but notes "by agent", the answer is straight forward. If however, documents are signed by the principal, additional discovery will be required to confirm if the principal had in fact signed the document, or if the agent signed the principal's name.

Suppose that a nephew of an elderly infirm woman handles her financial affairs and progressively gains control of her accounts: first, as her agent under a POA in writing checks on her accounts; then by transfers to him as co-owner of her various accounts. Witnesses testify that the nephew would sometimes ask the elderly infirm woman "to sign something" and "he would tell her he needed it for the hospital or to repair the house or [that] nurses [needed] to be paid." The <u>elderly infirm woman</u> names <u>the nephew</u> as joint tenant with right of survivorship on her accounts.

Should the nephew have to the rebut the presumption of unfairness with respect to being included on the right of survivorship designation on the accounts even though he did not "act" under the power of attorney? In *Texas Bank & Tr. Co. v. Moore*, the

Texas Supreme Court answered "yes" under the theory that a confidential informal relationship existed between the aunt and nephew.[73]

Issue: Was your Agent an Informal Fiduciary? In Texas, there are two types of fiduciary relationships: (1) a formal fiduciary relationship arising as a matter of law, for example agent/principal, and (2) an informal or confidential fiduciary relationship arising from a moral, social, domestic, or merely personal relationship where one person trusts in and relies upon another.[74]

A confidential relationship may exist in those cases "in which influence has been acquired and abused, in which confidence has been reposed and betrayed."[75] Whether a confidential relationship exists is "determined from the actualities of the relationship between the persons involved."[76] "The problem is one of equity and the circumstances out of which a fiduciary relationship will be said to arise are not subject to hard and fast lines."[77]

Factors relevant to the inquiry of whether a confidential relationship existed include whether the plaintiff relied on the defendant for support, the plaintiff's advanced age and poor health, and evidence of the plaintiff's trust.[78] A familial relationship, while considered a factor, does not by itself establish a fiduciary relationship.[79] Texas courts have imposed informal fiduciary duties on children for their parents.[80]

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[73] *Texas Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980)("When Moore accepted the transfers by Mrs. Littell to him as joint tenant with survivorship rights of her funds in the two accounts in question, Moore consented to have his conduct measured by the standards of the finer loyalties exacted by the courts of equity.")

[74] *Gray v. Sangrey*, 428 S.W.3d 311, 316 (Tex. App.–Texarkana 2014, pet. denied)(citing *Crim Truck & Tractor v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex.1992); *Smith v. Deneve*, 285 S.W.3d 904, 911 (Tex. App.–Dallas 2009, no pet.)); *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962).

[75] *Gray v. Sangrey*, 428 S.W.3d 311, 316 (Tex. App.–Texarkana 2014, pet. denied)(citing *Crim Truck & Tractor Co. v. Navistar Intern. Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992)(quoting *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex.1980)).

[76] *Id.* (citing *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962)).

[77] *Texas Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980).

[78] *See Gray*, 428 S.W.3d at 316 and the authorities cited therein.

[79] *Id.*

[80] *See Hatton v. Turner*, 622 S.W.2d 450, 458 (Tex. App. – Tyler 1981, no writ) ("Among several factors which indicate a confidential relationship are kinship, advanced age and poor health, taken together with evidence of trust."); *Williams v. Williams*, 559 S.W.2d 888 (Tex. Civ. App. – Waco 1978, writ ref'd n.r.e.) (Constructive trust imposed on property in suit by heirs of a father and mother who had deeded property to son. Evidence showed that at the time of deed, mother was in poor health, had "depended heavily" on son to manage her property, and that son had promised mother to hold title to the property for the benefit of mother during her life and then to divide the property among all of her children); *Mills v. Gray*, 210 S.W.2d 985 (Tex. 1948).

