The Law Commission

Working Paper No 69

The Incapacitated Principal

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It does not represent the final views of the Law Commission.

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Contents

		Paragraph	Page
PART I	INTRODUCTION	1-6	1
	The problem of the incapacitated principal	1-4	1
	Terms of reference	5	2
	Scheme of the paper	6	2
PART II	THE PRESENT LAW	7-33	5
	The Court of Protection	8-11	5
	Contractual incapacity	12-15	7
	Liability of a mentally incapable person	16-22	9
	(a) Liability for "necessaries"	16-17	9
	(b) Liability of a mentally incapable person in respect of a contract which does not concern "necessaries"	18-22	10
	(i) Where the incapacity is known to the other contracting party	18	10
	(ii) Where the incapacity is not known to the other party	19-22	11
	The rights and liabilities of the mentally incapable person's agent	23-32	13
	(a) The agent's liability to the third party	24-27	13
	(b) The agent's right to be indemnified by his principal	28-30	15

		Paragraph	Page
	(c) The agent's liability to his principal	31-32	16
	Summary	33	18
PART III	ARGUMENTS FOR AND AGAINST ENDURING POWERS OF ATTORNEY	34-48	19
	General arguments in favour of an enduring power of attorney	34-39	19
	General arguments against an enduring power of attorney	40-48	21
PART IV	CONDITIONS AND SAFEGUARDS	49-171	27
	Introductory	49-52	27
	Mental capacity of donor at time of grant	53-63	28
	(a) Standard of mental capacity	53-56	28
	(b) Evidence of mental capacity	57-63	29
	Formalities of the grant	64-72	31
	(a) General	64-65	31
	(b) Expression of intention	66	32
	(c) Witnessing	67-70	32
	(d) Acceptance by attorney	71-72	34
	Property in respect of which an enduring power of attorney may be granted	73-81	35
	Qualification and number of attorneys	82-96	38
	(a) General	82-86	38
	(b) Arguments against restrictions	87-90	40
	(c) Arguments in favour of restrictions	91-94	41
	(d) A provisional view	95-96	42
	Filing or registration requirements	97-101	43
	Accounts	102-113	44
	(a) General	102-103	44
	(b) Interested parties	104-106	46

		Paragraph	Page
	(c) Application to an independent body	107-109	47
	(d) Provisional views	110-113	48
	Extent of the attorney's power	114-121	49
	(a) General	114-115	49
	(b) Possible restrictions	116-119	50
	(c) Provisional views	120-121	52
	Power or duty to act	122-135	53
	(a) Introductory	122	53
	(b) Position of attorney under an ordinary power	123-126	54
	(c) Special considerations for an enduring power	127-129	55
	(d) Provisional views	130-135	56
	Remuneration of the attorney	136-140	60
	Time limit on the power	141-148	61
	Termination of an enduring power of attorney	149-164	64
	(a) Appointment of receiver	149-158	64
	(i) General	149-151	64
	(ii) On application of attorney	152	65
	(iii) On application of other parties	153-156	66
	(iv) Discretion to refuse receivership	157-158	67
	(b) Termination by the courts and appointment of substitute attorney	159-161	68
	(c) Termination under the general law	162-164	69
	Third parties	165-166	70
	Ademption	167-171	71
PART V	CONCLUSIONS	172-193	74
	The incapacitated principal: a restatement of the problem	172	74
	Possible solutions	173	74

		Paragraph	Page
	Other problems	174	75
	The enduring power of attorney	175-176	75
	Conditions and safeguards	177-188	76
	Provisional proposal	189-193	80
APPENDIX	VIEWS AND PROPOSALS OF OTHER BODIES		82

THE LAW COMMISSION

THE INCAPACITATED PRINCIPAL

PART I INTRODUCTION

The problem of the incapacitated principal

1. The question of the effect of mental incapacity on agency first came to our attention when we were considering the law relating to powers of attorney. The authority conferred by a power of attorney is revoked by the supervening mental incapacity of the donor.[1] This is part of the general law of agency and appears to be founded on the principle that "where such a change occurs to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him."[2] In our Working Paper on "Powers of Attorney"[3] we suggested that it might be convenient if it were possible to grant a power of attorney under which the donee would be entitled to continue to handle the affairs of the donor, notwithstanding the latter's incapacity, resulting, for example, from mental illness.

2. This suggestion attracted much comment, and proposals were put to us by The Law Society, amongst others, for the creation of special powers of attorney that were designed to survive the mental incapacity of the donor. They submitted a memorandum to us in which they set out the difficulties arising under the present law, which they considered would be remedied by provision for such special powers. The substance of the memorandum appears in the Appendix to this paper but the

1 However, the attorney is not prejudiced by the revocation unless he knows of it: Powers of Attorney Act 1971, s. 5(1).

2 Drew v. Nunn (1878) 4 Q.B.D. 661, 666 per Brett L.J. See also paras. 12-14, below.

3 (1967) Working Paper No. 11, para. 21.

main points that were made about the existing law were as follows:-

(a) There is uncertainty as to the exact circumstances in which mental incapacity revokes a power, and it is particularly difficult for the attorney of an elderly person whose faculties are failing to decide if and when the power has been revoked by mental incapacity.

(b) There are probably many attorneys who continue to act when in strict law the power has been revoked. Most of these act honestly and in the best interests of their principals, but in doing so they put themselves at risk with regard to third parties or their principals. A further result is that the law is being ignored on a large scale, which is an undesirable situation.

(c) The average layman would probably be very surprised to learn that a power of attorney is revoked just at the point when he would regard it as being most needed.

(d) Whilst accepting that the Court of Protection exists to look after the property and affairs of those who, by reason of mental disorder, are unable to do so themselves, the procedure is, it is said, inevitably cumbersome, time-consuming and expensive. Also there is some reluctance to resort to it by relatives of people whose inability to manage their affairs is the result of old age or brain damage caused by a stroke or accident, or other disabilities which are not mental disorders in the narrower sense.

The Law Society also pointed out that the scale of these problems is likely to increase with the growing ability of medical science to keep people alive after many of their faculties have become dulled.

3. However, after considerable discussion, it seemed to us at that time that the problem could not properly be dealt with in isolation from a complete review of the procedure for dealing with the property of persons of unsound mind, and we said as much in our Report to the Lord Chancellor.[4]

4. The problem has been examined by various law reform bodies in the Commonwealth, including those of New South Wales, Ontario, the Australian Capital Territory, Manitoba, and British Columbia. Their views and recommendations, together with those of The Law Society, are summarised in an Appendix, which appears at the end of this paper. The Appendix also contains summaries of schemes for powers of attorney which would survive the mental incapacity of the donor, which have been put forward in the United States of America, and adopted in some States.

Terms of reference

5. On 16 March 1973 the Lord Chancellor requested the Law Commission[5]

> "to consider the law and practice governing powers of attorney and other forms of agency in relation to the mental incapacity of the principal, and to make recommendations."

