

The University of Akron

From the Selected Works of Carolyn L. Dessin

1996

Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role

Carolyn L. Dessin, *University of Akron School of Law*



Available at: https://works.bepress.com/carolyn_dessin/7/

Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role

TABLE OF CONTENTS

I. Introduction	575
II. The Durable Power of Attorney.....	576
A. Definition and History.....	576
B. Attributes and Uses	580
III. The Problem	584
IV. The Analogy to Traditional Agency Law	587
A. The Role of the Agent	587
B. Use of Traditional Agency Law with Respect to Acts Under Durable Powers	587
V. The Analogy to Guardianship Law	589
A. The Role of the Guardian.....	589
B. A Comparison of the Role of Guardian/Conservator with the Role of Agent.....	593
C. Interaction of Guardians and Agents.....	595
VI. The Analogy to Trust Law	596
A. The Role of the Trustee	597
B. A Comparison of the Role of Trustee With the Role of Agent	599
VII. The Appropriate Role of the Agent	600
A. Common Ground	603
B. Unexplored Territory	605
C. Common Issues	612
1. Gift Giving/Self-dealing	612
2. Ademption and Other Dispositive Provisions ...	614
D. Court Supervision and Limits on Liability	616
VII. Conclusion.....	620

Copyright held by the NEBRASKA LAW REVIEW.

* Associate Professor of Law, Widener University. J.D., Villanova University Law School, M.M., Westminster Choir College; B.M. Ed., Temple University. The author wishes to thank Professors Joseph De Furia, Thomas Reed, and Frederick Rothman for their thoughtful comments on various drafts of this Article, and Michaela Cavanaugh and Nancy Kippenhan for their research assistance.

I. INTRODUCTION

The financial durable power of attorney, also known as a durable power of attorney for property management, is a creature of fairly recent origin.¹ The estate planning bar created it to provide an effective alternative to guardianship or conservatorship proceedings when people become incompetent or incapacitated.² Additionally, there was a sentiment that the wealthy had an effective way of dealing with potential disability by creating a funded inter vivos trust, and that such a device was not available to most individuals because of the prohibitive cost.³ Since its creation, the financial durable power of attorney has become an extremely popular planning device.⁴

Recently, however, concerns have been voiced that perhaps we have created an instrument of abuse rather than a useful tool.⁵ Sometimes the problems are as clear as wrongful misappropriation of the principal's property by the agent.⁶ Often, however, problems arise be-

1. For a discussion of the history of the financial durable power, see *infra* notes 12-29 and accompanying text.
2. See FRANCIS J. COLLIN, JR. ET AL., *DURABLE POWERS OF ATTORNEY AND HEALTH CARE DIRECTIVES* § 2.02, at 2-2 (3d ed. 1995). Two commentators suggest that guardianships can be expensive as well as unpleasant. A.L. Moses & Adele J. Pope, *Estate Planning, Disability, and the Durable Power of Attorney*, 30 S.C. L. REV. 511, 516 (1979). They suggest that the durable power of attorney is a less expensive alternative to guardianship. *Id.*
3. UNIF. DURABLE POWER OF ATTORNEY ACT Prefatory Note, 8A U.L.A. 310 (1987). See also John J. Lombard, Jr., *Asset Management Under a Durable Power of Attorney—The Ideal Solution to Guardianships or Conservatorships*, 9 PROB. NOTES 189, 190 (1983) (suggesting revocable trust is only partial answer to issue of potential disability).
4. See John J. Lombard, Jr. et al., *Legal Problems of the Aged and Infirm—The Durable Power of Attorney—Planned Protective Services and the Living Will*, 13 REAL PROP. PROB. & TR. J. 1, 4 (1978) (panel discussion at the 1977 Annual Meeting of the American Bar Association by the Real Property, Probate, and Trust Section) (reporting results of survey concerning durable powers of attorney; noting that most attorneys responding to survey recommended durable powers of attorney to their clients); Moses & Pope, *supra* note 2, at 525 ("[A durable power of attorney is] a reasonably simple mechanism by which a person may prepare for a contingency that could have devastating consequences to himself and to his family. Thus, the possibility of naming an agent under a durable power should be discussed with any client for whom the lawyer is preparing a will or providing estate planning services."). See also sources cited *infra* note 44.
5. See, e.g., David M. English & Kimberly K. Wolff, *Survey Results: Use of Durable Powers*, PROB. & PROP., Jan.-Feb. 1996, at 33 (reviewing results of survey conducted by American Bar Association Section of Real Property, Probate, and Trust; concluding abuse of durable powers of attorney is "relatively infrequent" but "can produce unfortunate and harmful consequences.").
6. E.g., *People v. Dunn-Gonzalez*, 55 Cal. Rptr. 404 (Cal. Ct. App. 1996) (affirming trial court's sentence for fraudulent appropriation by agent under durable power of attorney who made gifts to herself on principal's behalf); *In re Rick*, No. 6920, 1994 WL 148268 (Del. Ch. Ct. March 23, 1994) (agent unduly influenced principal).

cause the standards governing the behavior of agents under durable powers of attorney have never been clearly defined.⁷ In many instances, those standards have not even been considered. Legislatures, courts, and commentators have often simply assumed the application of various bodies of law without careful reflection. In light of the popularity of the financial durable power of attorney, it is surprising that there has been no in-depth consideration of the parameters of the agent's duty. There has been only the occasional sentence written, often merely noting the application of general fiduciary principles.

This Article examines the history and uses of the financial durable power of attorney and compares it to the alternative property management approaches of guardianship and trust creation. It then discusses the general lack of definition of the role of the agent under the financial durable power of attorney and problems that this lack of definition has begun to cause. Finally, it proposes a role for agents that comports with the purposes underlying the creation of financial durable powers of attorney and the public's expectations about how such powers will operate.

II. THE DURABLE POWER OF ATTORNEY

A. Definition and History

A power of attorney is an instrument by which a principal empowers an agent to act on the principal's behalf.⁸ At common law, a power of attorney was revoked by the incompetency or incapacity of the principal.⁹ Thus, having a power of attorney provided no protection from the difficulties of becoming incompetent or incapacitated because the

7. *E.g.*, *Eby Estate*, 6 D.&C.3d 371 (Pa. Ct. Com. Pls. 1977)(considering allegation that agent under durable power of attorney delayed sale of principal's assets for unreasonable time).

8. *E.g.*, *In re Estate of Lienemann*, 222 Neb. 169, 178, 382 N.W.2d 595, 602 (1986). The agent can also be called an "attorney in fact." *Id.*

9. RESTATEMENT (SECOND) OF AGENCY § 122 (1957). See *Unif. Probate Code* [hereinafter U.P.C.] Part 5, prefatory note, 8 U.L.A. 511 (1987). See also *Golleher v. Horton*, 715 P.2d 1225, 1229 (Ariz. Ct. App. 1985).

A narrow exception to revocation by incompetence existed if the power of the agent was coupled with an interest. See, *e.g.*, *Johnson v. Nat'l Bank of Mattoon*, 151 N.E. 231, 232 (Ill. 1926); *Witherington v. Nickerson*, 152 N.E. 707, 709 (Mass. 1926). Thus, if the agent had a present interest in the property over which the power was to operate, the power would not end at the incompetence of the principal. See, *e.g.*, *Hunt v. Rousmanier's Administrators*, 21 U.S. (8 Wheat.) 174, 203-04 (1823). See also Alexander M. Meiklejohn, *Incompetent Principals, Competent Third Parties, and the Law of Agency*, 61 IND. L.J. 115, 118-45 (1986)(discussing cases in which courts have upheld the acts of agents representing principals under traditional powers of attorney).

power of attorney would cease to be effective at the exact moment that the principal needed it most.¹⁰

The notion of durability had its genesis in this deficiency of a common-law power of attorney. Two approaches to durability are possible: 1) a power of attorney can be immediately effective and survive the incapacity of the principal (the "immediately effective" power) or 2) the power of attorney can become effective only when the principal becomes incapacitated (the "springing" power).¹¹

In 1954, Virginia enacted the first statute that allowed an agent to continue to act as empowered by a power of attorney even after the principal became disabled, incompetent, or incapacitated.¹² Ten years later, the National Conference of Commissioners on Uniform State Laws promulgated the Model Special Power of Attorney for Small Property Interests Act ("the 1964 Act").¹³ The 1964 Act was designed to be a less expensive alternative to guardianship or conservatorship proceedings.¹⁴ Designed to be used only in situations involving lim-

10. See COLLIN ET AL., *supra* note 2 § 1.01, at 1-1. One commentator has noted that the non-durable power may have less than full efficacy even before the principal becomes incompetent because third parties might be unwilling to deal with the agent of a principal who might be incompetent. Lombard, *supra* note 3, at 189.

11. See generally COLLIN ET AL., *supra* note 2, § 2.02, at 2-2. The U.P.C. offers two suggested clauses to express durability. U.P.C. § 5-501, 8 U.L.A. 513 (1987). Language similar to the first clause—"This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time"—authorizes immediately effective powers. See COLLIN ET AL., *supra* note 2, § 2.02, at 2-6. If the statute allows language like the second clause—"This power of attorney shall become effective upon the disability or incapacity of the principal," the statute authorizes a springing power. See COLLIN ET AL., *supra* note 2, § 2.02, at 2-6. See also CAL. PROB. CODE § 4030 (West Supp. 1996)(defining springing power).

12. VA. CODE ANN. § 11-9.1 (Michie 1950).

13. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 275-81 (1964).

14. The prefatory note to the 1964 Act states in pertinent part:

The purpose of this model Special Power of Attorney Act is primarily to provide a simple and inexpensive legal procedure for the assistance of persons with relatively small property interests, whose incomes are small, such as pensions or social security payments, and who, in anticipation or because of physical handicap or infirmity resulting from injury, old age, senility, blindness, disease or other related or similar cause, wish to make provision for the care of their personal or property rights or interests, or both when unable adequately to take care of their own affairs. It is not contemplated that a power of attorney executed under this Act will be used for the general handling of sizeable commercial property interests. Neither is it intended wholly to replace conservatorship or guardianship, but rather it is designed as a less expensive alternative.

HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 274 (1964). See COLLIN ET AL., *supra* note 2, § 2.02, at 2-4. In its

ited assets, the act was fairly comprehensive, and included a number of safeguards. For example, the Act required that powers executed under it had to be approved by a judge of a court of record to be valid.¹⁵ Interestingly, the 1964 Act offered three standards relating to the liability of the agent.¹⁶ Alternative one made the agent liable only in the case of "intentional wrongdoing, [gross negligence], or fraud."¹⁷ The second alternative held the uncompensated agent liable only for "intentional wrongdoing, gross negligence, or fraud" but held the compensated agent to the standard applied to other fiduciaries.¹⁸ Alternative three held all agents to the standard applied to other fiduciaries.¹⁹ The three alternatives were the result of a divergence of opinion among the Commissioners on Uniform State Laws.²⁰ Originally, the drafting committee suggested the lowest standard, alternative one, because they thought that small amounts of assets would be involved and relatives or close friends would be serving as agents "without compensation and as a labor of love."²¹ The 1964 Act received limited acceptance,²² although a number of states may have

enactment of a version of the 1964 Act, the Arkansas General Assembly noted that it was attempting to provide a workable alternative to guardianships, which it viewed as expensive. Acts 1965, No. 61, § 14, Feb. 12, 1965 (Emergency Clause).

15. Section 1 of the 1964 Act provided in part:

(a) If a [resident of][person within] this state desires to execute a power of attorney in anticipation or because of infirmity resulting from injury, old age, senility, blindness, disease, or other related or similar cause as a means of providing for the care of his person or property, or both, he shall sign the instrument in the presence of and with the approval of a judge of [a court of record] of the [county] in which the power is executed. . . .

(b) The approval of the judge may be given only if:

(1) the principal requests approval;

(2) the attorney in fact consents to serve;

(3) the judge is satisfied, after any examination and investigation he deems appropriate, that the principal is a person covered by this Act and reasonably understands the nature and purpose of the power, and that the attorney in fact is a suitable person to carry out the obligations imposed upon him; and

(4) the provisions of this Act have been observed. Approval may be given . . . without the necessity of service of summons or other notice and shall be endorsed upon the face of the original of the instrument. The power remains valid until terminated as provided in this Act.

MODEL SPECIAL POWER OF ATTORNEY FOR SMALL PROPERTY INTERESTS ACT § 1 (1964).

16. *Id.* § 7 (1964).

17. *Id.* (brackets in original).

18. *Id.*

19. *Id.*

20. *Id.* cmt.

21. *Id.*

22. The 1964 Act was enacted by Arkansas in 1965, and remains in effect in that state. ARK. CODE ANN. §§ 28-68-301 to 28-68-313 (Michie 1987). In Arkansas,

borrowed provisions from it to use in enactments of the later Uniform Probate Code or Uniform Durable Power of Attorney Act.²³

When the National Conference of Commissioners on Uniform State Laws approved and promulgated the Uniform Probate Code ("U.P.C.") in 1969, it included sections 5-501 and 5-502. These sections provided that the authority of an agent to act under a power of attorney could continue beyond the incompetence of the principal.²⁴ In addition to the idea of durability, the U.P.C. altered the common-law rule that the death of the principal ended the authority of an agent under a durable power of attorney and voided any acts performed by the agent after the death.²⁵ After the promulgation of the U.P.C., the durable power of attorney gained rapid acceptance.²⁶

In 1979, the National Conference amended and expanded the sections of the U.P.C. dealing with durable powers of attorney and approved the Uniform Durable Power of Attorney Act ("U.D.P.A.A."), a free-standing act paralleling the language of and designed to act as an alternative to sections 5-501 to 5-505 of the U.P.C.²⁷ All fifty states

powers under the act could control only property worth under \$20,000 or an annual income interest of less than \$6,000. Arkansas also enacted statutes similar to section 5-501 to 5-503 of the Uniform Probate Code, 8 U.L.A. 513-514 (1987). ARK. CODE ANN. §§ 28-68-201 to 28-68-203 (Michie 1987).

23. For example, the 1964 Act included a provision requiring the agent to account. MODEL SPECIAL POWER OF ATTORNEY FOR SMALL PROPERTY INTERESTS ACT § 9 (1964). A number of states have a similar requirement. See also *infra* notes 24 and 27.

24. See U.P.C. §§ 5-501, 5-502, 8 U.L.A. 513-14 (1987).

25. See U.P.C. part 5 prefatory note, 8 U.L.A. 511 (1987). Sections 5-501 and 5-502 of the 1969 and 1975 versions of the U.P.C. gave limited protection to an agent who acted after the principal had died. See U.P.C. § 5-504 cmt., 8 U.L.A. 516 (1987). The 1979 revisions broadened the agent's protection and moved it to section 5-504. U.P.C. § 5-504, 8 U.L.A. 516 (1987). Many states have adopted similar rules. See, e.g., ALA. CODE § 26-1-2(d) (1992); ALASKA STAT. § 13-26-356 (Supp. 1995); CAL. PROB. CODE § 4304 (West Supp. 1995); DEL. CODE ANN. tit 12, § 4904 (1987). This makes imposing a burden to act on an agent less troublesome because the agent has increased protection.

26. See COLLIN ET AL., *supra* note 2, § 2.02, at 2-2.

27. UNIF. DURABLE POWER OF ATTORNEY ACT, prefatory note, 8A U.L.A. 309 (1987). See COLLIN ET AL., *supra* note 2, § 2.03, at 2-7. The 1979 Act was less comprehensive and specific than the 1964 Act. See COLLIN ET AL., *supra* note 2, § 2.02, at 2-4.

Section 5-501 authorizes durability and states:

A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

and the District of Columbia have enacted statutes authorizing durability of powers.²⁸ Thus, the financial durable power of attorney is an available planning tool throughout the United States.²⁹

B. Attributes and Uses

Initially, it should be noted that durable powers of attorney can typically be placed in one of two categories: 1) powers aimed at management of the principal's property and 2) powers designed to empower the agent to make health care decisions on behalf of the principal. The concerns addressed in this Article are unique to financial durable powers of attorney, although some of the ideas presented, like a potential duty to act on behalf of the principal, can be carried by analogy to situations involving health care durable powers of attorney.

U.P.C. § 5-501, 8 U.L.A. 513 (1987).