The nature of the husband and wife relationship in marriage is a legal status and more than a contract.[81] Indeed, this engagement is the most solemn and important of human transactions.[82] The marital relationship between spouses is a fiduciary relationship.[83] Spouses generally owe a fiduciary duty to one another.[84] Texas courts have noted that a fiduciary duty exists between a husband and a wife as to the community property controlled by each spouse.[85]

As recently as 2017, the Corpus Christi-Edinburg Court of Appeals rejected the argument that a jury's verdict finding a spouse had breached her fiduciary duty to the other spouse was somehow legally insufficient because the spouses did not owe each other a fiduciary duty since no community property was created during the marriage under their premarital agreement.[86] In recognizing the existence of fiduciary duties with respect to community property, the Court noted those duties do not, by implication, eliminate other duties:

> While we recognize the holding in *Knight* and other cases that a fiduciary duty exists between spouses with regard to their community estate, we do not read those cases so narrowly as to foreclose that spouses do not owe other fiduciary duties to one another by virtue of their marital relationship.[87]

The Court went on to note that a fiduciary relationship was "nevertheless created by [the wife's] 'special relationship of trust and confidence' as [her husband's] spouse and joint account holder, regardless of the separate character of the property."[88]

This reasoning is consistent with long-recognized case law in Texas holding that a confidential relationship does exist between a husband and his wife and that such relationship extends to separate property:

- *Wiley and Co. v. Prince,* 21 Tex. 637 (1858)(affirming jury verdict finding wife was unduly influenced by husband to mortgage her separate

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[81] *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124 (1913).

[82] *Id.*

[83] *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009).

[84] *Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. App.—Houston [1st Dist.] 2006, no pet.)(citing *Vickery v. Vickery*, 999 S.W.2d 342, 357 (Tex.1999); *Matthews v. Matthews*, 725 S.W.2d 275, 279 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.)).

[85] *Knight v. Knight*, 301 S.W.3d 723, 731 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

[86] *Hughes v. Hughes*, 13-15-00496-CV, 2017 WL 2705472, at *14 (Tex. App.—Corpus Christi June 22, 2017, pet. denied), reh'g denied (2017).

[87] *Id.*

[88] *Id*

property). Additionally, recognizing:

> "There is no relation in which more influence, more dominion can be exercised by one person over another than that exercised by the husband over the wife. They are separate in this state as to property, but in other respects the legal existence, the powers of the wife, are merged in the husband, and his conduct in obtaining gifts . . . from her property should therefore be watched with the most scrupulous attention.")(emphasis added).

- *Buckner v. Buckner*, 815 S.W.2d 877, 880 (Tex. App.–Tyler 1991, no writ)(trial court correctly held husband's inaccurate statements about the non-necessity of probating his father's will leaving property to both husband and husband's wife (which inheritance would be wife's separate property as a matter of law), were fraudulent because husband had an affirmative duty to disclose material facts by virtue of the fiduciary relationship established from marital status); and

- *Bohn v. Bohn,* 455 S.W.2d 401, 406 (Tex. Civ. App.–Houston [1st Dist.] 1970, writ dism'd)(dealing with wife's alleged gift of separate property stock to her husband and noting "[t]hat a confidential relationship exists between husband and wife has been recognized in Texas.").

Indeed, this fiduciary relationship imposes strict burdens on interspousal gifts. *See Bohn v. Bohn,* 455 S.W.2d at 406 (in connection with an interspousal transfer of wife's separate property stock to her husband, noting that the spouse who received the property had the burden of "affirmatively showing that he acted in good faith, and that the gift was voluntarily and understandingly made.").

B. The Cavern of *Inter Vivos* Mysteries: Self-Dealing in the Creation, Amendment, Revocation or Termination of an *Inter Vivos* Trust