Scheme of the paper

6. Our consideration of the matters within these terms of reference has been divided up into four further parts as follows:-

PART II THE PRESENT LAW

Here we set out the present law and practice governing powers of attorney and other forms

4 Powers of Attorney (1970), Law Com. No. 30; Cmnd 4473, para. 27.

5 Law Commissions Act 1965, s. 3(1)(e).

of agency in relation to the mental incapacity of the principal.

PART III ARGUMENTS FOR AND AGAINST ENDURING POWERS OF ATTORNEY

The most important question canvassed in this paper is whether it is desirable to introduce a special kind of agency or power of attorney which survives the incapacity of the principal. Because of the importance of this question we set out the arguments on each side in detail. Such agency or power will be described, for convenience, as an "enduring power of attorney" in the rest of the paper.

PART IV CONDITIONS AND SAFEGUARDS

Here we consider the conditions and safeguards that might be required if the enduring power of attorney were to be introduced into English law. Reference will be made to the views and proposals of other bodies, including those that are summarised in the Appendix.

PART V CONCLUSIONS

We conclude with our provisional view to the effect that the law should be changed so as to permit enduring powers of attorney, subject to the conditions we recommend.

APPENDIX

In the Appendix we include the views and proposals of The Law Society; the Law Reform Commissions of Ontario, Manitoba, British Columbia, the Australian Capital Territory and New South Wales; and the Commissioners on Uniform State Laws in the United States of America.

PART II THE PRESENT LAW

7. The mentally ill are vulnerable to exploitation by others and public policy requires that they should be shielded from the consequences of their own acts or omissions. The law, both civil and criminal, provides for their protection in a variety of ways over a wide area, much of which is outside the scope of the present paper. In particular there is the jurisdiction of the Court of Protection itself and the protection of a more general kind that is provided by the law regarding contractual incapacity. Our terms of reference do not require us to consider the reform of either, but something must be said about each as a background against which to consider the particular problem of the incapacitated principal.

The Court of Protection

8. The Court of Protection's control over the property and affairs of the mentally ill is regulated by the provisions of Part VIII of the Mental Health Act 1959 and by rules made under it. The jurisdiction is invoked by an originating application made to the Court by anyone who considers that the affairs and property of another person require the protection of the Court. The gist of the application is that the person in question is "incapable, by reason of mental disorder, of managing and administering his property and affairs".[6] The Court's powers are very wide and its general functions are to do all things that may appear necessary or expedient for the maintenance or benefit of the patient, or members of his family or of any other person for whom the patient might be expected to provide if he had full capacity.[7] These functions may be exercised through a receiver appointed by the Court to manage the patient's property and affairs under the Court's direction.[8]

6 Mental Health Act 1959, s. 101.

7 Ibid., s. 102(1).

8 Ibid., s. 105(1).

9. The person making the application usually applies for the appointment of a receiver and in most cases a relative or close friend will be appointed. The Court is, however, reluctant to appoint someone who is much older than the patient or whose interests may conflict with those of the patient or who does not have much time to devote to the patient's affairs. Regard should be had, so far as possible, to the wishes and inclinations of the patient.[9] Where a competent and trusted friend has already been given a power of attorney by the patient he might well be the most appropriate person to appoint as a receiver. Where no other suitable person is available or willing to act the Official Solicitor or a local authority welfare officer is appointed. Before making a receivership order the Court will require satisfactory medical evidence of the patient's mental incapacity and evidence of the patient's financial situation.[10] Where the property of the patient does not exceed £1000 in value the Court may make an order in a summary way directing one of its officers or some other fit and proper person to deal with the property.[11] Where an order of receivership is made and the receiver is someone other than the Official Solicitor he is usually required, as a condition of his appointment, to give security in respect of the receivership.[12] Once appointed the receiver is required to deliver periodic accounts to the Court.[13]

10. As a further preliminary to the making of a receivership order the Court will need to know what family the patient

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9 Re Leacock (1838) Lloyd & G. 498.

10 Court of Protection Rules 1960, S.I. 1960, No. 1146, r. 38, as substituted by Court of Protection (Amendment) Rules 1970, S.I. 1970, No. 1783, r. 5.

11 Ibid., r. 6, as amended by Court of Protection (Amendment) Rules 1973, S.I. 1973, No. 791, r. 3.

12 Ibid., r. 65.

13 Ibid., r. 70.

has and will enquire whether he has made a will,[14] so that steps may be taken to facilitate the preservation of the interests of any person arising under a will, codicil, intestacy, perfected gift or nomination.[15] A patient who has testamentary capacity may make a will and where he has no such capacity the Court may, in certain circumstances, make a will for him.[16]

11. Although the patient may still have mental capacity, at least as regards certain acts, the making of a receivership order brings to an end any authority that may have been vested in anyone other than the receiver to manage the patient's property and the patient is incapacitated from dealing with it himself.[17] A full receivership order cannot usually be obtained quickly and there are sometimes problems, such as the sale of the patient's house or business, that need urgent attention. In such cases the Court may make orders before the formalities for a receivership order have been completed.[18]

Contractual incapacity

12. At common law mental disorder, whether congenital or resulting from illness, accident or senility, annuls the capacity to contract if it results in a person being unable to understand the nature and effect of the contract in question. In Boughton v. Knight[19] it was said that where a person seeks to avoid liability under a contract because of lack of mental capacity "... the question will be, was he or she capable of

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14 Ibid., r. 79.

15 Mental Health Act 1959, s. 107.

16 Ibid., s. 103(1)(dd) (added by the Administration of Justice Act 1969, s. 17(1)).

17 Re Walker [1905] 1 Ch. 160; Re Marshall [1920] 1 Ch. 284.

18 Mental Health Act 1959, s. 104 and Court of Protection Rules 1960, S.I. 1960, No. 1146, r. 47.

19 (1873) L.R. 3 P.& D. 64, 72.

understanding the nature of the contract which he or she had entered into."

13. In any particular case the question of whether the common law test is satisfied may be a difficult one. A person may suffer from weakness of mind as his faculties begin to fail, and may or may not have reached the stage where his ability to understand the nature and effect of a particular contract is impaired. A mentally disordered person may be irrational or obsessional on some matters or at some times, while remaining lucid and reasonable on other matters and at other times. Despite the practical difficulties it is clear that at some point mental weakness or disorder is such as to render a person incapable of understanding the nature and effect of a relevant transaction and in this paper we describe this state as mental incapacity in relation to that transaction. A person's mental state may also be such as to render him mentally incapable for all practical purposes.