28. ALA. CODE § 26-1-2 (1992); ALASKA STAT. § 13.26.350 (Supp. 1995); ARIZ. REV. STAT. ANN. § 14-5501 (1995); ARK. CODE ANN. §§ 28-68-201, 28-68-202 (Michie 1987); CAL. PROB. CODE §§ 4123-4125 (West Supp. 1996); COLO. REV. STAT. ANN. § 15-14-501 (West Supp. 1995); CONN. GEN. STAT. ANN. § 45a-562 (West 1993); DEL. CODE ANN. tit. 12, §§ 4901-4902 (1987); D.C. CODE ANN. §§ 21-2081, 21-2082 (1989); FLA. STAT. ANN. § 709.08 (West Supp. 1995); GA. CODE ANN. § 10-6-36 (Michie 1994); HAW. REV. STAT. §§ 551D-1, 551D-2 (1993); IDAHO CODE §§ 15-5-501, 15-5-502 (Supp. 1995); ILL. ANN. STAT. ch. 755, para. 45/2-6 (Smith-Hurd 1992); IND. CODE ANN. § 30-5-4-1 (West 1994); IOWA CODE ANN. § 633.705 (West 1992); KAN. STAT. ANN. §§ 58-610, 58-611 (1994); KY. REV. STAT. ANN. § 386.093 (Michie/Bobbs-Merrill 1984); LA. REV. STAT. ANN. § 3027 (West 1994); ME. REV. STAT. ANN. tit. 18-A, §§ 5-501, 5-502 (West Supp. 1995); CODE ANN. EST. & TRUSTS. § 13-601 (Supp. 1995); MASS. GEN. LAWS ANN. ch. 201B, §§ 1, 2 (West 1990); MICH. COMP. LAWS ANN. § 700.495 (West 1995); MINN. STAT. ANN. § 523.07 (West Supp. 1995); MISS. CODE ANN. §§ 87-3-105, 87-3-107 (Supp. 1995); MO. ANN. STAT. § 404.705 (Vernon 1990); MONT. CODE ANN. § 72-5-501 (1995); NEB. REV. STAT. §§ 30-2665, 30-2666 (1989); NEV. REV. STAT. ANN. § 11.460 (Michie 1993); N.H. REV. STAT. ANN. § 506:6 (1994); N.J. STAT. ANN. § 46:2B-8 (West 1989); N.M. STAT. ANN. §§ 45-5-501, 45-5-502 (Michie 1995); N.Y. GEN. OLIG. LW § 5-1505 (McKinney Supp. 1995); N.C. GEN. STAT. §§ 32A-8, 32A-9 (1995); N.D. CENT. CODE §§ 30.1-30-01, 30.1-30-02 (Supp. 1995); OHIO REV. CODE ANN. § 1337.09 (Anderson 1993); OKLA. STAT. ANN. tit. 58, §§ 1072, 1073 (West 1995); OR. REV. STAT. § 127.005 (Supp. 1994); 20 PA. CONS. STAT. ANN. § 5604 (Supp. 1995); R.I. GEN. LAWS § 34-22-6.1 (1995); S.C. CODE ANN. § 62-5-501 (Law. Co-op. Supp. 1995); S.D. CODIFIED LAWS ANN. § 59-7-2.1 (1993); TENN. CODE ANN. §§ 34-6-102, 34-6-103 (1991); TEX. PROB. CODE ANN. §§ 482, 484 (West Supp. 1996); UTAH CODE ANN. § 75-5-501 (1993); VT. STAT. ANN. tit. 14, § 3051 (1989); VA. CODE ANN. § 11-9.1 (Michie Supp. 1995); WASH. REV. CODE ANN. § 11.94.010 (West Supp. 1995); W. VA. CODE §§ 39-4-1, 39-4-2 (Supp. 1994); WIS. STAT. ANN. § 243.07 (West Supp. 1995); WYO. STAT. § 3-5-101 (Supp. 1995).
29. See Michael N. Schmitt & Steven A. Hatfield, *The Durable Power of Attorney: Applications and Limitations*, 132 M.L. L. REV. 203, 205 (1991) (noting all states have adopted either the U.D.P.A.A., the U.P.C. provisions governing durable powers of attorney, or some combination of them).

In most states, the principal must express the intention that the power be durable.³⁰ It is possible, however, that even an instrument that does not contain an express durability provision can be interpreted to create a durable power of attorney.³¹

Although the durable power of attorney is designed to survive the incompetency of the principal, the principal must, of course, be competent when he executes the durable power of attorney for the power to be valid.³² Further, if a person loses competency, he or she cannot revoke a durable power of attorney while incompetent.³³

With respect to execution formalities, durable powers of attorney are generally easier to execute than wills. Typically, the only execution requirements are that the power be in writing and signed by the

30. *E.g.*, *In re Kern*, 627 N.Y.S.2d 257, 259 (N.Y. Sup. Ct. 1995)(power of attorney instrument lacking language providing that authority of agent is to continue even if principal becomes disabled is not durable). *See also* U.P.C. Part 5 prefatory note, 8 U.L.A. 511 (1987)(stating instrument creating durable power of attorney must include language expressing principal's intent that power be durable).

31. *See, e.g.*, GA. CODE ANN. § 10-6-36 (Michie 1994). Under the Georgia statute, all powers are durable unless the instrument expressly provides otherwise. Louisiana and Pennsylvania have similar rules. LA. CIV. CODE ANN. ART. 3027(B) (West Supp. 1994); 20 PA. CONS. STAT. ANN. § 5601.1 (Supp. 1996)). *See also In re Head*, 615 P.2d 271 (N.M. Ct. App. 1980)(holding instrument that granted power to agent "without limitation" was durable).

32. *See* U.P.C. § 5-501 comment, 8 U.L.A. 513 (1987)(noting provisions governing durable power of attorney assume competence of principal at execution). *See also* Lombard, *supra* note 3, at 190; Paul L. Sturgul, *Financial Durable Powers of Attorney*, 41 No. 5 PRAC. LAW. 21, 28 (July 1995)(suggesting wisdom of having principal's physician execute affidavit of principal's competency on date of execution of power).

The requirement of competency at the time of execution will probably not invalidate many durable powers of attorney because a person is presumed competent to execute such an instrument. *See, e.g.*, *In re Head*, 615 P.2d 271, 274-75 (N.M. Ct. App. 1980)(discussing presumption of capacity). *Cf. In re Rick*, No. 6920, 1994 WL 148268 (Del. Ch. Ct. March 23, 1994)(finding presumption overcome).

Most jurisdictions that have considered the issue have held that competence to execute a durable power of attorney is similar to the competence required to execute a contract. *E.g.*, *In re Guardianship of Ray*, No. 657, 1991 WL 179418, at *4 (Ohio Ct. App. Sept. 16, 1991)(defining capacity to execute durable power of attorney as "the ability of the principal to understand the nature, scope and the extent of the business she is about to transact"). *Cf. In re Rick*, No. 6920, 1994 WL 148268, *5 (Del. Ch. Ct. March 23, 1994)(applying standard for testamentary capacity to durable power of attorney).

Additionally, a power of attorney can be challenged on the ground that it was the product of undue influence. In *Risbeck v. Bond*, for example, an Alzheimer's patient sought to void a power of attorney because he signed it under undue influence. *Risbeck v. Bond*, 885 S.W.2d 749 (Mo. Ct. App. 1994).

33. *E.g.*, *In re Guardianship of Wise*, No. 1-94-2, 1994 WL 521134 (Ohio Ct. App. Sept. 21, 1994)(noting same standard of competence applies to execution and revocation of durable power of attorney). *See Moses & Pope, supra* note 2, at 523; Schmitt & Hatfield, *supra* note 29, at 207.

principal.³⁴ A few states impose additional execution requirements, none of which are particularly oppressive.³⁵

Once a financial durable power of attorney is validly executed, it can be an extremely powerful document, authorizing an agent to perform virtually any act with respect to the principal's property that the principal could perform.³⁶ This breadth of power coupled with few required execution formalities creates a fear of overreaching by unscrupulous agents.³⁷

With respect to breadth of powers, there are a few restrictions on the acts that can be delegated to agents under durable powers of attorney.³⁸ The restrictions may come from statutes,³⁹ common law, public

34. See, e.g., *Bank IV, Olathe v. Capitol Fed. Sav. & Loan Assoc.*, 828 P.2d 355 (Kan. 1992)(noting form used for durable power of attorney was "cut from a magazine," validity of power not at issue).

35. See, e.g., ARIZ. REV. STAT. ANN. § 14-5503 (West Supp. 1995)(requiring notarization and attestation); CAL. PROB. CODE § 4121 (West Supp. 1996)(providing durable power of attorney must be either notarized or attested by two witnesses); CONN. GEN. STAT. ANN. § 45a-562 (West 1993)(requiring durable power of attorney be executed and witnessed in same manner as deed, i.e., the power must be: 1) in writing; 2) subscribed; 3) acknowledged to be the voluntary act of the principal, and 4) attested by two witnesses); S.C. CODE ANN. § 62-5-501 (Law. Co-op. Supp. 1995)(requiring durable powers of attorney to be signed by the principal, attested by two witnesses, and recorded like a deed); TEX. PROB. CODE ANN. § 36A(c)(4) (West Supp. 1996)(requiring durable power of attorney be notarized). See also *Moses & Pope, supra* note 2 at 518-20 (discussing South Carolina execution, attestation, and probate requirements). A court may be willing to give some effect to the principal's wishes, even if a power of attorney is not validly executed. *Byrne v. Schneider*, 808 S.W.2d 936, 940-41 (Mo. Ct. App. 1991)(honoring nomination of guardian in unacknowledged power of attorney even though statute governing power required acknowledgement).

36. Because the agent under a durable power of attorney can act with respect to any of the principal's property, his power is broader than that of a trustee. See *Lombard, supra* note 3, at 9. For a comparison of the roles of agent and trustee, see *infra* notes 151-53 and accompanying text.

37. See Sandra G. Krawitz, *The Florida Durable Power of Attorney Becomes a Document to Respect-1995 Changes*, FLA. BAR J., Dec. 1995, at 14 (noting ease of procuring and executing durable power of attorney under pre-1995 Florida law; suggesting combination of factors invited fraud).

38. RESTATEMENT (SECOND) OF AGENCY § 17 (1957); *Moses & Pope, supra* note 2, at 526 (discussing nondelegable acts); *Sturgul, supra* note 32, at 29-30 (noting the following powers are frequently non-delegable: making or revoking a will, funding a trust, changing beneficiaries on an insurance policy, taking a marriage vow or an oath, voting, performing under a personal service contract, and performing fiduciary responsibilities).

Special concerns may arise when the disabled principal was a professional. For example, the existence of a privilege like the attorney-client privilege may have implications on the delegation of powers to an agent. See Kent H. McMahan et al., *Disability Planning for Executives and Professionals*, 23 REAL PROP. PROB. & TR. J. 73, 105-07 (1988)(Report of Probate and Trust Division Committee E-4 on Special Problems of Executives and Professionals). Further, if the principal is a sole incorporated professional, it is unclear whether an agent can act on behalf of the principal with respect to the business of the corporation. See *id.* at 104.

policy limitations, or contract provisions that curtail the delegation of duties or assignment of rights.⁴⁰ Although few courts have considered the limits of delegability, the existing decisions suggest that the range of non-delegable acts is fairly narrow.⁴¹ Even if a restriction exists, its validity might be subject to challenge. Thus, the breadth of a durable power is virtually limitless.

Additionally, a court has fairly limited supervisory power over an agent under a durable power of attorney.⁴² Court approval for the agent's acts is generally not required.⁴³

Additionally, the right to appear in court pro se cannot be delegated to an agent under a power of attorney. See, e.g., *Christiansen v. Melinda*, 857 P.2d 345, 348 (Alaska 1993)(holding agent could not file small claims action pro se on principal's behalf); *Long v. Delarosa*, No. SPM-9412-4880, 1995 WL 50275 (Conn. Super. Ct. Jan. 30, 1995)(holding agent could not prosecute case pro se on principal's behalf). To allow such conduct would circumvent the statutes proscribing the unauthorized practice of law. See, e.g., *Christiansen v. Melinda*, 857 P.2d 345, 358 (Alaska 1993); *Risbeck v. Bond*, 885 S.W.2d 749 (Mo. Ct. App. 1994); *In re Estate of Friedman*, 482 N.Y.S.2d 686, 687 (Sur. Ct. Bronx City 1984).

39. E.g., CAL. PROB. CODE § 4265(a) (West Supp. 1995)(providing power of attorney may not authorize agent to make, amend, or revoke principal's will); FLA. STAT. ANN. § 709.08(7)(b) (West Supp. 1995)(listing non-delegable powers). See also CAL. CIV. CODE § 2356(d) (West Supp. 1996)(providing agent under durable power of attorney cannot vote stock of California corporation after principal is adjudged incompetent); CAL. CORP. CODE § 2219 (West Supp. 1996)(providing only guardian can vote stock of person adjudged incompetent); D.C. CODE ANN. § 45-601 (1981)(prohibiting execution of deeds by agent unless certain requirements are met); Harley J. Spitler, *Using the New Durable Power of Attorney as a Planning Tool*, CAL. LAW., May 1982, at 38 (noting anomalous situation that agent can sell, buy, and make gifts of stock while principal is incompetent, but cannot vote stock during that period).
40. E.g., *In re Marital Trust Under John W. Murphey and Helen G. Murphey Trust v. John and Helen Murphey Foundation*, 819 P.2d 1029 (Ariz. Ct. App. 1991)(holding settlor could not delegate power to amend trust to agent under durable power of attorney when trust indenture provided that power to amend was personal to settlor). See McMahan et al., *supra* note 38, at 99; COLLIN ET AL., *supra* note 2, § 2.01, at 2-1. One cannot marry by proxy in most states. See COLLIN ET AL., *supra*, § 2.01, at 2-1. Likewise, one cannot generally delegate one's duties under a personal services contract. RESTATEMENT (SECOND) OF AGENCY § 17 cmt. a, illus. 1 (1957); COLLIN ET AL., *supra*, § 2.01, at 2-1.
41. *In re Estate of Schriver*, 441 So. 2d 1105 (Fla. Dist. Ct. App. 1983)(holding surviving spouse's right to claim statutory share of deceased spouse's estate could be delegated to agent under durable power of attorney); *Brewington v. Brewington*, 313 S.E.2d 53 (S.C. Ct. App. 1984)(holding power to seek separation, maintenance, support, and equitable distribution could be delegated; appearing to recognize power to divorce could not be delegated). See COLLIN ET AL., *supra* note 2, § 2.01 at 2-2.
42. See U.P.C. Part 5, prefatory note, 8 U.L.A. 511 (1987)(noting original durable power of attorney provisions were designed "to assist persons interested in establishing non-court regimes for the management of their affairs in the event of later incompetency or disability")(emphasis added).
43. See, e.g., *In re Estate of Hegel*, 668 N.E.2d 474, 478 (Ohio 1996)(noting transactions by agent do not require court approval).

Estate planners view the durable power of attorney as an important planning tool, and its use is widely recommended.⁴⁴ It can be broad, and it is easy to execute. The cost of executing a durable power of attorney will probably be less than the cost of creating an inter vivos trust or instituting a guardianship.⁴⁵ A person may not even need to consult an attorney to obtain a durable power of attorney because a state statute may provide a form durable power of attorney.⁴⁶ Additionally, powers of attorney in printed form are widely available in stationery and office supply stores.⁴⁷ In sum, a durable power of attorney is an inexpensive, popular tool that creates a much more flexible arrangement than either a guardianship or a trust. With flexibility, however, comes the possibility for abuse.⁴⁸

III. THE PROBLEM

The most serious problem with the financial durable power of attorney is that neither courts nor legislatures appear to have given much thought to the appropriate role of an agent empowered by such a document. Thus, when questions arise about the propriety of agents' actions or inactions, courts, agents, and other interested persons have little guidance available. Some have assumed that the agent under a durable power of attorney should be governed by traditional agency

-
44. See COLLIN ET AL., *supra* note 2, § 1.02, at 1-4 ("[T]he Durable Power of Attorney is an essential component of every estate plan."); English & Wolff, *supra* note 5, at 33 (noting 49% of lawyers who responded to survey about durable powers of attorney prepared durable powers of attorney for over 90% of their personal clients); Lombard et al., *supra* note 4, at 4 (reporting results of survey concerning durable powers of attorney; noting that most attorneys responding to survey recommended durable powers of attorney to their clients); Lombard, *supra* note 3, at 191 ("[N]o estate planning job in the future should be regarded as complete without a suggestion that a Durable Power of Attorney be signed in addition to the Will."); Sturgul, *supra* note 32, at 21-22 (suggesting that durable power of attorney is "the right advice" for clients who seek to aid elderly relatives in handling financial matters).
45. Sturgul, *supra* note 32, at 22 (suggesting durable powers of attorney developed for people with limited means); EDWARD H. BORDIN ET AL., CALIFORNIA DURABLE POWER OF ATTORNEY HANDBOOK § 1.13, at 17 (1995).
46. E.g., ALASKA CODE § 13.26.332 (Supp. 1995); CONN. GEN. STAT. ANN. § 1-43 (West 1988); N.Y. GEN. OBLIG. LAW § 5-1501 to -1503 (McKinney Supp. 1996); TEX. PROB. CODE ANN. § 490 (West Supp. 1996). See also Jeffrey A. Baskies, *Florida Needs Legislative Change Regarding Durable Powers of Attorney*, FLA. BAR J., at 59 (April 1995) (suggesting Florida law be changed to include standard form durable power of attorney).
47. See English & Wolff, *supra* note 5, at 33. See also CAL. PROB. CODE § 4102 (West Supp. 1996) (regulating sale of form durable powers of attorney).
48. Sturgul, *supra* note 32, at 23 ("[B]ecause durable financial powers are designed to avoid the problems inherent in judicial supervision, problems can arise from that very lack of oversight."). See also English & Wolff, *supra* note 5, at 33 (noting that 40% of attorneys responding to survey about durable powers of attorney reported knowing of at least one misuse of a durable power of attorney).

rules⁴⁹ or by rules analogous to those governing guardians⁵⁰ or trustees,⁵¹ while others have simply assumed the application of general fiduciary principles. The danger of abuse may be heightened in a jurisdiction that has a statute setting forth a form power of attorney or that allows the sale of form durable powers of attorney because principals who execute form powers may fail to appreciate the breadth of the power they are granting.⁵²

The basic problem of lack of a well-defined role for the agent is only exacerbated by the fact that the statutes authorizing durable powers of attorney are not uniform.⁵³ Often, powers executed under the laws of another state are recognized even though they fail to comply with the interpreting state's execution requirements.⁵⁴ Because durable powers of attorney are governed by state law, conflict of laws issues often arise. As a general rule,

[t]he rights and duties of a principal and agent toward each other are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties and the transaction.⁵⁵

With respect to validity of the instrument, the governing law is that of the state where the power was executed.⁵⁶ On the other hand, the agent's acts are judged by the law of the state in which the agent acts.⁵⁷ The principal may be able to specify that a particular state's law will govern.⁵⁸

Against this background, in the context of protective proceedings, several courts have refused to appoint a guardian for a person when it appeared that the person's property was being adequately managed

49. *E.g.*, *In re Estate of Lienemann*, 222 Neb. 169, 178, 382 N.W.2d 595, 602 (1986)(non-durable power of attorney).