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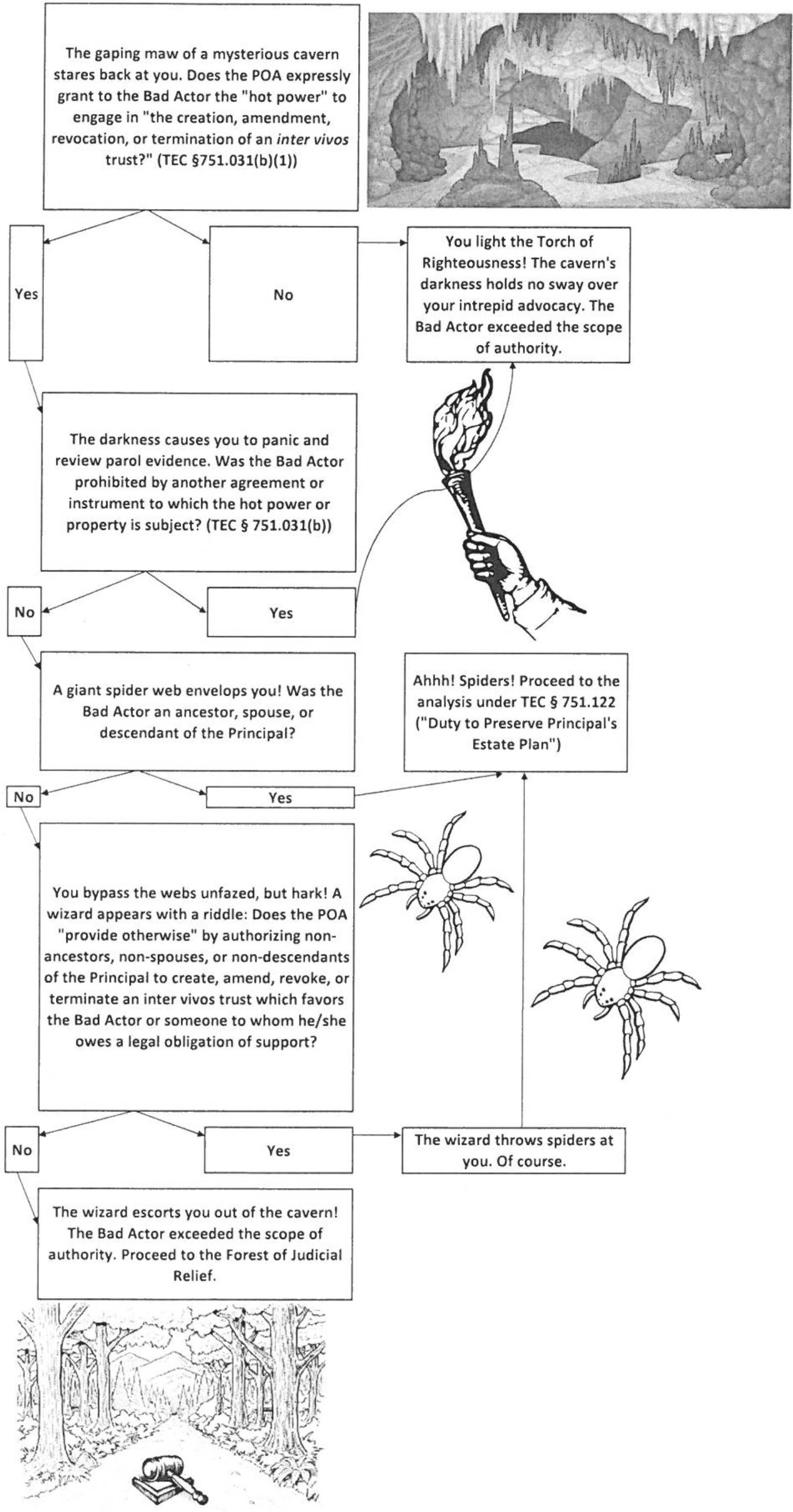
The Cavern of *Inter Vivos* Mysteries



(1). The Issues – What Can We Learn from Your Adventure?

The power to create, amend, revoke, or terminate an *inter vivos* trust gives the agent the ability to disrupt or thwart a principal's estate plan. Other commenters have noted the apparent inconsistency between allowing an agent to create, amend, revoke, or terminate an *inter vivos* trust but not execute a will of the principal.[89]

Issue: Who is planning the principal's estate? While some estate planners have limited the power of an agent with respect to changing the dispositive provisions of an *inter vivos* trust by tying that power to past known estate plans of the principal, what happens if the principal doesn't have a past estate plan? Is the agent, or should the agent be, limited to leaving the residuary of the *inter vivos* trust to the principal's heirs at law?

Texas Estates Code § 751.031 directly overrides *Filipp v. Till*, 230 S.W.3d 197, 200 (Tex. App.—Houston [14th Dist.] 2006, no pet.). In *Filipp*, the principal executed a statutory durable power of attorney, making his niece his agent. He also executed a will leaving his farm to his niece, and if she did not survive, to his niece's daughters. The principal intentionally left his nephew nothing. The principal's niece, acting as his agent, executed a revocable living trust and deeded the principal's farm to that trust. The trust provided that the niece was to receive the farm when the principal died.