14. At common law it therefore seems that mental incapacity in relation to contract may be permanent or temporary, general or, as it were, local. The incapacity may affect all transactions at all times, or only some or at some times. As we have indicated earlier[20] an agent's authority ceases when his principal ceases to have mental capacity. Thus, total and permanent mental incapacity in the principal will revoke the agent's authority totally and permanently, but it seems that partial or temporary incapacity may only revoke the agent's authority <u>pro tanto</u>. It would seem that, so long as the transactions which it is desired that the agent should effect are ones which the principal has the mental capacity to make, the agent may continue to act. He cannot, however, bind the principal by contracts for which the principal lacks capacity at the material time. Where the agent's authority derives from the grant of a power of attorney, the principles just considered apply in broadly the same way, subject to statutory

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20 See para. 1, above.

modifications that are considered later.[21]

15. As has already been noted,[22] the Court of Protection may assume jurisdiction where a person is "... incapable, by reason of mental disorder, of managing and administering his property and affairs". In some cases, weakness of mind or partial mental disorder may bring a person into this category and justify the making of a receivership order (particularly if his estate is large and difficult to administer). He may, however, still have mental capacity in some respects, so that, but for the receivership order, he, or his agent or attorney on his behalf, could have continued to act in respect of certain transactions.[23]

Liability of a mentally incapable person

(a) Liability for "necessaries"

16. The contractual incapacity of a mentally incapable person has been likened to that of a minor,[24] and there are many similarities. The Sale of Goods Act 1893 provides that where necessaries are sold and delivered to a minor, or to a person who by reason of mental incapacity is incompetent to

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21 Powers of Attorney Act 1971, s.5; see paras. 27 and 32, below.

22 See para. 8, above.

23 See, for example, Re Walker [1905] 1 Ch. 160, 170, where a woman who had been found a lunatic under the Lunacy Act 1890 (the precursor of the Mental Health Act 1959), which vested control of the lunatic's property in the Crown, had executed a deed with regard to her property. Vaughan Williams L.J. said that on the medical evidence before him "... apart from the unfortunate delusions which resulted, and I must take it properly resulted, in her being found a lunatic, she is of such mental capacity that she could generally be expected to deal with her property in a reasonable and sensible manner".

24 Thompson v. Leach (1691) 3 Mod. 301, 310; 87 E.R. 199, 205. In re Rhodes (1890) 44 Ch. D. 94, 97, per Kay J. and at p. 107, per Lindley L.J.

contract, he must pay a reasonable price for them, and "necessaries" means goods suitable to the condition in life of the minor or other person, and to his actual requirements at the time of the sale and delivery.[25] This provision is no doubt a restatement of the common law, and similar principles apply to necessaries other than goods.[26] Food, clothing, accommodation,[27] medical attendance[28] and the services of a lawyer[29] may qualify as "necessaries", depending on the circumstances of the particular case and the needs of the individual concerned. The policy on which the incapable person's liability for "necessaries" is based would seem to be that people should not be deterred from providing for the needs of the mentally incapable for fear of not recovering payment.

17. A person who provides money for the purchase of necessaries for the benefit of a mentally incapable person is entitled to be subrogated to the rights of the creditor supplying the necessaries.[30] Expenses reasonably incurred in attending to the day-to-day needs of an incapable person would therefore ordinarily be recoverable.[31]

(b) Liability of a mentally incapable person in respect of a contract which does not concern "necessaries"

(i) Where the incapacity is known to the other contracting party

18. A contract may always be avoided where one party makes it knowing of the other's mental incapacity, and the incapable person incurs no liability except to the extent that he may

25 Sale of Goods Act 1893, s. 2.

26 In re Rhodes (1890) 44 Ch. D. 94, 105, per Cotton L.J.

27 Chapple v. Cooper (1844) 13 M. & W. 252, 258; 153 E.R. 105, 107.

28 Huggins v. Wiseman (1690) Carth. 110; 90 E.R. 669.

29 Helps v. Clayton (1864) 17 C.B. (N.S.) 553; 144 E.R. 222.

30 In re Beavan [1912] 1 Ch. 196.

31 Cf. In re Rhodes (1890) 44 Ch. D. 94.

have been supplied with "necessaries". The policy of the law is that - "necessaries" apart - the person who is known to be incapable should be protected against incurring liability. As Lord Tenterden C.J. said in Sentance v. Poole:[32]

> "... it is very important that Courts of justice should afford protection to those individuals who are unfortunately unable to be their own guardians."

(ii) Where the incapacity is not known to the other party

19. Although a mentally incapable person lacks contractual capacity it is only where his incapacity is known to the other party at the time of making the contract that it is a ground for avoiding the contract.[33] The burden of proving that knowledge rests with the incapable person. If he fails to discharge it he is bound by the contract and his incapacity is irrelevant. He may thus be held liable for breaking contracts which were not beneficial to him [34] and which might not have been binding on a minor in an equivalent situation.

20. The policy of the law seems to be that although it is important that the mentally incapable should be protected[35] it is even more important that a person who makes a contract should not be prejudiced by incapacity in the other party of which he was unaware. In Drew v. Nunn Bramwell L.J. said:[36]

> "... insanity is not a privilege, it is a misfortune which must not be allowed to injure innocent persons; it would be productive of mischievous consequences,

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32 (1827) 3 Car. & P. 1, 3; 172 E.R. 295, 296.

33 Dane v. Kirkwall (1838) 8 Car. & P. 679; 173 E.R. 670; Imperial Loan Co. v. Stone [1892] 1 Q.B. 599.

34 See, for example, Imperial Loan Co. v. Stone [1892] 1 Q.B. 599; York Glass Co. Ltd. v. Jubb (1925) 134 L.T. 36.

35 See para. 18, above.

36 (1879) 4 Q.B.D. 661, 668.

if insanity annulled every representation made by the person afflicted with it without any notice being given of his malady."

In Elliott v. Ince Lord Cranworth L.C. made the same point:[37]

> "... a contrary doctrine would render all ordinary dealings between man and man unsafe. How is a shopkeeper who sells his goods to know whether a customer is or is not of sound mind?"

21. It therefore appears to be the general rule that a contract made with a mentally incapable person is binding on him if the other party did not know of the incapacity when the contract was made. This applies to all kinds of contract including a purchase of goods,[38] a lease of premises,[39] a guarantee of a debt[40] and, we would suppose, a contract of agency, since the "innocent" shop-keeper, landlord or money-lender would seem to deserve no better protection than the "innocent" attorney, solicitor or estate agent. As between the parties to it, a contract of agency would seem to be binding if made by an incapable principal with an agent who did not know of his incapacity. This is a point to which we return later.[41]

22. The policy of protecting the party who contracts with a mentally incapable person without knowing of the incapacity applies whether the incapable person acts on his own behalf or through an agent. The actual authority of the agent may be terminated or displaced by the incapacity of his principal but a contract entered into by the agent within the scope of his apparent authority will be binding on the incapable principal.[42] Of course, this would not apply where the other

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37 (1857) 7 De G.M. & G. 475, 487; 44 E.R. 186, 190.

38 Drew v. Nunn (1879) 4 Q.B.D. 661.

39 Dane v. Kirkwall (1838) 8 Car. & P. 679; 173 E.R. 670.

40 Imperial Loan Co. v. Stone [1892] 1 Q.B. 599.

41 See para. 28, below.

42 Drew v. Nunn (1879) 4 Q.B.D. 661; Taylor v. Walker [1958] 1 Lloyd's Rep. 490. Cf. Powers of Attorney Act 1971, s. 5(2).

contracting party knew of the incapacity because he would then know that the authority did not exist in fact.

The rights and liabilities of the mentally incapable person's agent

23. We come now to the most difficult part of the present law. It concerns the rights and liabilities of the agent who acts for a principal who is mentally incapable. The situation is three-cornered involving the principal, the agent and the third party. We have already considered the rights of the third party vis-à-vis the incapable principal.[43] We must now discuss (a) the agent's liability to the third party, (b) the agent's right to be indemnified by his principal and (c) the agent's liability to his principal.