50. *See, e.g.*, *In re Estate of Schriver*, 441 So. 2d 1105, 1107 (Fla. Dist. Ct. App. 1983)(stating "[w]hile not a 'guardian' in the legal sense, the attorney in fact has fiduciary duties similar in nature").

51. *E.g.*, COLO. REV. STAT. ANN. § 15-14-606 (West Supp. 1995); FLA. STAT. ANN. § 709.08 (West Supp. 1995)(providing agent held to same fiduciary standard as trustee); *Kline v. Orebaugh*, 519 P.2d 691, 695 (Kan. 1974)(noting remedy for wrongdoing by agent is same as remedy for wrongdoing by trustee).

52. *See* COLLIN ET AL., *supra* note 2, § 2.05, at 2-15. *See also* English & Wolff, *supra* note 5, at 34 (noting attorneys responding to survey about durable powers of attorney were concerned about inadequate warnings about granting broad powers in stationery store forms).

53. *See* COLLIN ET AL., *supra* note 2 § 2.04, at 2-11.

54. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-5503(C) (West Supp. 1995) (recognizing powers executed in other jurisdictions if validly executed in other jurisdiction); CAL. PROB. CODE § 4053 (West Supp. 1996)(recognizing powers of attorney executed in other jurisdictions); S.C. CODE ANN. § 62-5-501(E) (Law. Co-op. Supp. 1995)(recognizing foreign powers even though they don't comply with South Carolina attestation requirement).

55. RESTATEMENT (SECOND) OF CONFLICTS § 291 (1971).

56. *See* COLLIN ET AL., *supra* note 2, § 2.06, at 2-16.

57. *See id.* at 2-17; RESTATEMENT (SECOND) OF CONFLICTS § 292 (1971).

58. *See* COLLIN ET AL., *supra* note 2, § 2.06, at 2-17.

under a durable power of attorney.⁵⁹ The courts' position makes the necessity of a better defined role for agents obvious. A court should have some assurance that the agent will continue to manage the principal's affairs in an adequate manner. Today, in most jurisdictions, the agent could merely cease acting, leaving the incompetent principal unprotected. If the agent terminates the agency, his duty to the principal would end.⁶⁰ In such a case, the only way to protect the incompetent would be to commence a second protective proceeding, thus doubling the expense that the durable power of attorney was designed to avoid entirely.

Furthermore, some have suggested form durable powers of attorney. These forms make little effort to ensure that the agent will act responsibly.⁶¹ Often, forms suggest the use of broad exculpatory clauses, which further exacerbates the potential problem caused by the lack of definition of the agent's role. Not only is the law unclear

-
59. Conover, *Incompetent*, 2 Fid. Rep. 2d 200 (Pa. Ct. Com. Pl. 1984). The court found Mrs. Conover incompetent, but also found that her agent was efficiently managing her affairs, making appointment of a guardian unnecessary. *Id.* at 201-02. In so holding, the court noted that Mrs. Conover appeared to have executed the durable power of attorney precisely so that her affairs could be managed if she became incompetent. *Id.* at 201. The court saw the appointment of a guardian as a frustration of this intention. *Id.* at 202. See also *In re Guardianship of Pearson*, No. CA91-466, 1992 WL 121766 (Ark. App. May 27, 1992)(affirming probate judge's refusal to appoint guardian when agent acting under durable power of attorney was adequately caring for principal's person and estate); *In re Estate of Ewing v. Bryan*, 883 S.W.2d 545 (Mo. Ct. App. 1994)(terminating guardianship for person who had executed durable power of attorney); OHIO REV. CODE ANN. § 2111.02(C)(5),(6) (Anderson 1994)(providing court can consider evidence of less restrictive alternative to guardianship in guardianship proceeding and court can deny guardianship based on finding less restrictive alternative exists). Cf. *Rice v. Floyd*, 768 S.W.2d 57, 58 (Ky. 1989)(noting purpose of durable power of attorney statute is to "validate the acts of the attorney-in-fact during a period of actual disability prior to a finding of legal disability"); *In re Guardianship of Friend*, No. 64018, 1993 WL 526643 (Ohio Ct. App. Dec 16, 1993)(affirming lower court's refusal to appoint agent under durable power of attorney as guardian of incompetent's estate).
60. See RESTATEMENT (SECOND) OF AGENCY § 118 (1958)(suggesting agent can unilaterally terminate agency).
61. See *Moses & Pope*, *supra* note 2, at 545-46. In their suggested form, they give the agent the power to resign upon delivering a written resignation to the principal and recording the resignation. The form does not offer any guidance as to how an agent is to resign if the principal is incompetent. They do suggest that if resignation would be detrimental to the principal, the agent may not be permitted to resign after the principal has become incompetent. *Id.* at 524. Furthermore, the suggested form includes an exculpatory clause that absolves the agent from liability as a result of "any failure to act of [the agent] pursuant to this power of attorney." The clause releases the agent from liability for claims by the principal or those taking the principal's property. For a further discussion of exculpatory clauses, see *infra* notes 179-80 and accompanying text.

about what action or inaction will trigger liability, practitioners are using forms that excuse all but the most egregious misconduct.

As far back as the discussions leading to the promulgation of the 1964 Act, there has been disagreement about the standard by which an agent's action or inaction should be judged.⁶² Rather than clarify this uncertainty, the U.P.C. provisions on durable powers of attorney simply make no mention of the standard of care.

What, then, is the solution? Legislatures and courts must create a role for agents under durable powers of attorney that makes clear the agent's responsibilities. No state has gone far enough to protect the principal who executes a durable power of attorney to ensure adequate asset management in case of disability.

IV. THE ANALOGY TO TRADITIONAL AGENCY LAW

A durable power of attorney creates an agency relationship between the principal and the agent. Accordingly, courts have often looked to agency law when considering issues involving durable powers of attorney.

A. The Role of the Agent

In most states, the relationship of principal and agent is governed by common law.⁶³ Some states have codified some or all rules relating to agencies.⁶⁴

The basic duties of an agent are clear and are adopted with little variation throughout the United States.⁶⁵ An agent must act solely in the best interest of the principal when he acts.⁶⁶ Thus, he is a fiduciary, owing the principal a fiduciary duty. Further, an agent may not profit from the agency to the detriment of the principal or have an interest that conflicts with the principal's interests.⁶⁷

B. Use of Traditional Agency Law with Respect to Acts Under Durable Powers of Attorney

Under traditional agency law, the power of an agent ended when the principal became incapacitated.⁶⁸ Thus, most agency law is based

62. MODEL SPECIAL POWER OF ATTORNEY FOR SMALL PROPERTY INTERESTS ACT § 7 cmt. (1964). For a discussion of the disagreement, see *supra* notes ???-21 and accompanying text.

63. See Lombard, *supra* note 3, at 196.

64. *E.g.*, CAL. CIV. CODE §§ 2295-2369 (West Supp. 1996)(codifying California agency law).

65. See RESTATEMENT (SECOND) OF AGENCY §§ 377-86 (1958).

66. *E.g.*, Litvinko v. Downing, 545 S.W.2d 616, 617 (Ark. 1977).

67. *E.g.*, *In re Estate of Lienemann*, 222 Neb. 169, 178, 382 N.W.2d 595, 602 (1986).

68. RESTATEMENT (SECOND) OF AGENCY § 122 (1958).

on the presence of a competent principal who can control and monitor the agent.⁶⁹ Because most agency law was created before acceptance of the concept of durability of powers of attorney, the law did not contemplate a relationship in which the principal is incompetent.⁷⁰

A few states have recognized that the standard by which an agent's actions should be judged should change when the principal becomes incompetent.⁷¹ One state requires that an agent be held to the same standard of care as a conservator or trustee when the principal is incompetent.⁷² Most states, however, continue to apply agency principles that were fashioned before the durable power of attorney existed.

Beyond this, there has not been much discussion of applying traditional agency law principles. One commentator has, however, suggested that courts should apply the same transactional analysis when considering the acts of agents of incompetent principals under durable powers of attorney that they apply to similar acts under traditional powers.⁷³ Transactional analysis in the durable power of attorney

69. See, e.g., Warren A. Seavey, *The Rationale of Agency*, 29 Yale L.J. 859, 863 (1920). Professor Seavey stated:

That the [agency] relationship is consensual there can be no doubt. The law creates the power upon the voluntary act of the principal and he is the *dominus* during its existence. The agent's duty of obedience flows directly from the control which the cases recognize to be at all times in the principal.

This control over the existence of the power implies the exercise of the will at the inception of the relationship, and, as the principal may create the power, so he may diminish, enlarge, or terminate it at will, subject, of course, to rules for the protection of third persons. On the other side, the duties of a fiduciary cannot be thrust upon an unwilling person, so that the relation[ship] cannot be created, nor can it continue to exist without the consent of both parties. *Id.* See also Meiklejohn, *supra* note 9, at 115-16 (noting agency is consensual relationship); Valerie Finn-Deluca, Article, *The Federal Tax Problems Posed by Durable Powers of Attorney Which Are Ambiguous as to the Agent's Authority to Make Gifts*, 22 N. Ky. L. Rev. 891, 895 (1995) (stating "common law of agency is premised on the assumption that the principal has sufficient capacity to direct the acts of the agent") (citing RESTATEMENT (SECOND) OF AGENCY § 7 cmt. a).

70. In Georgia, for example, there is no discreet statute dealing with durable powers of attorney. Rather, the provisions of the Georgia Code dealing with agency apply to both durable and non-durable powers. GA. CODE ANN. §§ 10-6-1 to -10-6-142 (Michie 1994 & Supp. 1996). In Georgia, powers of attorney are durable unless the principal provides otherwise, and the statute authorizing durability was simply added into the pre-existing statute governing powers of attorney. *Id.* § 10-6-36. See Finn-Deluca, *supra* note 69, at 895 (noting this problem) (citing RESTATEMENT (SECOND) OF AGENCY § 34.5; Charles M. Hamann, *Durable Powers of Attorney*, Tr. & Est. 28, 29 (Feb. 1983)). See also Sturgul, *supra* note 32, at 24 (briefly noting that original "strict fiduciary duty" imposed on agents in many jurisdictions was later relaxed).

71. E.g., MO. ANN. STAT. § 404.731.1 (Vernon 1990) (giving probate court jurisdiction to consider acts of agent after principal becomes incapacitated).

72. COLO. REV. STAT. ANN. § 15-14-606 (West Supp. 1995).

73. Meiklejohn, *supra* note 9, at 146.

context improperly shifts the burden to third parties who enter into transactions that a court later declares unfair. Rather, a higher level of responsibility for the agent would appropriately place the burden on the agent to avoid transactions that are unfair to the principal or risk liability. Furthermore, the possibility of avoidance would make third parties even more nervous about transacting business with agents than they already are. Such a rule would effectively eviscerate the adequate management of assets that durability was meant to ensure.

V. THE ANALOGY TO GUARDIANSHIP LAW

Most courts and commentators consider guardianship an alternative to asset management under a durable power of attorney. Courts often note that durable powers of attorney are an inexpensive alternative to guardianships.⁷⁴ Commentators prefer assets management under durable powers of attorney because they view guardianships as expensive, time-consuming, and humiliating to the ward.⁷⁵ Because both a guardianship and a durable power of attorney are designed to ensure appropriate management of a disabled person's assets, it is useful to consider the workings of guardianship law when attempting to fashion an appropriate role for the agent under a durable power of attorney.

A. The Role of the Guardian

In each state, there is a procedure for a court to appoint a fiduciary for a person who becomes incompetent.⁷⁶ The mental level of the ward that will trigger appointment of a fiduciary for the ward's estate varies from state to state, but it is always grounded on the idea that a fiduciary should be appointed when the ward can no longer adequately manage his own affairs.⁷⁷ The fiduciary may be called a guardian,

74. See, e.g., *In re Estate of Schriver*, 441 So. 2d 1105, 1106 (Dist. Ct. App. Fl. 1983)(stating durable powers of attorney have "the beneficial effect of avoiding the time, expense and embarrassment involved in having to establish guardianships for incompetent persons"); *Bank IV, Olathe v. Capitol Fed. Sav. & Loan Assoc.*, 828 P.2d 355, 358 (Kan. 1992)(quoting lower court's statement that durable power of attorney is an inexpensive way to allow management of an impaired person's property and avoid a conservatorship, which costs approximately \$10,000 plus annual accounting fees).

75. See COLLIN ET AL., *supra* note 2, § 1.01, at 1-4. See also Lombard, *supra* note 3, at 190-91 (describing incompetency proceeding); Moses & Pope *supra* note 2, at 515 (describing South Carolina procedure for appointment of a committee and noting procedure is potentially "expensive, time-consuming, and unpleasant").

76. See, e.g., N.J. STAT. ANN. § 3B:12-25 (West 1983).

77. See, e.g., MO. ANN. STAT. § 475.010(4)(a) (Vernon Supp. 1996)(defining "disabled" as "[u]nable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that the person lacks ability to manage his financial resources;" providing conservator can be appointed for disabled individual); 20 PA. CONS. STAT. ANN. § 5501 (Supp. 1996)(de-

conservator, committee, or curator.⁷⁸ In some states a "guardian" protects personal interests and a "conservator" protects financial interests.⁷⁹ Regardless of what the fiduciary is called, when a court appoints a fiduciary charged with handling a ward's property, the fiduciary's duty is to ensure that the ward's needs are met and that the ward is not subjected to the overreaching of unscrupulous individuals.

Often, the statute governing guardianships sets forth a hierarchy describing who should be appointed.⁸⁰ Frequently, a nominee under a durable power of attorney is mentioned in the hierarchy.⁸¹ A guardianship creates a fiduciary relationship between guardian and ward, with the guardian owing a fiduciary duty to the ward.⁸² A guardian has powers and duties to deal with the ward's property, but does not hold title to the property as a trustee would.⁸³ The guardian's powers and duties are governed by statute.⁸⁴

With respect to investments by guardians, many jurisdictions impose more stringent rules on guardians than on trustees. For example, some states provide that a guardian may not make an investment without court approval.⁸⁵ Similarly, a state may impose restrictions on a guardian's ability to perform certain acts.⁸⁶

fining "incapacitated person" as one "whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety").

78. See RESTATEMENT (SECOND) OF TRUSTS § 7 cmt. c (1959).

79. See, e.g., MO. ANN. STAT. §§ 475.030.1, 475.010(4)(a), 475.010(9) (Vernon 1992 & Supp. 1996)(providing for appointment of guardian for person and conservator for estate of incapacitated person; defining "disabled;" defining "incapacity," respectively).

80. See, e.g., MO. ANN. STAT. § 475.050.1 (Vernon Supp. 1996); N.J. STAT. ANN. § 3B:12-25 (West 1983).

81. See, e.g., MO. ANN. STAT. § 475.050.1(2) (Vernon Supp. 1996); S.D. CODIFIED LAWS ANN. § 59-7-2.4 (1993)(providing principal can nominate guardian or conservator in power of attorney).