The opinion does not mention whether the DPOA in *Filipp* expressly granted the agent the power to create a trust. The Court began its analysis by noting that Texas Trust Code § 112.002 "dictates that a trust is created 'only if the settlor manifests an intention to create a trust.'"[90] The Court reasoned that an agent cannot form the requisite intent (in place of the settlor) to create a trust. Accordingly, the Court concluded that the deed transferring the principal's farm to the trust was ineffective.

Given the practical similarities between an *inter vivos* trust and a last will and testament, it is interesting to note that the Legislature stopped short of giving the principal the power to allow an agent to execute, amend, or revoke a will.

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[89] *See e.g.* David F. Johnson, *Dealing with Policies and Protocols of Banking Institutions in Texas*, 12th Annual Fiduciary Litigation Course (2017), pg. 15.

[90] *Filipp v. Till*, 230 S.W.3d 197, 203 (Tex. App. – Houston [14th Dist.] 2006, no pet.).

C. General Enigmas in Gifting: Self-Dealing Transactions Involving Gifts

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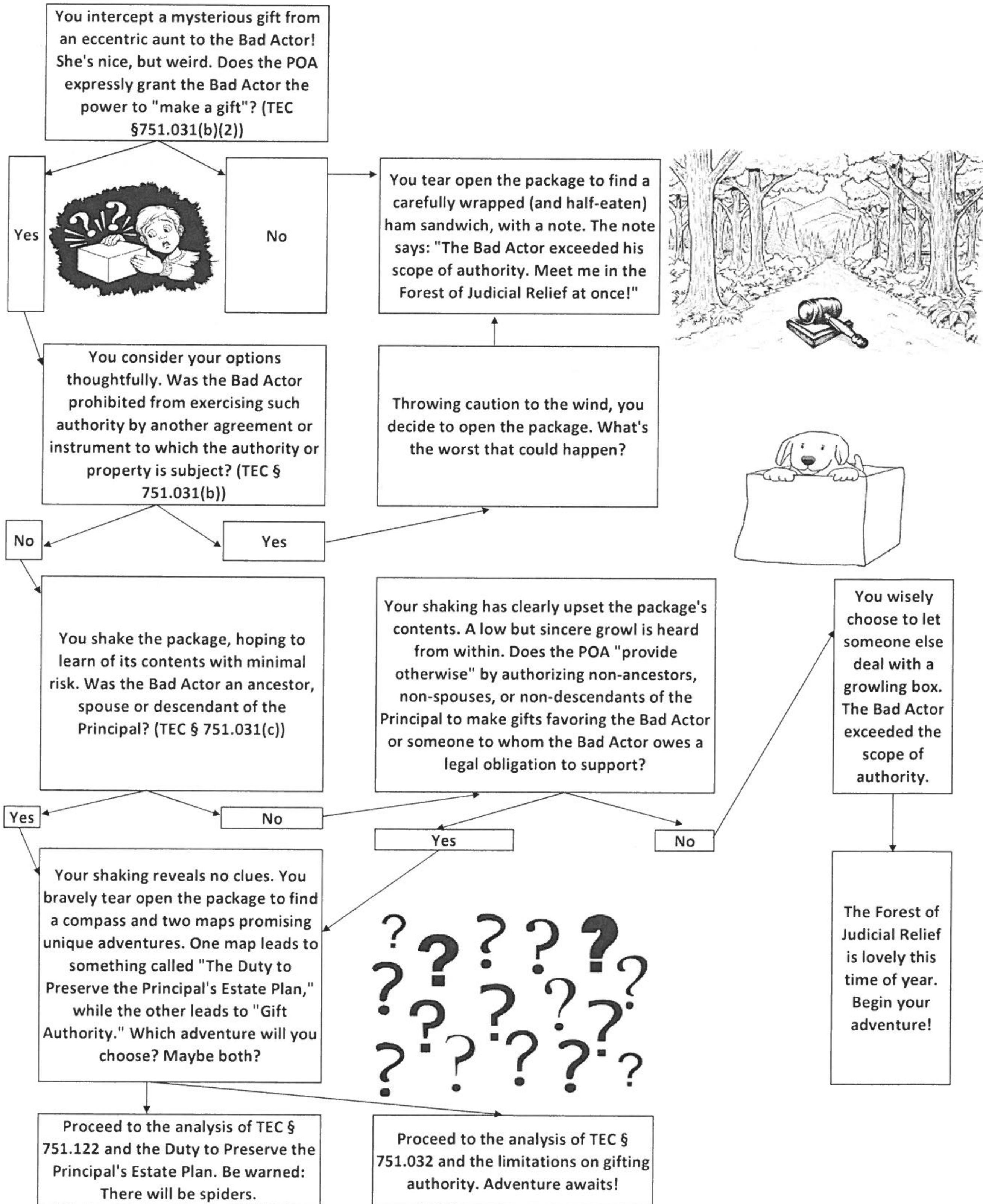
General Enigmas in Gifting