(a) The agent's liability to the third party

24. An agent who contracts with a third party without disclosing the fact of his agency may be liable to the third party; this is so whether or not his principal be mentally capable and is part of the ordinary law of agency. It is also part of the ordinary law of agency that an agent who purports to act on behalf of a principal impliedly warrants the existence of the principal and of the authority so to act.[44] If the principal was mentally incapable when he purported to invest the agent with authority to act for him, or if he were to become so later, the agent might be liable to the third party for breach of the implied warranty of authority. It would be immaterial that the agent acted in the belief that his principal had mental capacity.[45]

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43 Paras. 16-22, above.

44 Collen v. Wright (1857) 8 E. & B. 647; 120 E.R. 241.

45 Yonge v. Toynbee [1910] 1 K.B. 215. But see para. 27, below as to the case where the agent acts under a power of attorney.

25. It should not be concluded that the agent is always liable to be sued for breach of warranty of authority whenever he makes a contract on behalf of a mentally incapable principal. If the third party were unaware of the incapacity he would be entitled to sue the principal,[46] so the agent would not be liable.[47] If, on the other hand, the third party knew of the principal's incapacity, he would not be able to sue the agent for breach of warranty of authority as the agent could not be taken to warrant the truth of something that the third party knew to be false.[48]

26. There are, however, certain transactions which may be set aside on proof of the principal's mental incapacity, even if this was not known to the other party. In Elliot v. Ince[49] Lord Cranworth L.C. said that though a lunatic was bound by an executed contract where the other party was unaware of his lunacy "... no such question [of the binding nature of the transaction where there was ignorance of the insanity] can arise when there is no contract for value - when in fact there has been merely a dealing by the lunatic with his own property without any consideration passing from others". In that case, therefore, a deed by a lunatic, effected through her attorney, altering the provisions of a settlement, was held invalid. Similarly, a voluntary disposition of shares, effected by the attorney of a mentally incapable person, has been held to be a nullity.[50] Such transactions may be effected through an agent or attorney, provided that the necessary authority has been conferred, but might at common law be set aside on proof of mental incapacity despite lack of knowledge, if not for value. Similarly a solicitor, who continues to act for a person in civil proceedings after that person has become mentally incapable, may be liable to pay the other party's

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46 See para. 22, above.

47 Beattie v. Lord Ebury (1872) 7 Ch. App. 777.

48 Smout v. Ilbery (1842) 10 M. & W. 1; 152 E.R. 357, as explained in Yonge v. Toynbee [1910] 1 K.B. 215, 227-228; McManus v. Fortescue [1907] 2 K.B. 1.

49 (1857) 7 De G.M. & G. 475, 487; 44 E.R. 186, 190.

50 Daily Telegraph v. McLaughlin [1904] A.C. 776.

costs from the moment that his authority to act has been terminated by the incapacity.[51]

27. If the agent acts under a validly granted power of attorney which has been revoked by the donor's mental incapacity, however, the position is now regulated by statute. Where a third party deals with the donee of the power, without knowledge of the revocation, the transaction is as valid as if the power had then been in existence.[52] Moreover the agent who acts in pursuance of the power at a time when it has, without his knowledge, been revoked by the donor's incapacity, incurs no liability to the other party to the transaction.[53] Thus for example a voluntary disposition of shares may not be set aside if effected by an agent who has dealt with the transferee in pursuance of a power of attorney, although it may be set aside because of the principal's incapacity if effected by an agent without a power of attorney or if effected by the principal himself.

(b) The agent's right to be indemnified by his principal

28. Upon general principles an agent is entitled to an indemnity from his principal against liabilities incurred by the agent in executing the orders of his principal, unless those orders are illegal, or unless the liabilities are incurred in respect of some illegal conduct of the agent himself, or by reason of his default.[54] Where a contract of agency has been made by a mentally incapable principal the agent may hold him to the terms of the contract provided that he was unaware of the incapacity when the contract was made.[55]

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51 Yonge v. Toynbee [1910] 1 K.B. 215.

52 Powers of Attorney Act 1971, s. 5(2).

53 Ibid., s. 5(1).

54 Thacker v. Hardy (1878) 4 Q.B.D. 685, 687, per Lindley J. (affirmed on appeal).

55 See para. 21, above.

He would, therefore, be entitled to an indemnity from his mentally incapable principal for liabilities incurred in carrying out his instructions, provided that he carried out those instructions in ignorance of the incapacity. Once he knew of the incapacity, however, he would know that he no longer had authority to act, and he would have no contractual right to indemnity in respect of subsequent acts.

29. The agent's right to indemnity does not necessarily rest in contract. Where there is no formal contract of agency it may be founded in quasi-contract.[56] The following statement of principle was quoted with approval by Lord Halsbury L.C. in Sheffield Corpn. v. Barclay:[57]

> "... when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done."

30. It may therefore be concluded that any expense that an agent may incur in carrying out the instructions of a principal who is mentally incapable, although not to the agent's knowledge, may be recovered from the principal by the agent. His right to indemnity would seem to cover damages that he might have to pay a third party for breach of warranty of authority where the lack of authority was caused by incapacity in his principal of which he was unaware.

(c) The agent's liability to his principal

31. An agent who knows that his principal is or has become mentally incapable is entitled to be reimbursed for "necessaries" supplied by him or paid for with his money,

56 Adamson v. Jarvis (1827) 4 Bing. 66; 130 E.R. 693; Humphrys v. Pratt (1831) 5 Bli. (N.S.) 154; 5 E.R. 269; Betts v. Gibbins (1834) 2 Ad. & E. 57; 111 E.R. 22; Toplis v. Grane (1839) 5 Bing. N.C. 636; 132 E.R. 1245.

57 [1905] A.C. 392, 397.

provided that the price is reasonable.[58] If he engages in other transactions he does so at his peril. In Beall v. Smith James L.J. said:[59]

> "... every person so constituting himself officiously the guardian, committee, and protector of a person of unsound mind does so entirely at his own risk, and he must be prepared to vindicate the necessity and propriety of his proceedings if they are called in question, and to bear the consequences of any unnecessary and improper proceedings."

The safe course for a person who wished to constitute himself "the guardian, committee, and protector" of a mentally incapable person would be to apply to the Court of Protection to be appointed as receiver of that person's estate. Otherwise the officious guardian, whether he be agent, attorney or family friend, must run the risk of being sued.[60]

32. An agent who acts for a mentally incapable principal in ignorance of his incapacity is entitled to indemnity from the principal for any liability arising out of any act which his principal requires him to perform provided that the act is not illegal or manifestly tortious.[61] It must follow that he cannot be sued by his principal for doing any such act, although there appears to be no reported case in which the point was considered. So far as attorneys are concerned the position has been clarified by the Powers of Attorney Act 1971, section 5(1), which provides that a donee of a power of attorney who acts in pursuance of the power at a time when it has been revoked[62] is not to incur liability to the donor by reason of the revocation, provided that he did not know of it at the time.