82. See RESTATEMENT (SECOND) OF TRUSTS § 7 cmt. a (1959).

83. *Id.* But see N.J. STAT. ANN. § 3B-12-38 (West 1983)(providing that title to ward's property vests in guardian upon guardian's appointment).

84. See, e.g., OHIO REV. CODE ANN. § 2111.14 (Anderson 1994); 20 PA. CONS. STAT. ANN. § 5521 (Supp. 1996). See also RESTATEMENT (SECOND) OF TRUSTS § 7 cmt. b (1957).

85. See RESTATEMENT (SECOND) OF TRUSTS § 7 cmt. b (1959); S.D. CODIFIED LAWS ANN. § 30-29-40 (1984)(providing court can direct investments).

86. See COLLIN ET AL., *supra* note 2, § 2.03, at 2-9. In Pennsylvania, for example, a guardian may not lease property for a term longer than five years. 20 PA. CONS. STAT. ANN. § 5522 (Supp. 1996). See also OHIO REV. CODE ANN. § 2111.25 (Anderson 1994)(providing guardian may not lease ward's property for a period longer than three years without court approval).

Guardians are supervised by the appropriate court, and may need court approval to act.⁸⁷ Each time a guardian must go to court to seek approval for an act, he must provide appropriate evidence in support of his request. Thus, court supervision can be both time-consuming and expensive.⁸⁸

Some states have enacted provisions that allow a court to appoint a fiduciary for a person's estate with limited powers over the estate.⁸⁹ In California, for example, a conservatorship of the estate can be full or limited.⁹⁰ Conservatorship can be ordered to empower the fiduciary to manage both personal and financial affairs.⁹¹ Unlike full conservatorship, limited conservatorship can be ordered for a person who is not totally incompetent. The standard for imposing conservatorship in California is less strict than in many states. The conservatee need only be "substantially unable to manage his own financial resources, or resist fraud or undue influence."⁹² Thus, California has attempted to enact a comprehensive statute designed to protect a person needing protection in the least intrusive manner possible. To help effect this objective, California law provides for a "Court Investigator," who as-

87. *E.g.*, CAL. PROB. CODE § 2102 (West 1991)(conservator subject to control of court while performing duties); OHIO REV. CODE ANN. § 2111.50 (Anderson 1994)(providing probate court is "superior guardian" of wards subject to its jurisdiction); *In re Joyce*, 32 Ohio Law Abs. 553, 557 (Ohio 1940). The *Joyce* court described the majority view of the supervision of guardians:

When a guardian of the person has been appointed, the Probate Court is the agent of the State in protecting the person of that individual. It takes the place of the individual. The Probate Court, of course, cannot personally and individually look after all the affairs both of the person and of the estate of a person who may be incompetent, but its authority is exercised through an individual known as a guardian, and who is under the control of the court; and the court is under the directions and inhibitions of the statute, all made for the protection of the person and the estate of the person for whom a guardian has been appointed.

Id. See OHIO REV. CODE ANN. § 2111.21 (Anderson 1994)(providing guardian may sell, compromise, or adjust dower rights only with court approval). See also Lombard, *supra* note 3, at 192.

88. Moses & Pope, *supra* note 2, at 515 (discussing various difficulties of guardianships).
89. See, *e.g.*, MO. ANN. STAT. § 475.010(3)(Vernon 1992)(providing conservator of estate can have full or limited powers).
90. CAL. PROB. CODE §§ 1400-1491, 1800-1910, 2100-2808 (West 1991). See generally Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273 (1988)(describing California law and studying guardianships in San Mateo County, California).
91. Friedman & Savage, *supra* note 90, at 273.
92. CAL. PROB. CODE § 1801(b) (West 1991). A similar standard is used to determine whether a conservator of the person should be appointed. A conservator of the person can be appointed if the conservatee is "unable properly to provide for his or her personal needs for physical health, food, clothing or shelter." CAL. PROB. CODE § 1801(a) (West 1991).

sists the court in deciding whether to appoint a conservator and who sometimes protects the potential conservatee.⁹³

After appointment of a guardian or conservator with full or limited powers, a person is no longer fully legally competent.⁹⁴ He cannot "enter into or make any transaction that binds or obligates the conservatorship estate."⁹⁵ He might, however, retain some powers to act that a person who is fully incompetent would lack.⁹⁶

In most states, a guardian or conservator has broad powers.⁹⁷ In some states, the law of guardianship or conservatorship is quite flexible.⁹⁸ With respect to court supervision, guardianship law provides a number of safeguards. In California, for example, a conservator must file an account with the court after the first year of the conservatorship and biennially thereafter.⁹⁹ In addition, the Court Investigator reviews the conservatorship after one year and then every other year.¹⁰⁰

Often, the applicable statute allows a potential conservatee to appoint his or her conservator.¹⁰¹ The court will appoint the nominee unless the appointment does not comport with the "best interests" of the ward.¹⁰² Likewise, the wishes of a nervous third party may trigger a guardianship or conservatorship proceeding.¹⁰³ Thus, a person

93. CAL. PROB. CODE §§ 1419, 1454, 1823(b)(4), 1826 (West 1991)(describing role of Court Investigator). See also Friedman & Savage, *supra* note 90, at 276 (describing role of Court Investigator in general and actions of San Mateo County Court Investigator in particular).

94. *E.g.*, CAL. PROB. CODE § 1872 (West 1991); CAL. CIV. CODE § 40 (West Supp. 1996)(providing that after determination of incapacity, person cannot make any contract, delegate any power, or waive any right).

95. CAL. PROB. CODE § 1872 (West 1991); OHIO REV. CODE ANN. § 2111.02(B)(1) (Anderson 1994)(allowing court to appoint full or limited guardian); WYO. STAT. § 3-1-202 (Supp. 1996)(limiting power of ward with respect to property).

96. See Friedman & Savage, *supra* note 90, at 276-77. For example, a conservatee can execute a will or marry if he has actual capacity to perform these acts. CAL. PROB. CODE §§ 1871(c), 1900, 1901 (West 1991). See Friedman & Savage, *supra* note 90, at 277. The court can supervise the conservatee by determining whether he has the capacity to perform various acts. *Id.* See also WYO. STAT. § 3-1-202 (Supp. 1996)(providing ward can make will if ward has testamentary capacity).

97. CAL. PROB. CODE §§ 2450-2467 (West 1991). See also Friedman & Savage, *supra* note 90, at 277. In addition to the powers granted by statute, the court can grant additional powers if the circumstances warrant. CAL. PROB. CODE §§ 2590-2591 (West 1991) One study suggests that requests for additional powers are usually granted. Friedman & Savage, *supra* note 90, at 283.

98. See Friedman & Savage, *supra* note 90, at 285 (discussing California law; suggesting that although some flexibility exists, it is typically only exercised to expand conservators' powers).

99. CAL. PROB. CODE § 1850(a) (West 1991).

100. CAL. PROB. CODE § 1850 (West 1991).

101. *E.g.*, CAL. PROB. CODE § 1810 (West 1991).

102. *Id.*

103. See Friedman & Savage, *supra* note 90, at 280.

who has doubts about the capacity of a person with whom he wishes to transact business may desire a competency proceeding.¹⁰⁴ Moreover, guardianship or conservatorship is appropriate only when there is mental impairment.¹⁰⁵ The sole purpose of court appointment of a fiduciary of the estate is to protect one who cannot protect himself. Some have argued that a danger of overuse of conservatorship exists.¹⁰⁶

In sum, guardianship and conservatorship are highly intrusive ways to protect a vulnerable person. Even a guardianship or conservatorship is no guarantee, however, that the conservatee's assets will be appropriately managed.¹⁰⁷

B. A Comparison of the Role of Guardian/Conservator with the Role of Agent

Some view the durable power of attorney as inferior to guardianship because it lacks attributes that protect the principal.¹⁰⁸ For example, there is much less court supervision of an agent under a durable power of attorney than of a guardian.¹⁰⁹

104. *Id.* Professor Friedman and Mr. Savage give the example of a person who wanted to purchase a business interest from a stroke victim. *Id.* They also suggest that title companies might find appointment of a conservator comforting if they have doubts about a seller's capacity. *Id.* See also *id.* at 286 (discussing convalescent hospitals).

105. See Friedman & Savage, *supra* note 90, at 283.

106. See Friedman & Savage, *supra* note 90, at 285. These commentators suggest that conservatorship may be sought to protect an inheritance, rather than to protect the conservatee. *Id.* They note that "in this society a person generally has the right to spend, waste, and neglect; there is a thin line between protecting the helpless and imposing unfair restrictions." *Id.*

107. See Friedman & Savage, *supra* note 90, at 285, 290. Based on a Court Investigator's observations, Friedman and Savage suggest that abuses of the conservatorship occur despite safeguards like required inventories and investigations. *Id.* at 285. They suggest that the fact that many conservators are not experienced fiduciaries may cause difficulties. *Id.* Also, they note that potential heirs who act as conservators may feel that the conservatee's assets are already theirs. *Id.* See also English & Wolff, *supra* note 5, at 34 (noting 39% of respondents to survey about durable powers of attorney said they knew of at least one instance of abuse by a guardian or conservator).

108. See, e.g., Rice v. Floyd, 768 S.W.2d 57, 59-60 (Ky. 1989) (comparing roles of guardian and agent under durable power of attorney). See also Friedman & Savage, *supra* note 90, at 287. These commentators recount the opinion of the San Mateo County California Court Investigator that a durable power of attorney "has no protective measures whatsoever," and that the agent need not keep records or keep relatives informed. *Id.*

109. Rice v. Floyd, 768 S.W.2d 57, 59 (Ky. 1989) (opining that guardian is answerable to court while agent is answerable only to principal). See MO. ANN. STAT. §§ 404.731.3, 404.727.1 (Vernon 1990) (providing some court supervision of agent).

However, the durable power of attorney allows the principal to decide who will manage his affairs.¹¹⁰ The principal may or may not be permitted to make that decision under his state's guardianship law.¹¹¹ Some states provide that when a principal nominates a guardian, the court must appoint the nominee guardian unless the nominee is unfit.¹¹² Even if a statute permits a person to nominate a guardian, the court need not honor the nomination in an incompetency proceeding.¹¹³

A guardian of the estate's primary task is to "manage and conserve" the estate of the incompetent.¹¹⁴ Thus, the guardian of the estate must take control of and appropriately manage the ward's assets.¹¹⁵ An agent under a durable power of attorney can, on the other hand, perform any act for the principal that the governing instrument permits.¹¹⁶ Thus, the scope of permissible acts under a durable power of attorney is arguably broader than that under a

110. See, e.g., *Rice v. Floyd*, 768 S.W.2d 57, 61-62 (Ky. 1989)(Leibson, J., dissenting)(noting durable power of attorney allows self-determination of who will control affairs).

111. See U.P.C. § 5-503(b), 8 U.L.A. 514-15 (1987). Section 5-503(b) states:

A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

Id. See, e.g., ALA. CODE § 26-1-2(c)(2) (1992)(enacting provision substantially similar to U.P.C. § 5-503(b)); OHIO REV. CODE ANN. § 1337.09(D) (Anderson 1993)(same). See also Sturgul, *supra* note 32, at 22.

112. E.g., ARK. CODE ANN. § 28-68-203(b) (Michie 1987); CAL. PROB. CODE § 4126 (West Supp. 1996); 20 PA. CONS. STAT. ANN. § 5604(c)(2)(Supp. 1996). See also DEL. CODE ANN. tit. 12, § 4903(a) (1987)(providing that agent under durable power of attorney who requests that he be appointed guardian shall be so appointed absent cause to the contrary).

113. MO. ANN. STAT. § 475.050 (Vernon Supp. 1996)(giving preference for appointment as guardian to person nominated in durable power of attorney or by several other means); *In re Mitchell*, 914 S.W.2d 844 (Mo. Ct. App. 1996)(upholding lower court's decision to appoint public administrator rather than nominee in durable power of attorney as guardian and conservator of incapacitated person); *In re Guardianship of Wise*, No. 1-94-2, 1994 WL 521134 (Ohio Ct. App. Sept. 21, 1994)(upholding probate court's decision not to appoint person nominated in durable power of attorney as guardian of the person because nominee lived in Florida and incompetent lived in Ohio).

114. See, e.g., *In re Estate of Hegel*, No. CA94-12-103, 1995 WL 37841, at *5 (Ohio Ct. App. June 26, 1995)(Walsh, P.J., concurring in part and dissenting in part), *rev'd*, 668 N.E. 2d 474 (Ohio 1996).

115. See, e.g., CAL. PROB. CODE § 2401 (West 1991); CAL. PROB. CODE § 2401 Law Revision Comm'n Cmt. (West 1991).

116. See, e.g., *In re Estate of Hegel*, 668 N.E.2d 474, 476 (Ohio 1996)(noting agent can act as "alter ego" of principal).

guardianship.¹¹⁷ Additionally, an agent can decide whether to act on a situation-by-situation basis and need not act with respect to a particular piece of property if he chooses not to act.

C. Interaction of Guardians and Agents

Once a person has executed a durable power of attorney, an interesting issue arises if someone thereafter begins a proceeding for guardianship of the principal.¹¹⁸ What effect will the proceeding have on the power of the agent? There are several possible resolutions to this issue.

First, the guardianship proceeding could automatically terminate the power of the agent.¹¹⁹ Such an approach makes little sense if the agency is functioning well.¹²⁰ Further, such an approach undercuts a major motivation for allowing durability: to encourage durable powers of attorney over guardianships.

Second, if there is both a durable power of attorney and a court-appointed fiduciary, the agent could continue to act. Most states have adopted the position that court appointment of a fiduciary like a guardian does not automatically terminate the authority of an agent under a durable power of attorney.¹²¹ This is the position taken in section 5-503 of the U.P.C., which provides:

If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary

117. *But see* Rice v. Floyd, 768 S.W.2d 57, 59 (Ky. 1989)(opining that "scope of authority, duties and accountability" of guardian are "much broader" than those of an agent).

118. COLLIN ET AL., *supra* note 2, § 2.05, at 2-13 to -14.

119. CONN. GEN. STAT. ANN. § 45a-562(b) (West 1993)(providing durable power of attorney ceases at time conservator is appointed for principal's estate); GA. CODE ANN. § 10-6-36 (Michie 1994)(providing power to act continues until appointment of guardian or receiver for principal); KY. REV. STAT. ANN. § 386.093 (Baldwin 1995)(providing authority of agent terminates at court appointment of fiduciary for principal); TEX. PROB. CODE ANN. § 485 (West Supp. 1996)(providing appointment of guardian of the estate terminates powers of agent under durable power of attorney); Rice v. Floyd, 768 S.W.2d 57, 60 (Ky. 1989)(noting Kentucky does not follow U.P.C. with respect to dual management of incompetent's estate).

120. For a discussion of cases in which courts have refused to appoint a guardian when there was a functioning agent under a durable power of attorney, see *supra* note 59.

121. See, e.g., ALA. CODE § 26-1-2(c)(1) (1992)(providing court-appointed fiduciary may revoke power of attorney and agent is accountable to both principal and court-appointed fiduciary); ALASKA STAT. § 13.26.350 (Supp. 1995)(same); ARK. CODE ANN. § 28-68-203 (Michie 1987)(same); 20 PA. CONS. STAT. ANN. § 5604(c)(1) (Supp. 1996); S.D. CODIFIED LAWS § 29A-5-118 (Supp. 1996)(providing that guardian may not revoke or amend power of attorney without court approval). Cf. FLA. STAT. ANN. § 709.08(3) (West Supp. 1996)(suspending authority of agent when proceeding to determine capacity of principal is commenced unless court allows agent to act; terminating power when principal is adjudicated incapacitated unless court directs otherwise).

charged with the management of all of the principal's property or all of his property except with specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.¹²²

The second resolution is desirable to ensure full efficacy of the durable power of attorney. Family members, or others with standing, may petition for a guardianship for the principal if they are unhappy with the agent's management of the principal's affairs.¹²³ If the filing of a petition automatically terminated the agency, and if a principal were not able to nominate his or her guardian, the principal's intention to have a particular person make decisions on the principal's behalf could easily be frustrated.¹²⁴ On the other hand, a law that provides for the principal to nominate a guardian and permits an agent and guardian to co-exist allows the court to fashion the regime that best suits the needs of the principal. If the court determines that the principal is incompetent, it could: 1) allow the agent to continue to manage the principal's affairs without appointing a guardian;¹²⁵ 2) appoint a guardian with limited powers and allow the agent to continue exercising other powers;¹²⁶ 3) appoint a guardian with general powers and allow the agency to continue, or 4) appoint a guardian with general powers and terminate the agency.