D. Of Marshes and Mountains: The Scope of Gifting Authority

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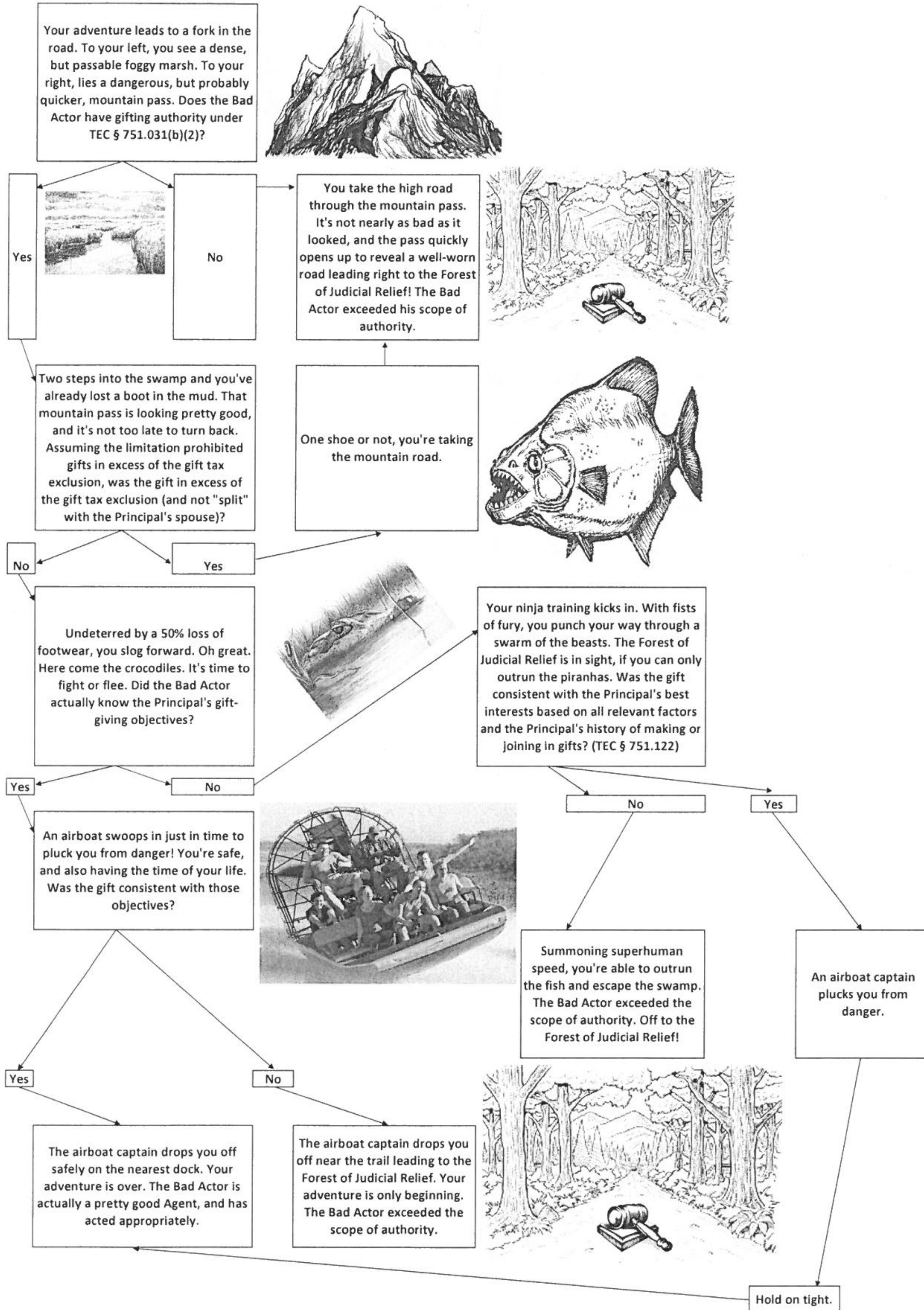
Of Marshes and Mountains: The Scope of Gifting Authority