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58 See paras. 16 and 17, above.

59 (1873) 9 Ch. App. 85, 91-92.

60 Cf. Ex parte Chumley (1790) 1 Ves. 156; 30 E.R. 278.

61 See paras. 28-30, above.

62 For example, by supervening mental incapacity.

Summary

33. The present law and practice governing powers of attorney and other forms of agency in relation to the mental incapacity of the principal may be summarised in a few sentences. Where the agent or attorney acts for a principal whom he knows to be mentally incapable he does so at his peril unless he confines his ministrations to the provision of "necessaries". Where the agent (but not the attorney) is unaware of his principal's incapacity there is the risk, in certain exceptional situations,[63] that he may incur liability to third parties for breach of an implied warranty of authority but, if so liable, he is entitled to indemnity from his principal. In other respects the ignorance of an agent or attorney of his principal's incapacity protects him from proceedings by his principal or by anyone else, except in respect of conduct which is actionable according to the general law.[64]

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63 See paras. 25-27, above.

64 For example, fraud, conversion or breach of contract.

PART III ARGUMENTS FOR AND AGAINST ENDURING POWERS OF ATTORNEY

General arguments in favour of an enduring power of attorney

34. The Law Society's arguments in favour of allowing a power of attorney to survive the mental incapacity of the principal were outlined in Part I,[65] and the publications of various overseas law reform bodies[66] put forward a similar point of view. One of the main arguments advanced is that many people would like to be able to arrange their affairs in this way (and many, it is said, would be surprised to be told that this is not possible under the present law). It is also said that becoming mentally incapacitated, like going abroad, is one of the occasions when a principal, being unable to act for himself, most needs his attorney to be able to act for him. If in these circumstances a person wishes to provide for the management of his affairs by someone he knows and trusts, even if this means losing some of the safeguards of a Court of Protection receivership, why should the law not allow him to do so?

35. The law after all does not, as a matter of principle, prevent people from divesting themselves of control over their property. A person is free to decide who is to administer his estate on his death and how his property is to devolve. It is only if he fails to make such provision that the law provides for detailed control and supervision over both the appointment of personal representatives and how the estate is to be dealt with. The law allows a person to set up a discretionary trust, with himself as principal beneficiary, which will continue to be operative despite any supervening mental incapacity. A discretionary trust is not, however, a satisfactory alternative to an enduring power of attorney.

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65 See para. 2, above.

66 Their recommendations are summarised in the Appendix.

The immediate and irreversible loss of control by the settlor even while he still has mental capacity, the tax implications, and the stamp duty and legal expenses, mean that this is a course which few, if any, well-advised people would wish to adopt.

36. It is said that a Court of Protection receivership, whilst providing the best and, in certain cases, the only solution, is not ideal in others, for example where management of a person's affairs is required only for a short period or where the sums involved are small. It has been suggested by some people that making an application to the Court causes distress to the patient and his family and that the Court's procedure is unavoidably "cumbersome, time-consuming and expensive."[67] Nor would a receivership seem appropriate in the case of people who, while normally capable of managing their affairs, intermittently suffer from mental incapacity such as, technically, to bring them within section 101 of the Mental Health Act 1959. With modern methods of treatment a person in this category is often only so disordered as to be unable to manage his affairs for comparatively short periods. An enduring power of attorney, which would enable his attorney to look after his affairs during his temporary but recurrent periods of incapacity, might be a suitable and useful solution in these circumstances.

37. It is also pointed out that applying the existing law puts on honest and conscientious attorneys the difficult burden of deciding when the donor of a power of attorney, who gradually becomes more and more senile, has reached the stage of incapacity when the power is in law revoked. The attorney may incur risk if he continues to act after evidence of his principal's mental incapacity has come to his notice. Although the attorney may continue to supply his principal with necessaries or to see that he is so supplied by others,

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67 See, in particular, the arguments of The Law Society at para. 2(d), above, but cf. para. 48, below.

transactions such as selling his house or buying him an annuity (which may well be desirable and necessary transactions in the case of an old person) may involve risk to the attorney. It should also be recognised that, while the law may be clear that money spent on necessaries for an incapable person may be recovered, this involves difficulties in practice. Apart from the decision as to what are necessaries in a particular case, and what is a reasonable price, there is the problem of how they are to be paid for in the first instance. A mentally incapable person can no longer draw on his own bank account, and any authority he may have given to another person to draw on it will have been revoked by the incapacity.

38. Furthermore, as we said in our Report on Powers of Attorney,[68] it is undesirable for common practice to be at variance with the requirements of the law. It is said that many attorneys continue to act when in law their authority has been revoked by their principal's mental incapacity, partly because they do not wish to cause distress to the principal by applying to the Court of Protection, and partly, it is thought in the case of many lay attorneys, because they do not realise what the law is in this respect.

39. The Law Society found considerable support among practising solicitors for the proposal for an enduring power of attorney, and the reports of the Ontario and New South Wales Law Reform Commissions say that they found wide support for their proposals for such a power.

General arguments against an enduring power of attorney

40. The main arguments against changing the law fall broadly into two categories; first, that the social need for enduring powers of attorney has been overstated and, second, that such a power would not serve the best interests of a mentally incapable person.

68 (1970) Law Com. No. 30; Cmnd. 4473, para. 26.

41. The first question is whether an <u>enduring</u> power of attorney is necessary. It depends what special purpose it is to serve that is not already served by the <u>ordinary</u> power of attorney. Much of the argument in favour of an enduring power of attorney has concentrated on the case where the donor is in the "twilight" between capacity and incapacity. For example, The Law Society has argued[69] that a new procedure is required which provides a means by which a suitable person could discreetly assume responsibility for the major decisions in the management of the affairs of someone whose capability was beginning to suffer from age or infirmity, while leaving him some appearance of responsibility and perhaps control of the more routine of his affairs. The problem area, on this approach, is where the aged or infirm person still has sufficient intellect to know what he is doing but not sufficient to know what needs to be done in every situation. His need is for guidance and assistance in his affairs rather than a comprehensive take-over. But is a <u>new</u> procedure needed to deal with this problem? The risks that face the lawfully appointed attorney in such a situation may have been overstated. First, the onset of incapacity in the donor of the power of attorney revokes or reduces the authority of the attorney but it is only where the attorney is aware of the incapacity that he is put at risk.[70] Second, although, once the attorney knows that the donor's intellectual powers are failing, he must, no doubt, act with reasonable caution, this is not to say that he may not act at all. He may continue to make such contracts on the donor's behalf as the donor still has capacity to make.[71] For example, the proper management of the donor's property and affairs may require that the insurance cover on his house is increased or that his car is sold or that money in his current account is placed on deposit.

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69 The Council of The Law Society's Memorandum on the Court of Protection (March 1970), para. 11.

70 Powers of Attorney Act 1971, s. 5(1).

71 Para. 14, above.

The donor may, through mental infirmity, lack the perception or resolve to attend to such transactions himself. If he had no-one to help and advise him an application to the Court of Protection might be the appropriate course. Where, however, he had given a trusted friend a power of attorney and that friend was willing to explain what needed doing and to help him to do it, an application to the Court of Protection would not be needed.