VI. THE ANALOGY TO TRUST LAW

A trust can be an effective way of dealing with potential disability. In creating the trust, the settlor has almost unlimited freedom in

122. U.P.C. § 5-503, 8 U.L.A. 514-15 (1987). Section 5-503 was added to the U.P.C. in 1979 to "adjust the durable power concept so that it may be used either as an alternative to a protective procedure, or as a designed supplement enabling nomination of the principal's choice for guardian to an appointing court and continuing to authorize efficient estate management under the direction of a court appointee." U.P.C. Part 5 prefatory note, 8 U.L.A. 512 (1987).
123. CAL. PROB. CODE § 4206 (West Supp. 1996). See, e.g., *In re Guardianship of Pearson*, No. CA91-466, 1992 WL 121766 (Ark. App. May 27, 1992)(relatives of deceased husband of principal who were likely to inherit from principal filed guardianship petition and petition for accounting alleging agent under power of attorney was appropriating principal's property). See also Sturgul, *supra* note 32, at 35.
124. See U.P.C. § 5-503 cmt., 8 U.L.A. 515 (1987)(noting best reason to allow person to nominate guardian in durable power of attorney is to ensure that agent will be able to carry out principal's wishes).
125. See, e.g., *Conover*, Incompetent, 2 Fid. Rep. 2d 200 (Pa. Ct. Com. Pl. O.C. Div. 1984). For a discussion of *Conover* and similar cases, see *supra* note 59.
126. See, e.g., DEL. CODE ANN. tit. 12, § 4903(a) (1987)(providing powers of agent under durable power of attorney are terminated to the extent those powers are granted to a court-appointed fiduciary); MO. ANN. STAT. § 404.731.3 (Vernon 1990)(providing court can enter order determining "powers, duties and responsibilities" of conservator and agent under durable power of attorney, coordinating the two roles).

crafting the trust's dispositive provisions. A settlor could, for example, create a trust while competent that would require the trustee to make periodic distributions to the settlor while competent, and allow the trustee to make distributions for the benefit of the settlor, as needed, should the settlor become incompetent.

Although trusts are popular planning tools, they are often criticized as overly expensive.¹²⁷ Because a well-crafted trust instrument is fairly complex, a settlor would probably have to engage an attorney to create a trust. Once the trust is in existence, the trustee must file appropriate tax returns for the trust, perhaps generating additional expenses. Also, if the trustee is someone other than the settlor, there may be trustee commissions to pay.

A. The Role of the Trustee

The primary source of the trustee's duties is the trust instrument itself.¹²⁸ The settlor can direct the trustee to act in a particular way with respect to the dispositive and administrative provisions of the trust.¹²⁹ The settlor could also choose to give the trustee discretion as to how to distribute or manage the trust assets.¹³⁰

Not all of the trustee's duties arise from the language of the trust instrument. Trustee powers may also be implied, rather than express.¹³¹ When the settlor fails to delineate an aspect of the trustee's duties, trust law fills the interstices. The jurisprudential basis for such gap-filling is the premise that some duties flow from the relationship between trustee and beneficiary that the settlor has established. The trustee's duty of loyalty to the beneficiaries, for example, arises from the nature of the fiduciary relationship between trustee and beneficiary.¹³² In virtually every instance, the settlor has the ultimate say about the extent of the Trustee's duties and powers, and can vary the "default" rules governing duties and powers.

Although a trustee who is named in a trust instrument cannot be forced to serve as trustee, once he accepts the trust, he has a fiduciary

127. See UNIF. DURABLE POWER OF ATTORNEY ACT Prefatory Note, 8A U.L.A. 310 (1987).

128. See AUSTIN W. SCOTT & WILLIAM W. FRATCHER, *THE LAW OF TRUSTS* § 164, at 250 (4th ed. 1987).

129. For example, if the settlor provides in the trust that the trustee must pay all trust income to the settlor for as long as the settlor is living, the trustee has a duty to pay the income to the settlor in accordance with the terms of the trust. Similarly, if the settlor directs in the trust that the trustee must send a yearly accounting to all living adult beneficiaries, the trustee must so account.

130. For example, it is very common to give the trustee discretion to distribute principal for the support of a beneficiary. Additionally, most settlors give trustees complete discretion with respect to trust investments.

131. See RESTATEMENT (SECOND) OF TRUSTS § 164 cmt. h (1959).

132. See *id.* See also SCOTT & FRATCHER, *supra* note 128, § 164.

duty to administer the trust in accordance with its terms and the other principles supplied by trust law.¹³³ This broad duty of administration includes a number of component duties. These include the duty of loyalty to the beneficiaries,¹³⁴ the duty not to delegate non-ministerial duties,¹³⁵ the duty to keep accurate accounts,¹³⁶ the duty to furnish information about the trust to the beneficiaries,¹³⁷ the duty to exercise reasonable care and skill in administering the trust,¹³⁸ the duty to muster the assets of the trust,¹³⁹ the duty to preserve the trust property,¹⁴⁰ the duty to enforce and defend claims involving trust property or potential trust property,¹⁴¹ the duty not to commingle trust property with other property,¹⁴² the duty to take care in selecting any bank in which the trustee wishes to deposit trust assets and to properly title the deposit,¹⁴³ the duty to make the trust assets productive,¹⁴⁴ the duty to pay income in a reasonable manner as directed by the trust,¹⁴⁵ the duty to treat multiple beneficiaries impartially,¹⁴⁶ the duty to monitor the activities of co-trustees,¹⁴⁷ and the duty to act responsibly with regard to a person empowered to control the trustee's actions.¹⁴⁸

Thus, in many instances, the duty of the trustee with respect to dispositions of trust property to the beneficiaries of the trust are wholly delineated by the trust instrument. In other cases, the trustee may be given discretion with respect to dispositions from the trust, but will at least be able to identify the intended beneficiaries based on the language of the trust.¹⁴⁹ With respect to administrative duties, again, the trust instrument will often explicitly direct certain trustee action. Where the trust instrument is silent with regard to either dispositive or administrative provisions, the body of trust law, both statutory law and caselaw, is so well developed that courts are seldom without guidance in deciding whether a trustee's actions complied with an appropriate standard of fiduciary care.

133. RESTATEMENT (SECOND) OF TRUSTS § 169 (1959).

134. *Id.* § 170.

135. *Id.* § 171.

136. *Id.* § 172.

137. *Id.* § 173.

138. *Id.* § 174.

139. *Id.* § 175.

140. *Id.* § 176.

141. *Id.* § 177-78.

142. *Id.* § 179.

143. *Id.* § 180.

144. *Id.* § 181.

145. *Id.* § 182.

146. *Id.* § 183.

147. *Id.* § 184.

148. *Id.* § 185.

149. *Id.* § 112.

The well-defined role of the trustee makes the trust an attractive tool for disability planning. The settlor can direct many of the trustee's actions if he chooses to do so. Even discretionary powers are fairly predictable because the trustee has a duty to exercise discretionary powers fairly. Finally, where the settlor has failed to direct the trustee in any way on a particular issue, there is often controlling precedent that would guide the trustee in acting. Thus, the settlor can feel confident that the trust he creates will continue to operate in a particular way even if he becomes incompetent and cannot monitor the actions of the trustee.

One of the difficulties in using a trust for disability planning is that the terms of the trust will be "frozen" at the creation of the trust, unless the settlor reserves the right to amend the trust. In certain limited circumstances, a trustee may be able to deviate from the express terms of a trust. Usually, the circumstances must include a significant change in circumstances not anticipated by the settlor when the trust was created. Additionally, the person seeking deviation must show that compliance with the trust's terms would frustrate the purpose of the trust.¹⁵⁰ To protect himself, a trustee would probably want court permission to deviate from the terms of a trust, although the trustee can deviate without prior court approval without incurring liability in an emergency situation.¹⁵¹

B. A Comparison of the Role of Trustee With the Role of Agent

There are some significant differences between the role of the trustee and the role of the agent. One of the primary differences between a trustee and an agent is that a trustee holds legal title to the property that forms the corpus of the trust while an agent merely has

150. See *id.* § 167. Section 167 provides:

(1) The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust.

(2) Under the circumstances stated in Subsection (1), the trustee can properly deviate from the terms of the trust without first obtaining the permission of the court if there is an emergency, or if the trustee reasonably believes that there is an emergency, and before deviating he has no opportunity to apply to the court for permission to deviate.

(3) Under the circumstances stated in Subsection (1), the trustee is subject to liability for failure to apply to the court for permission to deviate from the terms of the trust, if he knew or should have known of the existence of those circumstances.

151. See *id.* § 167(2).

powers with respect to the principal's property.¹⁵² Thus, while the principal is competent, both the principal and the agent have the power to act with respect to the principal's property. On the other hand, once a settlor has transferred property to a trust, he cannot exercise any control over the property unless, in creating the trust, he retained the power to do so.

Another significant difference between an agent under a durable power of attorney and a trustee is that the agent's duties are often wholly undefined by the document creating the agency.¹⁵³ In the trust context, the trustee's duties are usually well-defined.¹⁵⁴ In this respect, a trust is a directive instrument: it tells the trustee what to do. If the trust failed to impose legally enforceable duties on the trustee, it would not be a trust. On the other hand, a durable power of attorney under the law as it now exists is merely an empowerment instrument: it describes what the agent can do. Often, durable powers of attorney contain no indication of how the principal wishes the agent to act.

It is ironic that the agent under a durable power of attorney, whose powers often are significantly broader than those of a trustee, lacks much of a defined role. A trustee manages only that property which forms the corpus of the trust. In most cases, this is less than all of the settlor's property. An agent under a durable power of attorney, on the other hand, frequently has power over all of the principal's assets.¹⁵⁵

VII. THE APPROPRIATE ROLE OF THE AGENT

Unlike death, disability is not certain to occur. This may help to explain why death planning is much more developed than disability planning.¹⁵⁶ As medical science extends the average life expectancy, however, the possibility that one will become disabled increases.¹⁵⁷ Additionally, the statistical chances of becoming at least temporarily disabled are sobering.¹⁵⁸

152. See, e.g., *Smith v. United States*, 113 F. Supp. 702, 707 (D. Haw. 1953) (noting principal remains legal owner of principal's property after executing power of attorney). See also RESTATEMENT (SECOND) OF TRUSTS § 8 cmt. a (1959); *Moses & Pope*, *supra* note 2, at 514.

153. *Moses & Pope*, *supra* note 2, at 514.

154. See RESTATEMENT (SECOND) OF TRUSTS § 164 (1959). For a discussion of a trustee's duties, see *supra* notes 128-49 and accompanying text.

155. See BORDIN ET AL., *supra* note 45 § 1.7, at 12.

156. See, e.g., *Schmitt & Hatfield*, *supra* note 29, at 213.

157. See, e.g., *Rice v. Floyd*, 768 S.W.2d 57, 61 (Ky. 1989) (Leibson, J., dissenting). See COLLIN ET AL., *supra* note § 1.02, at 1-2; *Lombard et al.*, *supra* note 4, at 1; *Lombard*, *supra* note 3, at 189; *Meiklejohn*, *supra* note 9, at 115. See also *Schmitt & Hatfield*, *supra* note 29, at 213 (suggesting longer life expectancy means people consume more of their assets, making lifetime management more important).

158. An often-quoted commentator noted almost thirty years ago:

In light of these somber statistics, it is not surprising that people are seeking an effective, economical device to allow asset management in the event of disability. The likelihood of disability has recently caused more attorneys to think and write about planning for disability.¹⁵⁹ Most disability planning begins with the premise that guardianships should be avoided.¹⁶⁰ Thus, attorneys often recommend other means for dealing with the property of an incompetent.¹⁶¹

The durable power of attorney has come to be regarded as an extremely useful tool in planning for possible disability.¹⁶² It is particularly well-suited to allow management of a person's property while the person is disabled either mentally or physically. Mental disability may impair one's legal power to act. Even if a person has sufficient mental capacity to act, a serious physical disability may make it difficult for the person to manage his assets.¹⁶³ The financial durable power of attorney can assist the principal in both instances, and attorneys are strongly recommending the use of durable powers of attorney to their clients for precisely that reason.¹⁶⁴

Much has been written about how to draft durable powers of attorney to clearly express the powers that the principal wishes the agent to have.¹⁶⁵ Additionally, one often sees suggestions about how to se-

If disability of any nature, especially a legally incapacitating disability, can create serious asset management problems, how likely is it to occur? Insurance statistics indicate that a twenty-two year old person is seven and one-half times more likely to suffer a disability of ninety days or more than he is to die. Such a disability is four and one-quarter times more likely to occur than death in a sixty-two year old. At age twenty, 789 persons out of 1000 can expect to suffer a disability of ninety days or more at some time during their lives. At age forty, 635 persons out of 1000 can expect to suffer such a disability, and at age sixty, 221 persons out of 1000 can expect to suffer a disability lasting ninety days or longer.

If the disability for a twenty-two year old person has continued for one year, there is a fifty-two percent chance that it will continue for an additional two years and a thirty-two percent chance that it will continue for an additional five years. If the person is fifty-seven and the disability has continued for a year, there is a seventy-three percent chance that it will continue for two additional years and a fifty-five percent chance that it will continue for an additional five years.

Moses & Pope, *supra* note 2, at 512-13 (citation omitted).

159. See, e.g., McMahan et al., *supra* note 38.

160. Lombard et al., *supra* note 4, at 1 (discussing some difficulties of guardianships).

161. *Id.*

162. See, e.g., McMahan et al., *supra* note 38, at 99.

163. See Moses & Pope, *supra* note 2, at 512-13 (discussing problems of disability). Mr. Moses and Ms. Pope note that even physical disability unaccompanied by mental disability can create "physical and emotional obstacles to the exercise of sound judgment." *Id.* at 512.

164. See McMahan et al., *supra* note 38, at 99 ("One of the principal uses of powers of attorney is to delegate to an agent the management and control of the principal's property during mental incapacity or other disability.").

165. E.g., *id.*, at 99-105; Schmitt & Hatfield, *supra* note 29, at 211-14.

lect the person to be named as agent.¹⁶⁶ Some have written about the factors that a principal should consider when choosing an agent.¹⁶⁷ For example, commentators have discussed the need for certain skills to make certain decisions, and have suggested that splitting the broad durable power of attorney into several components might best carry out the wishes of the principal.¹⁶⁸ One author has suggested that it is wise to have the named agent or agents sign the durable power of attorney to indicate acceptance of the duties thereunder.¹⁶⁹ What is strangely lacking, however, is any discussion of what standards should govern the behavior of the agent or any suggestion that the principal should discuss the agent's appointment with the agent to ensure that the agent understands his role.

In light of the popularity of the durable power of attorney as a planning tool, it is critically important that the role of the agent be better defined. This is particularly true because estate planning attorneys often market the durable power of attorney to clients as an alternative to a trust or guardianship.¹⁷⁰ Without a clearly defined role, the agent may not perform the way the principal expects, and the principal may suffer financially by choosing to execute the durable power of attorney rather than to create a trust. Although it is difficult to say that a client "chooses" a durable power of attorney rather than a guardianship, the client's decision to execute a durable power of attorney may discourage others from instituting a protective proceeding. If the principal has nominated the agent under his durable power of attorney to serve as his guardian, interested third parties may refrain from petitioning for guardianship because they do not appreciate the increased protection of the principal that a guardianship would afford. The client's execution of a durable power of attorney may even lead to a court refusing to appoint a guardian upon finding that the principal is incompetent.¹⁷¹ Because use of the financial durable power of attorney makes it less likely that other methods of coping with disability will be used, we must ensure that the financial durable power of attorney adequately copes with the principal's incompetence.

166. *E.g.*, McMahan et al., *supra* note 38, at 101 ("Careful consideration also should be given to the selection of an agent having knowledge of the business and of the owner's desires in connections [sic] with continuation of the business."); BORDIN ET AL., *supra* note 45, at 209 §§ 2.13-2.22.

167. *See, e.g.*, Lombard, *supra* note 3, at 202.

168. *See id.* Mr. Lombard suggests that it may be advisable to have one agent make financial decisions and another make health decisions. *Id.*

169. Sturgul, *supra* note 32, at 28. *See also* MODEL SPECIAL POWER OF ATTORNEY FOR SMALL PROPERTY INTERESTS ACT § 1(b)(2) (1964)(requiring consent of agent to serve for validity of durable power of attorney).

170. *See, e.g.*, *In re Estate of Hegel*, 668 N.E.2d 474, 478 (Ohio 1996)(Stratton, J., dissenting)(noting attorneys encourage use of durable power of attorney to avoid court supervision).

171. *See supra* note 59 and accompanying text.