(1). The Issues – What Can We Learn from Your Adventures?

Here, the new statutory framework does not appear to deviate all too far from prior iterations of the law dealing with an agent's ability to make gifts. Two primary focal points emerge – authority and scope.

It has long been the practice of estate planners to include, where appropriate, specific grants of authority to an agent to make tax-motivated gifts under the power of attorney. This power also includes the power to consent to split annual exclusion gifts made by the spouse. Now, gifting is also included among the "hot powers" that a principal can authorize an agent to engage in. Because all of the hot powers are subject to additional limitations, largely based upon the agent's familial relationship to the principal, the power to gift – when granted as a hot power – is so limited as well.

The key analysis in dealing with an agent's transactions involving gifts is one of scope. Does the power of attorney give the agent the authority to make the gift, and did the agent apply the proper limitation(s) to the gift he or she made on behalf of the principal? Additionally, the statute includes for itself, and makes an express reference to, gifting limitations that are consistent with the principal's objectives and preservation of the principal's estate plan.

E. The Haunted Mansion of Beneficiary Designations: Self-Dealing in Beneficiary Designations

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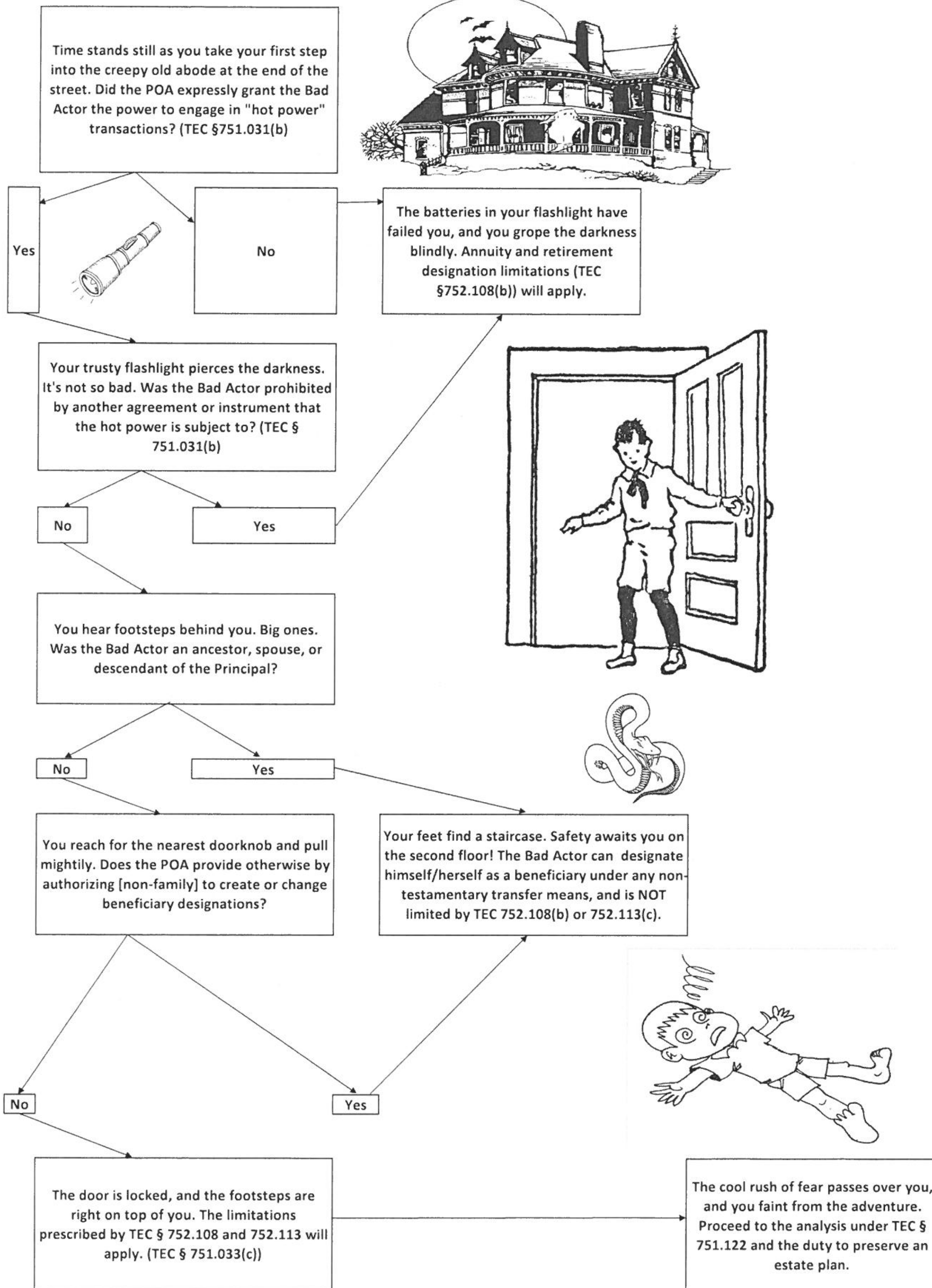
The Haunted Mansion of Beneficiary Designations