42. Of course there may come a stage when the donor is so enfeebled or the proposed transactions are so complicated that the attorney must reasonably doubt the donor's capacity to understand them even when explained. At such a stage the attorney's proper course, on the existing state of the law, is to apply to the Court of Protection for the appointment of a receiver. However, it should be remembered that the Court of Protection can grant the receivership to the original attorney and will usually do so where the attorney is a suitable person and is willing to act, and that the risk of causing distress to the donor can be reduced by an order dispensing with the service on him of the relevant court proceedings.[72]

43. The next question is whether a new sort of power of attorney is really in the best interests of a principal at a time when his mental state is such that he completely lacks mental capacity. It is clear that no alternative system could provide protection of the principal's interests (at a time when he most needs protection) that is as complete as that of the Court of Protection, unless it provides for the appointment and continuous supervision and control of the attorney by some independent and responsible body, such as a court or public official. In the nature of things, there is always the possibility that an attorney may mismanage the

72 Court of Protection Rules 1960, S.I. 1960, No. 1146, r. 28(1), as amended by Court of Protection (Amendment) Rules 1973, S.I. 1973, No. 791, r. 4.

principal's affairs. Such mismanagement does not necessarily involve dishonesty or neglect; the estate and interests of the principal can and sometimes do suffer at the hands of attorneys who mean to act for the best. The point may be made that the proposed enduring power of attorney would, unless adequate safeguards or limitations were provided, give greater opportunities for mismanagement by the attorney with reduced chances of detection or redress. There is the further point that an unfettered discretion can be embarrassing to an attorney, particularly where members of the principal's family disagree with him or amongst themselves as to how it should be exercised. There are therefore sound reasons for placing limitations or safeguards upon the proposed enduring power of attorney and this has been widely conceded.[73] The question for consideration is whether satisfactory limitations or safeguards can be devised which give the parties concerned adequate protection and guidance without thereby producing a regime so similar to that already provided by the Court of Protection that nothing would be achieved by its introduction.

44. In considering the interests of a person who is no longer capable at all of acting for himself, perhaps a more basic issue than that of safeguards is whether a power of attorney is of its very nature an appropriate instrument to use in these circumstances. The function of an ordinary power of attorney is generally to provide for the carrying out of transactions of a particular nature, or for a particular period, and the donor will usually tell his attorney in what way and for what purposes he expects the power to be used. He will also often be available for consultation or to give directions. While a person is mentally incapable, on the other hand, his main need is for someone else to provide comprehensive management of his property and affairs and to take the initiative in deciding what is required. If a receiver is appointed, he will perform this function. The

73 All the schemes summarised in the Appendix (except the Uniform Probate Code) have safeguards or limitations of one kind or another.

essence of a power of attorney, however, is that it confers authority to act - it does not impose a duty.[74] It is therefore arguable that it is not a suitable means of providing the necessary management for the affairs of a mentally incapable person. If it is sought to impose some duty on an attorney under an enduring power,[75] it would be adequate only if the duty were so comprehensive that in effect the attorney's duty became analogous to that of a receiver, which would not be that commonly associated with an attorney.

45. Other disadvantages are that an enduring power of attorney may not be the best means of managing a large and complex estate; that the existence of such a power may discourage an application for a Court of Protection receivership when the interests of the principal required it as, for example, where the principal is acting improvidently and irresponsibly with his property; and that the exercise of such a power might prejudice the interests of the principal's successors by adeeming testamentary dispositions, which is a risk against which the Court of Protection's procedure provides some safeguard.[76]

46. Other arguments against the introduction of such a power concern the people by whom it would be granted. On the one hand, it might be said that people, especially the old, would be unwilling to admit that they might become incapacitated, so that such a power would not be given by those for whom it was intended nor those most likely to need it. If it were not given by these people, its introduction would not be justified. On the other hand, provision for an enduring power of attorney might result in pressure, however well-meaning, being applied to elderly people to execute such a power. A person whose mental faculties were already failing and who was not very well able to manage his affairs might find such pressure from relatives, or from others who showed

74 This is discussed in more detail at paras. 122, 125, 126, below.

75 This solution is discussed in paras. 130-135, below.

76 See para. 10, above, and paras. 167-171, below.

him kindness, hard to resist. He might be legally competent and understand what he was doing and yet lack independent judgment as to whether this was really what he wanted or was in his best interests.

47. Finally, it must be borne in mind that for many centuries the management of the affairs of the mentally incapable has been supervised by the courts on behalf of the Crown, which has the general guardianship of them. "As regards the relation of the Crown to lunatics, it may be taken generally that the Crown is the custodian of the property of a lunatic so found ... the property passes out of the control of the lunatic and comes under that of the Crown only in order that the lunatic may have that protection from the Crown to which he is entitled."[77] "... during the whole period of history in which we have legal reports, the Crown has possessed the prerogative ... of dealing with and controlling the property of a lunatic ... in the interest and for the benefit of the lunatic ..."[78] It would be wrong, some may say, to abandon this tradition of "protection", just because some people do not like the idea of the Court of Protection becoming involved in their affairs and would prefer them to be dealt with by a friend or adviser without "outside interference".

48. As regards the specific criticisms of the working of the Court of Protection, which have been mentioned by The Law Society,[79] these would seem of less importance since the setting up of a joint committee of the Court of Protection and The Law Society in 1970 which has met at regular intervals since. Of the discussions of the joint committee, it is reported: "Progress has been made in simplifying the procedure, clearing away misconceptions and bringing in new policies and procedures for investments and costs."[80]

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77 Re Walker [1905] 1 Ch. 160, 171, per Vaughan Williams L.J. See also para. 18, above.

78 Ibid., at pp. 171, 172.

79 See para. 2(d) above and Memorandum of the Council of The Law Society on the Court of Protection (1970), p. 21.

80 Law Society's Gazette, 10 December 1975.

PART IV CONDITIONS AND SAFEGUARDS

Introductory

49. The idea of an enduring power of attorney has been given favourable consideration in this country by The Law Society, the Holborn Law Society and the Birmingham Young Members Group of the Law Society and also abroad.[81] If a satisfactory scheme can be produced, it would serve a useful function in the system for administering the affairs of the mentally incapable, being complementary to the functions now performed by the Court of Protection, and in suitable cases relieving it of a part of its duties.

50. The main justification for, and aim of, changing the law to provide for an enduring power would be to enable a donor to have his affairs dealt with in this way if he so wished, whilst ensuring, so far as possible, that his interests were not prejudiced. Some conditions and safeguards would be essential in any such scheme for the protection of the donor.

51. On the other hand, the aim of enabling the donor to arrange for his affairs to be dealt with in this way, if he so wished, would be defeated if the safeguards made the scheme so complex and expensive as to discourage its use. It would also be undesirable if the imposition of numerous formalities on the grant or exercise of an enduring power resulted in the validity of a power, which the donor thought was achieving his intention and on which the attorney and third parties had relied, being open to challenge on technical grounds.