A. Common Ground

All states recognize that an agent under a durable power of attorney is a fiduciary.¹⁷² A number of states have enacted this principle in their laws governing durable powers of attorney.¹⁷³ Even if no statute addresses the issue, courts usually reach the same conclusion using common-law agency principles.¹⁷⁴

A fiduciary is one who is entrusted with the property of another.¹⁷⁵ A number of legal implications flow from the fiduciary relationship, and there are some areas of common ground that are well-settled. First and foremost, a fiduciary owes a duty of loyalty to the person who equitably owns the property.¹⁷⁶ Also, any fiduciary dealing with the property of another has a duty to act prudently with respect to that property.¹⁷⁷ If the fiduciary fails to act prudently, an interested party could institute an action to surcharge the fiduciary.¹⁷⁸

172. See Lombard, *supra* note 3, at 197.

173. E.g., ARK. CODE ANN. § 28-69-201 (Michie 1987)(defining "fiduciary" to include agent); N.J. STAT. ANN. § 46:2B-19 (West Supp. 1996)(providing agent is fiduciary); S.C. CODE ANN. § 62-5-501 (Law. Co-op. 1995)("The attorney in fact has a fiduciary relationship with the principal and is accountable and responsible as a fiduciary."). See also Moses & Pope, *supra* note 2, at 522 (suggesting that predecessor of section 62-5-501(A) is broad enough to require consideration of caselaw about fiduciaries in addition to statutes).

174. See, e.g., *Sevigny v. New South Federal Savings and Loan Ass'n*, 586 So. 2d 884, 887 (Ala. 1991)(noting principal-agent relationship is fiduciary); *McHaney v. McHaney*, 190 S.W.2d 450, 454 (Ark. 1945)(noting all agencies create fiduciary relations); *King v. Bankerd*, 492 A.2d 608, 613 (Md. 1985)(noting fiduciary relationship of principal and agent).

175. See generally SCOTT & FRATCHER, *supra* note 128, § 2.5. There are a variety of fiduciary relationships: 1) trustee-beneficiary; 2) agent-principal; 3) guardian-ward; and 4) attorney-client. *Id.*

176. See, e.g., *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928). In one of the most frequently quoted descriptions of the duty of loyalty, Chief Justice Cardozo said in *Meinhard*, "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor most sensitive, is then the standard of behavior." *Id.* at 546. See also Cal. Prob. Code § 4232 (West Supp. 1995)(providing agent under durable power of attorney has duty to act solely in the principal's interest and avoid conflicts of interest). *Id.* § 4234 (requiring agent keep in contact with principal to extent practicable).

177. See, e.g., *In re Estate of Denlinger*, 297 A.2d 478, 480 (Pa. 1972)(fiduciary is "required to use such common skill, prudence and caution as a prudent man, under similar circumstances would exercise in the management of his own estate; and if he negligently causes a loss to an estate he may properly be surcharged for the amount of such loss").

178. See Lombard, *supra* note 3, at 201. Mr. Lombard notes that the principal could sue the agent for the agent's imprudence, and that third parties might be able to sue as well. *Id.* For example, the heirs of a deceased principal might be able to sue an agent who imprudently wasted the principal's assets. See *id.* See also Vaughn v. Batchelder, 633 So. 2d 526 (Fla. Dist. Ct. App. 1994)(removing personal representative of deceased principal's estate because personal representative breached fiduciary duty while serving as agent under durable power of attorney and estate had claim against agent for misconduct).

One approach that attorneys may use to try to prevent surcharge actions is the inclusion of an exculpatory clause in durable powers of attorney.¹⁷⁹ For example, a drafter could provide that the agent will be liable only in the case of gross misconduct.¹⁸⁰ Although there are no reported cases addressing the use of exculpatory clauses in durable powers of attorney, it is likely that courts would apply principles similar to those applied to exculpatory clauses in trusts.¹⁸¹ In virtually every state, a settlor can relieve the trustee of liability for ordinary negligence if he so chooses.¹⁸² Although courts strictly construe exculpatory clauses,¹⁸³ they uphold exculpatory clauses unless there is a violation of public policy.¹⁸⁴

Further, a court of appropriate jurisdiction has the power to supervise the acts of a fiduciary.¹⁸⁵ Court supervision may be more intense when the person to whom the fiduciary duty is owed is incompetent.¹⁸⁶

The fiduciary duty governs all matters within the scope of the agency.¹⁸⁷ It is clear that the agent must act prudently when he acts.¹⁸⁸ The duty arises even if the agent is not compensated.¹⁸⁹ Unlike a guardianship or trust setting, the agent does not appear to have

179. See Sturgul, *supra* note 32, at 40 (offering form that makes agent liable only in the case of the "agent's own misconduct or negligence"); Schmitt & Hatfield, *supra* note 29, at 226 (including provision releasing agent from liability in list of "basic" provisions for durable power of attorney).

180. See Lombard, *supra* note 3, at 202 (suggesting helpfulness of provision limiting agent's liability to cases of "gross misconduct or fraud").

181. See generally SCOTT & FRATCHER, *supra* note 128, § 222.

182. *E.g.*, Sullivan v. Mosner, 295 A.2d 482 (Md. 1972); Corpus Christi Nat'l Bank v. Gerdes, 551 S.W.2d 521 (Tex. Civ. App. 1977). See RESTATEMENT (SECOND) OF TRUSTS § 222 (1957). See also SCOTT & FRATCHER, *supra* note 128, § 222 (collecting cases).

183. See, *e.g.*, Milbank v. J.C. Littlefield, Inc., 36 N.E.2d 833 (Mass. 1941); Tuttle v. Gilmore, 36 N.J. Eq. 617 (Ct. Errors & App. 1883). See also SCOTT & FRATCHER, *supra* note 128, § 222.2.

184. *E.g.*, Browning v. Fidelity Trust Co., 250 F. 321 (3d Cir.), *cert. denied*, 248 U.S. 564 (1918); *In re Andrus*, 281 N.Y.S. 831 (Surr. Ct. 1935). See also SCOTT & FRATCHER, *supra* note 128, § 222.3.

185. See Friedman & Savage, *supra* note 90, at 273-74.

186. *E.g.*, COLO. REV. STAT. ANN. § 15-14-609 (West Supp. 1995). Under the Colorado statute, after a court determination that a principal "lacks the capacity to control or revoke the agency instrument," the court can examine the acts of an agent under a durable power of attorney. *Id.* If the court finds that the agent's actions or lack thereof are not adequately protecting the principal's interests, the court can order a range of remedial actions, including appointment of a guardian or conservator with full or limited powers. *Id.* See Friedman & Savage, *supra* note 90, at 274.

187. RESTATEMENT (SECOND) OF AGENCY § 13 (1957); Gagnon v. Coombs, 654 N.E.2d 54, 60 (Mass. App. Ct. 1995).

188. See, *e.g.*, McHaney v. McHaney, 190 S.W.2d 450, 454 (Ark. 1945) (Noting agent may not perform any act "which defeats or hinders the efforts of his principal to accomplish the purpose for which the agency was established").

a duty to act at all unless he has agreed to act or has acted to cause detrimental reliance by the principal.¹⁹⁰ Some commentators, however, view the durable power of attorney as creating a "less formal" fiduciary relationship than a trust or guardianship.¹⁹¹

B. Unexplored Territory

What has not been addressed in most states, however, is whether fiduciary principles should guide the agent in determining whether to act at all or whether to continue to act once a person has begun serving as agent.¹⁹² A few state legislatures have gone beyond a simple pronouncement that an agent is a fiduciary and have spoken more precisely on the duties of agents. Several states have made it quite clear that an agent need not exercise the powers given him in a durable power of attorney.¹⁹³ Such a position is dangerous in light of the way that durable powers of attorney are being marketed to clients by estate planning attorneys.

189. *E.g.*, *McHaney v. McHaney*, 190 S.W.2d 450, 454 (Ark. 1945). *Cf.* CAL. PROB. CODE § 4231 (West Cum. Supp. 1996)(providing agent must act as prudent person when he acts, but uncompensated agent is liable only for losses resulting from "bad faith, intentional wrongdoing or gross negligence"); GA. CODE ANN. § 10-6-22 (Michie 1994)(stating uncompensated agent liable only for gross neglect). In light of the lack of definition of the standards governing the agent's behavior, it is perhaps not surprising that the law governing compensation of the agent is similarly murky. *See* Lombard, *supra* note 3, at 204. Most of the states use a reasonableness standard: if the governing instrument is silent, the agent is entitled to reasonable compensation. *E.g.*, CAL. PROB. CODE § 4204 (West Supp. 1996); MO. REV. STAT. § 404.725 (Vernon 1990). *See also* Sturgul, *supra* note 32, at 27 (noting most states have applied reasonableness standard when issue of agent's compensation has arisen).

190. *See* RESTATEMENT (SECOND) OF AGENCY §§ 377, 378 (1958).

191. Lombard, *supra* note 3, at 197. Discussing the question of required accountings, Lombard notes that the durable power of attorney "is intended as an alternative to a more formal fiduciary relationship, such as a guardianship or trusteeship with its expense and loss of flexibility." *Id.* Thus, Lombard concludes that the failure of most states to require accountings by agents under durable powers of attorney is appropriate. *Id.*

192. *See* *McHaney v. McHaney*, 190 S.W.2d 450, 454 (Ark. 1945)(noting duty of good faith and loyalty once agent has assumed duties); Cal. Prob. Code § 4128 (West Supp. 1996)(requiring form durable power of attorney sold or distributed for use by person without legal counsel contain phrase "Your agent (attorney-in-fact) has no duty to act unless you and your agent agree otherwise in writing"); CAL. PROB. CODE § 4230 (West Supp. 1995)(providing agent has no duty to act unless agent has already begun transaction or principal and agent have agreed otherwise).

193. *E.g.*, CAL. PROB. CODE § 4230 (West Supp. 1996)(providing agent has duty to act only if necessary to complete transaction agent has already begun or if agent and principal agreed that agent would act); COLO. REV. STAT. ANN. § 15-14-606 (West Supp. 1995)(providing "agent is under no duty to exercise the powers granted by the agency or to assume control of or responsibility for any of the principal's property, care, or affairs, regardless of the principal's physical or mental condition").

The type of action or inaction by an agent under a durable power of attorney that will lead to liability has not been clearly defined. There is not much caselaw on the issue, and, as one court noted, appellate courts have not often had the opportunity to analyze powers of attorney.¹⁹⁴ Although most reported cases deal with whether an agent breached his fiduciary duty by making gifts of the principal's property,¹⁹⁵ various grounds have been asserted as possible bases for liability.¹⁹⁶ Legislative attempts to prevent abuses are extremely rare.¹⁹⁷

There are a number of types of conduct that could give rise to a surcharge action. These include the failure of the agent to act at all on behalf of a principal; the agent taking action with respect to some property, but not as to other property; and the agent taking action with respect to all property. These will be discussed seriatim.

First, what of the person named in a durable power of attorney who simply refuses to act? Clearly, a person cannot be forced to act as agent. Courts have acknowledged that various fiduciary offices are absolutely necessary to society.¹⁹⁸ Courts also recognize that the fiduciary's role is a difficult one.¹⁹⁹

An assumption of powers as agent under a durable power of attorney could cause federal tax consequences.²⁰⁰ For example, if the principal owned a life insurance policy on the agent's life, the government might argue that the policy proceeds are includable in the agent's gross estate for federal estate tax purposes.²⁰¹ Also, a power to make

194. *King v. Bankerd*, 492 A.2d 608, 611 (Md. Ct. App. 1985).

195. *See, e.g., Hodges v. Surratt*, 366 So. 2d 768 (Fla. Dist. Ct. App. 1978); *Kline v. Orebaugh*, 519 P.2d 691 (Kan. 1974).

196. In *Eby Estate*, for example, the Pennsylvania Orphans' Court considered an allegation by the executor of the will of a deceased principal that an agent under a durable power of attorney should be surcharged for failing to sell the principal's home and automobile after the principal moved into a nursing home. 6 D.&C.3d 371, 197-98 (Pa. Ct. Com. Pls. O.C. Div. 1977). *See also Gagnon v. Coombs*, 654 N.E.2d 54, 56 (App. Ct. Mass. 1995) (describing situations in which agent transferred principal's property to herself as trustee of irrevocable trust even though principal had contracted to sell property).

197. *See, e.g., ALASKA CODE* § 13.26.358 (Supp. 1995) (forbidding "public home care provider," who is a home care provider paid with state funds, from acting as agent under power of attorney given by one to whom he is providing care).

198. *See, e.g., In re Estate of Denlinger*, 297 A.2d 478, 481 (Pa. 1972) (mentioning offices of administrator, executor, and guardian).

199. *See id.* (noting fiduciary's office "is attended in its faithful discharge with trouble, anxiety, and hazard") (quoting *Keller's Appeal*, 8 Pa. 288, 289-90 (1848)).

200. *See Moses & Pope, supra* note 2, at 531-34 (discussing potential tax problems for agents).

201. *See, e.g., Estate of Bloch*, 78 T.C. 850 (1982); *Terriberry v. United States*, 517 F.2d 286 (5th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *Rose v. United States*, 511 F.2d 259 (5th Cir. 1975); *Estate of Skifter*, 468 F.2d 699 (2d Cir. 1972).

gifts to one's self could cause inclusion.²⁰² The agent need not serve if he or she is concerned about such consequences.

In some cases, the person named as agent may not even be aware of the appointment.²⁰³ In those cases, it would be unjust to impose any liability on the person named if he does not act.²⁰⁴ This would include liability for any damages that occur because the principal's assets were not properly managed after the principal lost competence.

If a person knows she has been named as the agent under a durable power of attorney, however, she should not be permitted to do nothing for an unreasonable period of time and escape liability. Once the principal loses competence, the agent should have some responsibility to either step in and act on behalf of the principal or take some action to protect the principal's property.

Consider, for example, an eighty-year-old father and fifty-year-old daughter. After discussion with the daughter, the father has his attorney draw up a broad financial durable power of attorney naming the daughter as agent. The father's health begins to fail, and his management of his assets becomes increasingly lax. The value of his assets declines significantly as a result of this mismanagement.²⁰⁵ Should the daughter be held liable for failing to intervene?

The answer should depend on whether the principal is competent. If the principal is competent, the daughter should not be held liable for failing to intervene in her father's financial affairs. This is so because the principal's wishes are always paramount while he is competent. The rights of a competent principal must, of course, be respected.²⁰⁶ Just as some states have attempted to make guardianship minimally intrusive,²⁰⁷ the principles governing durable powers of attorney should not encourage agents to intrude in the affairs of

202. Sturgul, *supra* note 32, at 32-33; Ann Weber, *Power to Make Gifts: Tax Protection for the Attorney in Fact or Trustee*, 1 *The Elder Law Report* 11 (May 1990).

203. See Lombard, *supra* note 3, at 202.

204. See *id.* Lombard suggests that a court could neither compel an agent who has not agreed to his appointment as agent to serve, nor could it hold him liable for refusing to serve. *Id.*

205. It is not difficult to imagine the myriad of ways in which such a decline could occur. Missed mortgage payments could lead to a default, unpaid insurance premiums could lead to policy cancellation, unwatched investments could dissipate, and unpaid obligations could incur penalties, to name but a few possibilities.

206. See, e.g., OHIO REV. CODE ANN. § 2111.02(C)(5),(6) (Anderson 1994) (providing court must consider proffered evidence of less restrictive alternative to guardianship and court may base denial of guardianship on fact that less restrictive alternative exists). See Friedman & Savage, *supra* note 90, at 289-90 (discussing negative implications of overuse of conservatorships; suggesting conservatee should be given more autonomy).

207. California law relating to conservatorship of the "developmentally disabled" aims to make conservatorship minimally intrusive. See Friedman & Savage, *supra* note 90, at 287 (citing CAL. PROB. CODE § 1828.5(e) (West Supp. 1987)).

competent principals. If, on the other hand, the principal is incompetent, the daughter should be potentially liable for failing to intervene.

At first blush, this rule attaching potential liability of the agent to incapacity of the principal might seem to place an unreasonable burden on the agent. Although there is a burden, it is not unreasonable.

It is true that the agent may have difficulty determining when the principal becomes incompetent. This difficulty could be overcome. For example, a durable power of attorney could include a provision that specifies a procedure for determining when the principal is incompetent.²⁰⁸ Such provisions are already widely used in springing powers.²⁰⁹ Further, the courts could develop a test that would not be too harsh on agents. The agent could be required to make reasonable periodic investigation into the competency of the principal and be liable only if she unreasonably concludes that the principal is competent when the principal is incompetent.

The burden on the agent is necessary to ensure that the principal will be adequately protected upon incompetence. This is the purpose of durability. Furthermore, estate planning attorneys often tout durable powers of attorney as an alternative to guardianships, and it is unlikely that clients interpret this as meaning that a durable power of attorney is effective only if the agent decides to act.²¹⁰ If we fail to impose liability on named agents who know of the principal's incompetence and take no action, then we have truly created a monster in the durable power of attorney.