(1). The Issues – What Can We Learn from Your Adventure?

Without question, Section 751.033 is an agonizing read. The amount of "subject to's" and cross-references to other code sections is enough to make most heads spin. At the very least, the reader is forced to flip back and forth between numerous statutory provisions. Convoluted as it may appear, the statute is actually relatively easy to apply to a transaction involving the agent and a beneficiary change.

Here's the key takeaway. Absent an express provision otherwise stated in the power of attorney (or other instrument), a specific grant of a "hot power" regarding beneficiary designations allows an agent to create or change such a designation for a principal. In most cases, this creation or change will NOT be limited by the specific statutes that previously only allowed an agent to designate themselves only to the extent they were already named by the principal. Without this "hot power," the general grant of authority to change beneficiary designations will still be limited by those specific statutes.

How will this authority, when granted, match up with the agent's duty to preserve a principal's estate plan? Any litigator's guess is as good as ours, and we may well see an uptick in cases founded upon an agent naming himself as a beneficiary where he was not previously named by the principal.

F. Trapped in a Spider Web: The Agent's Duty to Preserve the Principal's Estate Plan

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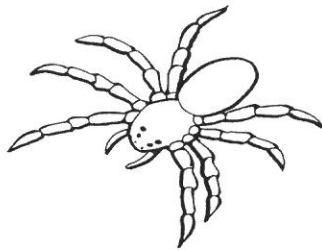
Trapped in a Spider Web

You're stuck in a spider web! A hungry spider eyes you and awaits your decision to struggle or surrender. Was it reasonably possible for the Bad Actor to preserve the Principal's estate plan? (TEC §751.122)



Yes

No

Spiders love to eat lawyers! You're doomed. And, no duty was violated. At least the spider is happy.

Or is it?

You remember you have your trusty pocket knife! Did the Bad Actor have actual knowledge of the Principal's estate plan?

Your knife breaks! And you cut yourself. Your pinky is bleeding. Now the spider is going to eat you, AND your pinky hurts. Today is really not your day.

Yes

No

You've sawed through most of the webs! One last stubborn strand to cut: Was preserving the Principal's estate plan consistent with the Principal's best interests? (TEC § 751.122(1)-(4)

You're free! But at what cost? Now you're falling from the web down a deep, dark hole. Good luck landing. No duty was violated.

Is this the end of your adventure?