52. In this part of the paper we therefore suggest various safeguards that might be provided in a scheme for an enduring power of attorney, and consider which ones would be praticable as well as desirable, and which would tend to make the scheme so complex and expensive that it would be of little practical use.

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81 See Appendix.

Mental capacity of donor at time of grant

(a) Standard of mental capacity

53. It would obviously be essential that the donor should have the mental capacity to understand what he was doing in granting an enduring power of attorney, and to intend its consequences. Such a condition would do no more than re-state the general law. In the other proposals for an enduring power of attorney which we have examined, emphasis is placed on the donor's having the requisite mental capacity at the time of the grant, but although the test of capacity is variously expressed none seems in fact to propose a stricter test than that imposed by the general law.

54. We consider that the application of the general law, in respect of mental capacity, to the grant of an enduring power of attorney should be emphasised. Although provision for such a power would alter the law as to the effect of mental incapacity on the continuing validity of a power of attorney, there would be no question of altering the law as to its effect on the initial validity of a power. If there were a purported grant of an enduring power when the donor did not have the requisite mental capacity, the grant would be invalid.

55. We realise that application of the general law as to mental capacity to grant an enduring power of attorney would enable such a power to be validly granted in circumstances where it might not be considered desirable. For example, an elderly person, whose mental faculties were beginning to fail, might be able to understand the nature and effect of an enduring power, but be unable to withstand pressure from his relatives or advisers, or to exercise independent judgment as to whether the grant was in his best interests. Nevertheless, we do not consider it would be practicable to impose a higher standard of mental capacity with regard to the grant of an enduring power of attorney than that imposed by the general law. A definition of any

higher standard would have to be precise and easily applicable or else it would create uncertainty as to the validity of the grant of many enduring powers. This would seem difficult, or even impossible, to achieve. Even if it were possible to define such a higher standard, the result might be to prevent some people from granting enduring powers when they had sufficient capacity and the reasonable desire to do so.

56. We therefore consider that, in order to be valid, an enduring power of attorney would have to be granted by someone who satisfied the general legal test of mental capacity, i.e. someone who was able to understand the nature and effect of an enduring power of attorney.

(b) Evidence of mental capacity

57. As we have mentioned above, all the other proposals for an enduring power of attorney attach importance to the mental capacity of the donor at the time of the grant, but they express different views as to whether there should be special provision for evidence of this.

58. One view, which was adopted in the proposals of The Law Society and the Law Reform Commissions of Manitoba and British Columbia, is that an enduring power should incorporate a certificate by a doctor or lawyer, that the donor was of sound mind and understanding at the time of executing the power. In The Law Society and Manitoba proposals, this certificate would be a condition of the validity of the power; in the British Columbia proposals it is considered desirable, but not made mandatory. On the other hand, the Law Reform Commissions of Ontario and New South Wales have rejected any such requirement, considering that its disadvantages outweigh its advantages.

59. Arguments in favour of a requirement of medical evidence are that it provides strong (but presumably not

conclusive) evidence of the initial validity of the power, which third parties could rely on, and which would be useful in the event of subsequent dispute (which might be more likely to occur in respect of an enduring than an ordinary power). It would also help to prevent the purported grant of a power when the donor's mental capacity was clearly not sufficient, (it being possible that a donor and his family might, without the benefit of advice and with no improper intent, consider the grant of an enduring power in such circumstances).

60. Against this, it can be said that unless the certificate were treated as irrebuttable proof of capacity (which would be undesirable), medical evidence in such a form would not prevent disputes from arising, as the question of initial capacity could always be re-opened.

61. Also, whilst a requirement of medical evidence might help to prevent the grant of an enduring power of attorney by someone who clearly did not have the necessary mental capacity, there would probably only be a limited number of such cases. Medical evidence would be of less value in the more likely case where the person who wished to grant an enduring power was one whose faculties were failing, and who himself, or whose family or advisers, were anxious that some arrangement should be made for managing his affairs. Such people might not be really capable of judging whether an enduring power was the best solution for their particular circumstances, or might not be able to resist pressure or persuasion from people who thought that an enduring power would be the most convenient course without necessarily giving priority to the donor's best interests. Different doctors and lawyers could quite reasonably take widely varying views on the question of mental capacity in such cases; some might be over-cautious about committing themselves, while others might be prepared to treat such evidence more as a formality to be overcome in order to

provide a solution to a troublesome family problem. Family or other pressure, (even if it amounted to undue influence, which would make the power voidable) would often not be apparent to an outsider, such as a doctor or lawyer, whose evidence would not safeguard against this eventuality.

62. Unless a doctor or lawyer knew the potential donor well, he might not be the best person to testify as to the donor's mental capacity, and in any event, an enquiry into the donor's mental state might be embarrassing.

63. On the whole, we do not think that a mandatory requirement of medical or other professional evidence of the donor's mental capacity would provide a sufficient safeguard to justify its inclusion in a scheme for an enduring power of attorney. We consider that such evidence would provide a real safeguard in only a few cases, whilst adding complexity and expense to all cases. In some cases it would doubtless be advisable for there to be medical evidence, or for the donor to take independent legal advice before granting the power (especially if a solicitor was to be an attorney), but this would, we think, have to be left to the discretion of the donor and attorney, and their advisers. We would, however, particularly welcome comments on the question of evidence of mental capacity.

Formalities of the grant

(a) General

64. As we have said in paragraph 51 above, we think that if a provision for an enduring power of attorney imposed too many formal requirements on the grant of the power, it would defeat its own object. On the other hand some degree of formality might help to discourage the improper use of such powers, and to impress upon the donor that what he was doing had great significance for himself and the management of his affairs.

65. If the means of enabling a person to provide for the management of his affairs in the event of his subsequent mental incapacity were to be a species of power of attorney, the minimum requirement would be that it would have to satisfy the formalities necessary for the grant of an ordinary power of attorney. Under the law of England and Wales, it would therefore have to be created by instrument, and be signed and sealed by the donor,[82] (or by another person by his direction and in his presence and in the presence of two witnesses[83]).

(b) Expression of intention

66. Further, in any proposal for an enduring power of attorney, an essential element would be the intention of the donor that it should continue to be exercisable despite any supervening incapacity on his part. To provide evidence of this intention, and to ensure, as far as possible, that the donor had directed his mind to the import of what he was doing, we consider that this intention should be clearly expressed, in the form of a statement incorporated in the document granting the power. All the proposals we have considered contain such a requirement.

(c) Witnessing

67. The possibility of requiring medical or other evidence as to the donor's soundness of mind has already been discussed at paragraphs 57-63 above. There remains the question of whether the execution of the power should in any event be witnessed. On this subject there is a variety of opinion in the proposals we have considered: the New South Wales proposals contain no witness requirement; those of British Columbia consider witnessing to be advisable but that the absence of witnesses should not invalidate an otherwise valid power; those of Ontario require one witness, who

82 Powers of Attorney Act 1971, s. 1(1).

83 Ibid., s. 1(2).

should not be the donee or his spouse; the Manitoba proposals require two witnesses, neither of whom is the donee or his spouse, not more than one of whom is a member of the donor's family, and at least one of whom is a doctor or lawyer; and the United States Model Act[84] requires the power to be executed in the presence of a judge.