It has been suggested that a court could not impose liability on a named agent who has not agreed to serve as agent.²¹¹ A few states have adopted this position.²¹² It does not seem unreasonable, how-

208. See, e.g., ALASKA STAT § 13.26.353 (Supp. 1995)(setting forth procedure to establish disability of principal).

209. See U.P.C. § 5-501 comment, 8 U.L.A. 513 (1987)(suggesting springing power could require two named persons concur that principal is incapable of managing financial affairs and inform the agent in writing); Lombard, *supra* note 3, at 204 (suggesting procedures). See also Sturgul, *supra* note 32, at 26 (suggesting that the wide variety of methods for determining when the power should spring into effectiveness implies that "no one method has proven greatly superior to any other").

210. E.g., *In re Estate of Hegel*, 668 N.E.2d 474, 478 (Ohio 1996)(Stratton, J., dissenting)(opining that most clients "have little appreciation of the difference in the roles of guardian and attorney-in-fact other than one seems less complicated to use than the other").

211. Lombard, *supra* note 3, at 202. Lombard notes, however, that a different result could obtain if the agent agreed to serve in advance or began to serve, then wanted to stop serving. *Id.*

212. CAL. PROB. CODE § 4230 (West Supp. 1996). Section 4230 is a broad provision protecting agents named in powers of attorney. First, it provides that a named agent has no duty to exercise the powers granted to the agent in the power of attorney, regardless of the principal's condition. *Id.* § 4230(a). Second, although the section requires the agent to complete any transaction already commenced, it

ever, to require the agent to notify someone that the agent chooses not to serve. The court with jurisdiction over guardianship proceedings would seem a likely choice for such notification. If such a rule were adopted, prudent principals would discuss the durable power of attorney with the named agent and obtain a commitment that the agent would act.²¹³ Even if an agent agrees to act as agent, there may be disagreement concerning the extent of the agent's duties.²¹⁴

Adequate asset management may require a broad range of activities. Most estates need the following types of action: 1) management of investments; 2) collection of debts; and 3) filing of tax returns and payment of taxes.²¹⁵ Additionally, in larger or more complicated estates, the manager might also wish to: 4) disclaim property interests; 5) make estate planning gifts; 6) claim the elective share of the estate of a deceased spouse; 7) pursue litigation on behalf of the principal; and 8) adjust the principal's assets to qualify for various tax benefits at the principal's death.²¹⁶

makes clear that no act for the principal obligates the agent to perform another act. *Id.* § 4230(b). Third, the section allows the principal and agent to agree in writing that the agent will have certain duties. Only in the case of such an agreement, must the agent act under the power of attorney. *Id.* § 4230(c).

In connection with the enactment of section 4230, the Law Review Commission commented that, "[t]he principal wants someone to have the ability to act if something needs to be done, but rarely would the principal expect to impose a duty to act on a friend or family member who chooses not to do so." CAL. PROB. CODE § 4230, Law Revision Commission Comment (West Supp. 1996). The comment also makes clear that the agent can choose not to act at any time and for any reason, including mere inconvenience. *Id.* See also BORDIN ET AL., *supra* note 45, at 209, § 1.2, at 6 (noting rules in section 4230 "are intended to facilitate use of powers of attorney by allowing a person who might be reluctant to be named as agent to accept the designation and then determine on a situation-by-situation basis whether to act").

213. See Schmitt & Hatfield, *supra* note 29, at 224 n.75 (suggesting durable power of attorney for health care be discussed with agent "to ensure he or she is comfortable carrying out the tasks set forth"; failing to suggest similar discussion with respect to durable power of attorney for financial management).

214. See, e.g., GA. CODE ANN. § 10-6-142 (Michie Supp. 1996). In the Georgia statutory form for financial durable power of attorney, there is an "Acceptance of Appointment" form for the agent to sign. The Acceptance states in part, "I must protect and conserve, and exercise prudence and caution in my dealings with, the Principal's funds and other assets." *Id.* This provision arguably imposes the duty on the agent who accepts appointment to act with respect to all of the principal's assets.

215. See Moses & Pope, *supra* note 2, at 514 n.5. Moses and Pope suggest that "under appropriate circumstances" the Code's requirements for trustees could be imposed on agents because the South Carolina statute they are discussing says that the agent has a fiduciary relationship with the principal. *Id.*

216. For example, if real property is used for a qualified use, such as farming, on the date of the owner's death, the property can be valued for Federal Estate Tax purposes at its value for its use rather than its fair market value. I.R.C. § 2032A (1996). Similarly, the Internal Revenue Code reduces the burden that the Federal Estate Tax would have on an estate that consists largely of a closely held

After a principal loses competence and the agent has agreed to serve, the agent should be held liable if he fails to prudently manage all of the principal's assets. The agent should be held to a standard of reasonable diligence in locating all of the principal's assets.

The current law in most states is that an agent can pick and choose when to act, even after the principal loses competence. Although this poses little problem when there is a competent principal to monitor the agent's acts, it is an especially dangerous rule when applied to durable powers. If an outside observer sees the agent adequately managing one piece of the principal's property, he may assume that all of the principal's property is being appropriately managed. Thus, he may not investigate any further, even if he believes that the principal is incompetent.

The law should be changed with respect to agents of incompetent principals. An agent acting for an incompetent principal should not be permitted to pick and choose which of the principal's assets he will manage and leave any other assets unmanaged. Rather, once the agent should reasonably know that the principal is incompetent and that he has been named as agent, the agent should be required to either: 1) refuse to serve as agent and make his refusal known; 2) accept responsibility for those assets he wishes to manage and institute a protective proceeding to assure adequate management of the principal's other assets; or 3) agree to serve as agent and try to take control of the principal's entire estate.

With respect to a requirement of notice by the agent who does not wish to serve, several possibilities exist. First, an agent could always inform a competent principal that the agent would not serve in the future. Second, if the principal is incompetent, some procedure could be crafted to ensure protection of the principal. Perhaps the governing instrument could require the agent to notify the principal's "closest relative" or "treating physician." Perhaps the named agent should notify the court that would have jurisdiction over protective proceedings or some local social welfare organization. Many possibilities exist regarding effective communication of the agent's desire not to serve in a way that would perhaps prompt institution of a protective proceeding. Each state should create the notice mechanism that best suits its needs and is in line with available resources. In California, for example, a Court Investigator's Office already exists, and unwilling agents could notify it.

Such changes in the law would probably cause attorneys to change the ways they handle durable powers of attorney. First, it would be foolish not to discuss the agent's role with the named agent to make

business by allowing the tax to be paid in installments if certain conditions are met. I.R.C. § 6166 (1996).

certain that the agent is at least currently willing and able to serve. If possible, most would want the agent to agree to serve in writing. Second, attorneys would probably advise against appointing agents who were reluctant to manage all of the principal's financial affairs. The only situation in which partial management seems to make sense is when several agents manage separate portions of the principal's estate, and the portions add up to the entire estate. All of these changes would be steps toward better protection of incompetent principals.

The law governing resignation of agents under durable powers of attorney should also be crafted to ensure adequate protection of an incompetent principal. It has been suggested that because the agent has a fiduciary relationship to the principal, the agent may not be able to resign after the principal becomes incompetent if the resignation would be detrimental to the principal.²¹⁷ One can reach that conclusion by analogizing to the law that limits the resignation of trustees²¹⁸ and executors.²¹⁹ Most states follow the rule that a trustee can resign if: 1) all of the beneficiaries are sui juris and consent; 2) the court with jurisdiction over the trust administration approves; or 3) the instrument allows the trustee to resign without court or beneficiary approval.²²⁰ The purpose of limiting the right of the trustee to resign is to ensure the uninterrupted administration of the trust. Frequently, state statutes provide procedures to be followed when trustees resign.²²¹ Often, a guardian's power to resign is similarly limited,²²² as is an executor's power.²²³ California has adopted a similar rule for agents.²²⁴

The analogy is a good one. There are limitations on the power of a trustee or executor to resign because such limitations are necessary to protect the assets over which the fiduciary has responsibility. When a principal becomes incompetent, the same is true.

217. Moses & Pope, *supra* note 2, at 524.

218. *Id.*

219. *Id.*

220. See, e.g., *Ledbetter v. First State Bank & Trust Co.*, 85 F.3d 1537 (11th Cir. 1996); RESTATEMENT (SECOND) OF TRUSTS § 106 (1957); IND. CODE ANN. § 30-4-3-29(a) (West Supp. 1996). Cf. *In re Sherman B. Smith Family Trust*, 482 N.W.2d 118 (Wis. Ct. App. 1992)(affirming lower court's refusal to let trustee resign despite trust provision allowing resignation without court approval).

221. See, e.g., 20 PA. CONS. STAT. ANN. § 3184 (1996).

222. See, e.g., S.D. CODIFIED LAWS ANN. § 29A-5-503 (1996)(requiring court approval for resignation).

223. See, e.g., 20 PA. CONS. STAT. ANN. § 3184 (1996).

224. CAL. PROB. CODE § 4207 (West Supp. 1996). Section 4207 allows an agent to resign in four ways: 1) by notifying a competent principal; 2) by notifying an appointed conservator; 3) by finding a willing successor; or 4) by obtaining court permission. *Id.*

C. Common Issues

Most of the litigation involving durable powers of attorney seems to arise from allegedly improper gifts made by agents. In addition, some litigation results when a disappointed legatee learns that an act performed by an agent under a durable power of attorney adeemed the legatee's gift. Better definition of the agent's role could help resolve both of these issues.

1. Gift Giving/Self-dealing

Because an agent must act in the principal's best interest, an interesting question arises when the agent wants to make a gift of the principal's property. Under traditional agency law, gift giving was beyond the scope of an agent's authority.²²⁵ For various reasons, however, a gift of the principal's property may benefit the principal in ways other than mere maintenance of asset value.²²⁶ For example, gifts are frequently part of an effective estate plan.²²⁷ Under the current Federal Gift Tax, a person can give \$10,000 annually to as many people as he or she pleases without incurring any tax.²²⁸ Similarly, transfers to pay the medical or educational expenses of another are not subject to the gift tax.²²⁹ Many estate planners advise a program of significant lifetime gifts to minimize the size of the principal's estate, which could be taxable at death under the Federal Estate Tax.²³⁰ In addition, the principal may obtain greater entitlement to benefits like Medicaid by reducing the amount of his wealth using a gift-giving program.

If a durable power of attorney is silent as to whether the agent has the power to make gifts of the principal's property, the agent is placed in an uncertain position in most states.²³¹ It can be argued that gift-

225. *E.g.*, *King v. Bankerd*, 492 A.2d 608, 612 (Md. 1985)(opining that gift of principal's property by agent does not benefit principal when gift not specifically authorized and no evidence principal intended gift). See *Sturgul*, *supra* note 32, at 31.

226. *But see Johnson v. Fraccacreta*, 348 So. 2d 570, 572 (Fla. Dist. Ct. App. 1977)(noting and rejecting agent's argument that estate planning value was consideration for transfer so principal received benefit). See also *Sturgul*, *supra* note 32, at 31-32 (gift giving can further Medicaid and estate planning).

227. See generally *Finn-Deluca*, *supra* note 69, at 893-94 (discussing federal transfer tax benefits of making lifetime gifts).

228. I.R.C. § 2503(b)(1996).

229. I.R.C. § 2503(e) (1996).

230. I.R.C. § 2001 (1996)(imposing estate tax); I.R.C. § 2031 (1994)(defining gross estate upon which estate tax is imposed). See generally *Finn-Deluca*, *supra* note 69, (discussing difficulties caused by IRS position that gifts made under durable powers of attorney that do not expressly empower agent to make gifts are revocable).

231. See, *e.g.*, *Douglas S. Colosky*, Case Comment, *The Estate of Antone: Does an Attorney in Fact Have Power to Make Gift Under Short Form Power of Attorney Statute?*, 10 CONN. PROB. L.J. 369 (1996)(discussing Connecticut law); *Finn-Deluca*, *supra* note 69, at 899 (noting most states' courts and legislatures have not ad-

giving violates the agent's fiduciary duty to the principal.²³² Many states have held that an agent cannot make a gift of the principal's property to himself unless the governing instrument expressly gives the power to make gifts.²³³

Other states are more liberal about the gift-giving power of an agent. For example, Pennsylvania revised its durable power of attorney legislation in 1982.²³⁴ One of the statutory changes was the inclusion of a broad power to make gifts.²³⁵ The section describing this gift-making power also sets forth a principle of responsibility with respect to gifts made under a durable power of attorney:

An attorney-in-fact and the donee of a gift shall be responsible as equity and justice may require to the extent that a gift made by the attorney-in-fact is inconsistent with the prudent estate planning or financial management or with the known or probable intent of the principal with respect to the disposition of his estate.²³⁶

The focus on equity and prudent management makes more sense than a rule that limits gift-giving authority.

In light of the desire that durable powers of attorney be as flexible as possible, strict interpretation of documents to deny the agent the power to make gifts is not the answer to perceived abuses or the fear of abuses by agents. Rather, the standards governing the agent's behavior should be more clearly articulated so that misbehavior can be avoided by agents. If agents do misbehave, then a surcharge action would be appropriate.

Consider, for example, a mother with three children who grants a financial durable power of attorney to her oldest child. The instrument is silent as to the agent's power to make gifts on behalf of the mother. Soon thereafter, the mother has a stroke, is expected to live for no more than three months, and is completely unable to communicate. Her child, the agent, decides to make cash gifts of \$10,000 each to each of the principal's three children (including himself), the three children's spouses and the principal's six grandchildren. Three of the

dressed this issue)(citing Schmitt & Hatfield, *supra* note 29, at 210). Cf. *Mischke v. Mischke*, 247 Neb. 752, 759, 530 N.W.2d 235, 241 (1995)(holding agent cannot make gifts of principal's property unless instrument expressly grants such power and principal's intent to make such a gift is shown).

232. See Schmitt & Hatfield, *supra* note 29, at 212 n.29. Schmitt and Hatfield note that "giving away the principal's estate basically is inconsistent with the agent's fiduciary duty." *Id.*

233. E.g., CAL. PROB. CODE § 4264(c) (West 1995)(prohibiting agent from making gift of principal's property unless expressly authorized by power of attorney); *Fender v. Fender*, 329 S.E.2d 430, 431 (S.C. 1985).

234. 20 PA. CONS. STAT. ANN. ch. 56 (1996). The current statute blends provisions of the 1979 Act with a New York adoption by reference model. See Lombard, *supra* note 3, at 196.

235. 20 PA. CONS. STAT. ANN. § 5603 (Supp. 1996).

236. 20 PA. CONS. STAT. ANN. § 5603(a)(4) (Supp. 1996).

grandchildren are children of the agent. The mother had made no prior gifts and has assets worth well over \$2,000,000. Her will divides her estate among her issue, per stirpes.

Was there abuse of the power of attorney by the agent? Perhaps.²³⁷ But the solution to the abuse is not to interpret the document so that the gifts were invalid. Doing so would force \$120,000 back into the mother's estate to be taxed. Rather, the answer is to judge the agent's behavior under a well-defined standard: did the agent act prudently in the principal's best interest?

Even in the guardianship setting, legislatures are beginning to recognize that it may be appropriate for the guardian to use the incompetent's funds for the benefit of persons other than the incompetent. For example, the guardian may be able to use assets to benefit the dependents of the incompetent.²³⁸ The governing statute may also permit the guardian to make gifts to the incompetent's relatives and friends or to charities.²³⁹

2. *Ademption and Other Dispositive Provisions*

If the agent knows that the principal has made a will or created a trust that will distribute assets after the principal's death, the agent should avoid taking any action that will defeat the principal's estate plan.²⁴⁰ If, for example, the principal has made specific gifts in a will, the agent should avoid acts that would defeat those gifts by causing an

237. See, e.g., *Gagnon v. Coombs*, 654 N.E.2d 54, 62 (Mass. App. Ct. 1995) (holding agent under durable power of attorney breached her fiduciary duty by transferring principal's property to irrevocable trust of which she and principal's other children were remaindermen).

238. OHIO REV. CODE ANN. § 2111.50(C) (Anderson 1994).

239. OHIO REV. CODE ANN. § 2111.50(B)(7), (D) (Anderson 1994). The Ohio guardianship statute offers a well-thought-out plan for gifts by guardians. For example, the statute calls for a hearing if the court directs a gift of the incompetent's property of more than one thousand dollars. OHIO REV. CODE ANN. § 2111.50(E) (Anderson 1994). Furthermore, the statute directs the court to consider such factors as the incompetent's future financial needs, the tax benefits of the gift, any prior pattern of giving, and the incompetent's estate plan. *Id.* § 2111.50(D).