No

Yes

The spider respects and admires your determination. It frees you and apologizes for the misunderstanding. You shake hands (eight times). The duty was violated, and your adventure in the Forest of Judicial Relief awaits!

What about the traditional duty of good faith? The Model Act? Could the Bad Actor HAVE knowledge of a private estate plan? Wouldn't privilege(s) make knowledge harder to obtain?

(1). The Issues – What Can We Learn from Your Adventure?

The duty to "preserve" an estate plan seems more than a bit amorphous. Here, it seems that the Legislature's good intentions will likely require significantly more information sharing between the estate planner, the principal and the agent, and may still spawn an entire new niche of fiduciary litigation. Since this provision is an echo of the Uniform Power of Attorney Act (UPOA), which has been adopted (in whole or in part) in the majority of jurisdictions in the country, Texas estate planners and fiduciary litigators will soon find themselves looking to the decisions of other jurisdictions to resolve disputes that arise.

How will agents learn about the principal's estate plan, and will estate planners implement mechanics in their powers of attorney to make the principal's estate plan more accessible to the agent? Just as importantly, how will we measure agents against a duty that, even under the best of circumstances, appears difficult to judge?

Section 751.122 provides:

> An agent shall preserve to the extent reasonably possible the principal's estate plan to the extent the agent has actual knowledge of the plan if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
>
> (1) the value and nature of the principal's property;
>
> (2) the principal's foreseeable obligations and need for maintenance;
>
> (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
>
> (4) eligibility for a benefit, a program, or assistance under a statute or regulation.

From the authors' perspective, the statute produces more questions than it does answers. Below are a few choice musings that litigators could soon be asking in their own cases, and that estate planners might be looking for ways to avoid.

- Are the duties and restrictions described in Section 751.122 the default rule, and can the principal waive them? Some legislative scholars believe that since the power of attorney itself is part of the "estate plan,"

authorizing an agent to take actions which, if given effect, change the plan could be construed as relieving the agent of this entire duty. Viewed in this light, are we going to see more estates "planned" by agents, or at least see more agents involved in the estate planning process? Estate planners consulting with principals should make the application (on non-application) of 751.122 as clear as possible.

- What first appears as a clear duty (*i.e.* preserve the estate plan) is immediately filtered through many unique factual circumstances. The number of "outs" for the agent almost seem to strip away the efficacy of the duty in all but the most egregious cases of self-dealing.

    - Was it "reasonably possible" to preserve the plan? If not, we must assume that this duty was not breached no matter how great the deviation from the principal's estate plan and the agent's action.

    - Did the agent have "actual knowledge" of the estate plan? If not, we must assume that this duty was not breached no matter how great the deviation from the principal's estate plan and the agent's action.

    - Was preserving the principal's estate plan consistent with the principal's best interests, taking into account (1) the value and nature of the property, (2) the principal's obligations and future needs, (3) the minimization of taxes, and (4) benefit eligibility? If not, we must assume that this duty was not breached no matter how great the deviation from the principal's estate plan and the agent's action.

- The duty clearly only applies if the agent has "actual knowledge" of the estate plan. Presumably, this means that the agent actually knows of the existence and terms of either or both the principal's will and/or trust, and perhaps a host of other "estate plan" documents and instruments. Are we going to see more agents intimately involved in the estate planning process? Would the estate planner run afoul of his or her obligations to the principal by refusing to expand privilege and confidentiality to include the agent?

VII. Conclusion

In summary, analyzing self-dealing transactions involving a DPOA now seems to primarily involve examining the agent's authority – not necessarily the agent's fiduciary duty. This is especially true where "hot power" transactions are involved. It remains unclear how Texas courts will interpret the agent's duty to preserve the principal's estate plan. Thus, it will be helpful to look to other jurisdictions who have adopted the Uniform Power of Attorney Act and examine how their courts have interpreted any duty to preserve the estate plan. Finally, the 2017 legislative changes to the Act will continue the trend of requiring estate planners to engage in a more thorough estate planning process with respect to durable powers of attorney. If for no other reason than there are simply more choices (and consequences, both intended and unintended) now for a principal to consider before signing a DPOA. Estate planners should consider making the agent aware of the principal's estate plan, including as and when it changes.