240. COLO. REV. STAT. ANN. § 15-14-608 (West Supp. 1995) (requiring agent to preserve principal's estate plan if possible; making agent liable to beneficiary of estate plan only for acts performed in bad faith). See, e.g., *Elkins v. Green*, No. CA 92-1451, 1993 WL 226168 (Ark. Ct. App. June 16, 1993). In *Elkins*, the principal opened a bank account that was payable on death to Green. The principal's agent, acting under a durable power of attorney, withdrew funds from the account to pay the principal's bills, even though other funds were available. *Id.* at *1. This action by the agent affected the principal's estate plan by increasing the amounts available for the takers under her will and decreasing the amount available for Green. The court allowed Green to take only the balance remaining in the account, holding that the agent was empowered to withdraw the funds. *Id.* at *4. See also *Litvinko v. Downing*, 545 S.W.2d 616 (Ark. 1977) (agent under power of attorney transferred assets that would have passed to principal's sons at her death to himself; agent violated his fiduciary duty).

ademption.²⁴¹ Thus, if the principal devises his house to his daughter, the agent should avoid selling the house if other assets are available to fund the principal's care.²⁴² Similarly, if a principal gives an agent power to fund an inter vivos trust, the agent should not transfer so many assets to the trust that the estate will be insufficient to pay gifts made under a will.²⁴³ There have been some statutory efforts to prevent an agent's act from working an ademption by extinction.²⁴⁴ If

241. See, e.g., *In re Estate of Hegel*, 668 N.E.2d 474 (Ohio 1996). In *Hegel*, an agent under a durable power of attorney sold the principal's house after the principal became incompetent. *Id.* at 475. The principal's will devised the house and its contents to the agent. *Id.* When the principal died, the agent asked the executor for the cash proceeds of the sale that remained in the principal's estate. *Id.* The probate court held the devise adeemed by extinction. *Id.*

The Court of Appeals of Ohio reversed the probate court in a 2-1 decision. *In re Estate of Hegel*, No. CA94-12-103, 1995 WL 375841 at *4 (Ohio Ct. App. June 26, 1995), *rev'd*, 668 N.E.2d 474 (Ohio 1996). Noting a policy to prevent abuse by a fiduciary when a testator is incompetent, the court held that sale by an agent when the principal is incompetent does not adeem a specific gift of the sold property, and that the taker under the will is entitled to any remaining sale proceeds. *Id.* A strenuous dissent argued that a statute provided the rule announced by the majority applied to court-appointed guardians, and that extending the rule to agents under durable powers of attorney was the exclusive province of the legislature. *Id.* at *5 (Walsh, P.J., concurring in part and dissenting in part).

The Ohio Supreme Court reversed the Court of Appeals in a 4-3 decision. *In re Estate of Hegel*, 668 N.E.2d 474 (Ohio 1996). The majority relied on the fact that the language of an Ohio statute limiting ademption by extinction in situations in which a guardian sells specifically devised property does not create a similar rule for agents under durable powers of attorney. *Id.* at 476. The dissent argued that an act performed by an agent under a durable power of attorney on behalf of an incompetent principal should not cause ademption. *Id.* at 477 (Resnick, J., dissenting).

The course of the *Hegel* litigation illustrates the uncertainty surrounding this issue. Whether an act by an agent can work an ademption by extinction remains unresolved in most states.

242. See *In re Estate of Graham*, 533 P.2d 1318, 1323-24 (Kan. 1975) (refusing to allow sale by agent under durable power of attorney of specifically devised real property to work an ademption). See also *Litvinko v. Downing*, 545 S.W.2d 616, 617 (Ark. 1977) (suggesting transfer of assets for potential use for principal's care might not violate agent's fiduciary duty even though transfer affected dispositive plan of principal); *Ruppert v. Breault*, 222 Neb. 432, 438, 384 N.W.2d 284, 288 (1986) (refusing to impose constructive trust on assets that agent under durable power of attorney converted from joint names to name of principal only).

243. See *Moses & Pope*, *supra* note 2, at 527-28 (discussing possibility of drafting provision to avoid abatement of gifts under will in cases in which agent depletes probate estate by transferring assets to trust created by principal).

244. Section 2-608 of the pre-1990 U.P.C. provides that the sale of specifically devised assets by a guardian did not work an ademption by extinction and that the specific devisee was entitled to a legacy equal to the net sale price. Many states adopted this rule. See, e.g., OHIO REV. CODE ANN. § 2107.501(B) (Anderson 1994). In 1987, section 2-608 of the U.P.C. was amended to limit ademption when property is sold by "an agent acting within the authority of a durable power of attorney for an incapacitated principal." U.P.C. § 2-606(b), 8 U.L.A. 171 (Supp. 1996).

the agent unreasonably defeats a principal's testamentary desires, the agent should be liable to the disappointed legatees.

D. Court Supervision and Limits on Liability

Some states have established procedures for court supervision of agents under durable powers of attorney. In some states, this procedure allows a court to order an account by the agent or to require a bond of the agent.²⁴⁵ The procedure may be available only after the onset of incompetency.²⁴⁶ A number of states require an attorney-in-

Many states did not similarly amend their statutes. *E.g.*, OHIO REV. CODE ANN. § 2107.501(B)(Anderson 1994).

Even such statutes are not complete protection for the taker of a specific gift because the taker is entitled only to proceeds that remain in the estate. Section 5-502 of the U.P.C., however, states:

All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled. Unless the instrument states a time of termination, the power is exercisable notwithstanding the lapse of time since the execution of the instrument.

U.P.C. § 5-502, 8 U.L.A. 514 (1987). Some have argued that under similar state statutes, the act of an agent under a durable power of attorney should change the principal's estate plan. *See, e.g.*, *In re Estate of Hegel*, No. CA94-12-103, 1995 WL 375841 at *5 (Ohio Ct. App. June 26, 1995)(Walsh, P.J., dissenting)(arguing sale of property by agent should have caused ademption; relying in part on Ohio REV. CODE ANN. § 1337.09(C), which is similar to U.P.C. § 5-502), *rev'd*, 668 N.E.2d 474 (Ohio 1996); *Funk v. Funk*, 563 N.E.2d 127, 132 (Ind. Ct. App. 1990)(Staton, J., dissenting)(arguing that sale of property by agent should have caused application of equitable conversion statute; relying in part on Ind. Code § 30-2-11-2 (repealed 1991), which is similar to U.P.C. § 5-502). *See also* FLA. STAT. ANN. § 709.08(7) (West Supp. 1995)(providing agent cannot perform specified acts that would change principal's disposition of assets at death unless expressly so authorized in governing instrument).

245. *E.g.*, CAL. PROB. CODE § 4236(b)(5)(West Supp. 1995)(allowing court to order agent to account).

246. *E.g.*, S.C. CODE ANN. § 62-5-501(D)(Law. Co-op. Supp. 1995). Section 62-5-501 provides in part:

The court, in its discretion, and at any time after the onset of physical disability or mental incompetence, on motion of an interested party or on its own motion, may require that an inventory of all deposits, choses in action, and personal property must be filed with the court, and a surety bond must be posted by the attorney in fact in the manner and amount applicable to a protected person's estate.

Id.

fact to account to a court.²⁴⁷ A court can, of course, require an agent to account if there is an allegation of impropriety.²⁴⁸

Like the principles governing liability, the level of court supervision of agents under durable powers of attorney should be higher when the principal is incompetent. At the very least, a court should order the agent to account if there is a suggestion by an interested party that the agent is mismanaging the principal's assets. Because any property fiduciary has a duty to maintain accurate records, a duty to account would not be unduly burdensome.

With respect to the limits of the agent's liability, the agent's duty to act should be lessened in situations in which the agent lacks the power to act.²⁴⁹ In California, for example, a competent spouse can control his or her incompetent spouse's interest in community property.²⁵⁰ Thus, an agent under a durable power should not be held liable for failing to act with respect to community property when the act is not permitted by the competent spouse. Similarly, if a power of attorney does not authorize an act because of the language of the instrument itself, the agent cannot, in fairness, be held liable for failing to perform the act.²⁵¹

247. *E.g.*, MO. ANN. STAT. § 404.727.1 (Vernon 1996)(allowing principal to petition for accounting by agent while principal is competent and allowing interested party to petition for accounting if principal is disabled). See Lombard, *supra* note 3, at 197. Cf. Finn-Deluca, *supra* note 69, at 893 (citing JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING 325 (1992))(stating agent under durable power of attorney has no duty to account to the court).

248. See Lombard, *supra* note 3, at 197. See also Sturgul, *supra* note 32, at 23 (suggesting provision in power requiring periodic accountings by agent ameliorates potential for problems resulting from lack of judicial supervision).

249. See, *e.g.*, CAL. PROB. CODE § 15401(c) (West Supp. 1996)(providing agent under durable power of attorney may not amend or revoke trust unless trust instrument expressly allows); *In re Estate of Denlinger*, 297 A.2d 478, 481 (Pa. 1972)(noting fiduciary not liable for losses he could not prevent, in this case a decrease in the value of real property as a result of an amendment to the housing code).

250. CAL. PROB. CODE § 3051 (West 1996); COLLIN ET AL., *supra* note 2, § 2.04, at 2-12.

251. Courts often state that powers of attorney are to be strictly construed. *E.g.*, *Sevigny v. New S. Fed. Sav. & Loan Ass'n*, 586 So. 2d 884, 886 (Ala. 1991); *Kotsch v. Kotsch*, 608 So. 2d 879, 880 (Fla. Dist. Ct. App. 1992); *King v. Bankerd*, 492 A.2d 608, 611-12 (Md. 1985). See also Sturgul, *supra* note 32, at 30 (discussing need for specificity in instruments).

There are several ways that a document might be interpreted to exclude certain powers. First, if a durable power of attorney specifically grants certain powers, a judge could hold that a specific power not included is not granted, even in the face of a provision granting general authority. *E.g.*, *King v. Bankerd*, 492 A.2d 608, 612 (Md. 1985)(discounting general grants of power as "meaningless verbiage"). See Sturgul, *supra* note 32, at 30. Second, a court could construe a provision granting general authority in such a case as giving only the additional powers needed to carry out the specifically granted powers. *E.g.*, *Sevigny v. New S. Fed. Sav. & Loan Ass'n*, 586 So. 2d 884, 886-87 (Ala. 1991). See Sturgul, *supra*

Furthermore, a situation may arise in which the agent cannot act with respect to a particular asset as a result of circumstances beyond the agent's control. For example, a durable power of attorney which is not notarized may not be valid to convey real property located in a particular state. In such a case, the agent should not be held liable for failing to act when he cannot act. On the other hand, the agent should not simply allow the property to waste away, and perhaps has a duty to institute a guardianship proceeding with respect to the real property. One reasonable alternative would be to empower a court to allow actions that are otherwise impermissible under the durable power of attorney. This would allow an agent to act as a limited guardian with court supervision.

In sum, then, there should be a difference between the standard governing the behavior of an agent of a competent principal and the standard governing the agent of an incompetent principal.²⁵² Although differing standards lead to difficulties, they are necessary to both respect and protect the principal.²⁵³

The balance between protecting the interests of the principal and maintaining the flexible efficiency of the durable power of attorney is difficult to design. Some have expressed concern that too much regulation of agents defeats the goal of the durable power of attorney.²⁵⁴ In addition, commentators fear that too much court supervision of agents is undesirable. More court supervision is warranted, however, when the principal is incompetent.²⁵⁵

The law governing use of a durable power of attorney should be changed to enhance the agent's duty. In the past, protection of assets of an incompetent was accomplished in one of two ways. The person could either create a trust while competent, or a court could appoint a guardian when the person lost competence. Both mechanisms are directive. The trust instrument directs the trustee to act and the guard-

note 32, at 30. See generally Finn-Deluca, *supra* note 69, at 894 (discussing various approaches to interpretation of durable powers of attorney).

252. This point is not often discussed, although at least one commentator has hinted at it. Lombard, *supra* note 3, at 197-98. In discussing the rights of third parties to petition a court for an accounting by an agent, Lombard notes that there is an "important difference between ordinary conduct by an attorney-in-fact and conduct by an attorney-in-fact under a Durable Power after the principal [has] become incompetent." *Id.* at 198. Lombard concludes that third parties should not be permitted to interfere with the principal-agent relationship while the principal is competent. *Id.*

253. See Lombard, *supra* note 3, at 198 (discussing difficulty of drafting statute that appropriately regulates agents of both competent and incompetent principals).

254. Lombard, *supra* note 3, at 198 (suggesting desirable flexibility of durable power of attorney could be curtailed by overregulation of the agent's acts).

255. See Friedman & Savage, *supra* note 90, at 274 (noting that incompetent beneficiaries of fiduciary relationships are "thought to need special protection" and that fiduciaries are under closer court supervision when their wards are incompetent).

ianship statute directs the guardian to act. The difficulty of using a durable power of attorney to accomplish the same purpose is that the durable power is merely an empowerment mechanism. Under current law, the principal is left to rely largely on the agent's sense of duty to protect the principal's assets. Because the durable power of attorney is intended to function as an alternative to guardianship law, the principles that courts apply after the principal loses competence should more closely resemble guardianship law than traditional agency law.

Aside from enhanced protection of incompetent principals, another salutary effect of a better-defined standard of behavior for agents under durable powers of attorney would be a likely increase in the willingness of third parties to deal with agents. Many have noted that third parties sometimes refuse to deal with agents under durable powers.²⁵⁶ Without a reasonable assurance that third parties will deal with the agent, the durable power of attorney is not an acceptable alternative to either the trust or a guardianship in the event of disability.²⁵⁷

If a heightened agent duty is adopted, the clear possibility of liability might discourage corporate fiduciaries from serving as agents under durable powers of attorney. This does not raise a significant issue because most corporate fiduciaries are reluctant even now to serve as agents.²⁵⁸ In fact, a better-defined standard of behavior for agents under durable powers of attorney might make corporate fiduciaries *more* willing to serve as agents because it is easier to act in accordance with a known duty than to act in accordance with a vague duty.

The same is true for individuals deciding to serve as agents. Again, the argument that a higher standard will discourage individuals from serving as agents is not compelling. Most agents are family members or close friends who serve because they feel bound to do so. For such agents, a clearer standard is desirable because they can get advice about what is required of them and act accordingly.²⁵⁹

In addition, attorneys should avoid the use of broad exculpatory clauses. Even a heightened level of agent responsibility imposed by courts will not help the incompetent principal whose agent is protected by an exculpatory provision.

256. *E.g.*, Lombard, *supra* note 3, at 201.

257. *Id.*

258. *Id.* at 203. Based on personal experience and conversations with other attorneys, Lombard suggests that corporate trustees prefer to serve only in the "true fiduciary [roles] of trustee and guardian." *Id.*

259. *See, e.g.*, Estate of Griffin, 160 Misc. 2d 871, 874 (N.Y. Surr. 1994)(acknowledging principal's sister, who served as agent under durable power of attorney, appeared too unsophisticated to understand fiduciary role).

VII. CONCLUSION

Looking at the state of the law as it exists today, one is left with the uneasy feeling that durable powers of attorney are being used with a great deal of faith that things will work out for the best. Clients are being told that the agent under the durable power of attorney will be able to take care of all of the principal's financial needs in case of the principal's disability. While this is true, such advice probably leaves many clients believing that the agent is under a duty to protect them in case of disability.

The agent, on the other hand, probably feels that although he is empowered to act on behalf of the principal, he is under no duty to do so. The fact that it is generally agreed that the agent is held to some fiduciary standard when he acts does not answer the larger question: should a duty to act be imposed on the agent?

Courts should adopt a rule that, once an agent agrees to serve as an agent, the agent should act for the principal whenever the interests of the principal require action, and whenever the principal would have intended action. After the principal loses competence, this standard would require the agent to assume control of all of the principal's assets. Further, an agent's power to resign after the principal becomes incompetent should be limited so that there will be continuous management of the principal's assets.

If the agent is unwilling to accept the responsibility that this heightened duty entails, then he should refuse to serve as agent. Attorneys often state that the purpose of creating a durable power in disability planning is to avoid a guardianship proceeding. However, this is somewhat misleading. The true purpose is to provide an effective alternative to a guardianship. If the agent under a durable power is not held to a standard similar to that of a guardian once the principal is incompetent, then the use of a durable power of attorney is simply not an effective alternative. Indeed, if the agent is unwilling to take responsibility for managing the principal's assets, or to assume the potential liability that would flow from nonmanagement or mismanagement of those assets, then a guardianship would better serve the interests of the principal.

It could be argued that this proposed higher standard of conduct will discourage people from agreeing to serve as agents. If it discourages people who would not be diligent in their roles as agents from serving as such, then vulnerable members of our society would be better protected than they are under the law as it now exists. On the whole, the burden of any loss of flexibility in the durable power of attorney will be far outweighed by the benefit of having it function as the truly effective alternative to guardianship that its creators intended the durable power of attorney to be.