68. It might be said that a witness requirement gives little real protection to the principal (it certainly would not prevent someone determined to obtain a power improperly), while imposing some trouble and complexity. At present a power of attorney does not generally have to be witnessed,[85] nor do many other legal documents, such as settlements and conveyances, although in practice they almost invariably are. Wills, however, must be witnessed in accordance with the provisions of section 9 of the Wills Act 1837. The reason for this statutory requirement would seem to be to confirm the testator's identity and the absence of physical duress, and to prevent forgery, as by the time the document becomes operative the testator himself cannot dispute the signature. This seems to us to be a good reason for requiring that the signature of the donor of an enduring power of attorney should be witnessed; after the onset of mental incapacity the donor would not be able to deny his signature and therefore the attorney's authority.

69. Witnesses could also perform a useful evidentiary function, for example if the donor's capacity to grant the power were subsequently challenged (and it may be that this would be more likely in this context than others). We have

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84 "Special Powers of Attorney for Small Property Interests Act" - see Appendix.

85 Unless it is signed by a person by direction and in the presence of, the donor of the power: Powers of Attorney Act 1971, s. 1(2); or unless a trustee is delegating his powers: Trustee Act 1925, s. 25(3), as amended by Powers of Attorney Act 1971, s. 9.

already said that we do not think that mandatory witnessing by a doctor or lawyer would provide a sufficient safeguard against an enduring power being granted in undesirable circumstances to justify the disadvantages involved.[86] We do think, however, that some less stringent witness requirement might still be useful as helping to deter (if not in all cases prevent) the grant of an enduring power by someone who was not mentally capable of it, or who was subject to pressure to grant the power when he was worried or confused. It would also generally help to impress on the donor the significance of what he was doing.

70. For these reasons, we would suggest that such a power of attorney should be witnessed. We do not think that such a requirement would involve too much complexity or inconvenience in practice as people are accustomed to having legal documents witnessed, even where this is not strictly necessary. We would provisionally suggest that one witness, who need not be a medical or other professional person, would be sufficient.[87] The attorney himself should not be the witness (and if he were, the power would not be valid), but we think that any further restrictions (for example making the attorney's spouse ineligible) would put on third parties the undesirable burden of enquiring as to the witness's identity, and would put an otherwise valid power at risk of being found invalid.

(d) Acceptance by attorney

71. One additional formal requirement which the Law Reform Commission of Manitoba recommends, is that the donee of an enduring power of attorney should sign a form of acceptance which should be incorporated in the power. The

86 See paras. 60-63, above.

87 As in the case of powers of attorney given by trustees: Trustee Act 1925, s. 25(3), as amended by Powers of Attorney Act 1971, s. 9.

United States Model Act also requires the attorney's consent to be established. This is, of course, not a requirement of an ordinary power of attorney in this country, but it has some attractions in the case of an enduring power and would not be an onerous condition to satisfy. As will appear from discussion below, an attorney under an enduring power would probably be undertaking greater responsibilities and commitments than an ordinary attorney.[88] It might therefore be desirable for him to signify his willingness to undertake the responsibilities and his awareness of what was involved.

72. Of course, there is no such requirement in the case of executors or trustees, whose acceptance of office may be express or implied from their conduct. It is, however, recommended that "to avoid question, every person who is appointed a trustee by a deed should be made a party to and should execute such deed",[89] and we think that in practice this would also be advisable in the case of enduring powers of attorney. On the other hand, it would be a pity for a grant to be invalidated where the attorney was indeed willing to act but had failed to put his acceptance in writing. Our provisional view is that formal acceptance by the attorney should not be a mandatory requirement.

Property in respect of which an enduring power of attorney may be granted

73. A matter which also requires consideration is whether, if an enduring power of attorney were introduced, there should be any limit on the property in respect of which it could be granted. The only scheme for an enduring power we have considered which recommends such a limit is the United States Model Act, the "Special Power of Attorney for Small Property

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88 See e.g. paras. 130-135, below.

89 Encyclopaedia of Forms and Precedents (4th ed., 1973), Vol. 22, p. 742.

Interests Act"[90], which, as its title implies, is aimed at providing a means of managing the affairs of people with relatively small capital and income. It was felt that if powers could be executed under the Act for the management of sizeable commercial property interests, or unlimited amounts of property and income, there would have to be "extensive safeguards and more detailed and complicated procedures with attendant increased expenses, which [would] largely [destroy] the value of the Act for the purposes originally intended."

74. There is much force in this argument. Some estates are of such size and complexity that a power of attorney might not seem the most appropriate means of managing them. There is also the point that the larger the estate, the larger the field for fraud and mismanagement.

75. On the other hand, complexity is not limited to large estates, and some large estates might in fact be simple and straightforward to manage. It might in fact be thought that there would be less risk of an enduring power of attorney having undesirable consequences in the case of a large or complex estate. In such a case, professional advisers would probably already have been involved in its management, and would continue to give the attorney expert advice and assistance. The donor might well appoint a professional person as his attorney, or, if his affairs were not suitable for this means of management, his professional advisers might advise him against granting an enduring power.

76. A limit on the property to which a scheme for an enduring power of attorney could apply would involve making an arbitrary distinction between estates deemed suitable for this means of management, and those deemed unsuitable, based entirely on size or value. We think it would be extremely difficult to decide what the limit should be, and any limit

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90 See Appendix.

might deprive many people who reasonably wished to take advantage of such a scheme of the opportunity of doing so, whilst not guaranteeing that enduring powers were not granted in unsuitable cases.

77. The United States Model Act is only intended for small estates and presupposes a limit which would so restrict its application (although it does not itself impose a limit, leaving this decision to enacting States). It is therefore not concerned with the problem of large estates, in respect of which it might be desired to grant an enduring power, and which might be suitable for this means of management. We feel, however, that, if such a scheme were introduced in this country, there is little justification for not making it generally available and that limiting it to estates of a certain size would not of itself ensure that it was only used in suitable cases.

78. A fixed limit would also put third parties on enquiry as to whether the donor's estate fell within it, which would obviously be undesirable. If, however, the instrument were required to state on the face of it that the property to which it related was within the prescribed limit, this might seem to give undue, and possibly undesirable, publicity to the donor's affairs.

79. This problem is solved in the case of the United States Model Act by a provision that the power has to be signed in the presence of and with the approval of a judge. One of the points on which the judge must be satisfied before approving the power is that the property to which it relates falls within the prescribed limit . The judge's approval (and in fact the value of the property) is endorsed on the instrument, and so third parties do not have to satisfy themselves further.

80. If it were decided to impose a limit on the value of property in respect of which an enduring power could be granted, some provision would seem to be needed similar to

that in the Model Act, namely certification by an adjudicating body that the property was within the prescribed limit. That would, however, involve the burden and expense of presenting a full statement of the donor's affairs to the adjudicating body, as well as of making the application. There would also presumably have to be a periodic review to ensure that the property has not increased beyond the prescribed limit. A scheme on these lines would seem to have too many of the characteristics of the procedures of the Court of Protection to provide a useful alternative.

81. We think it would have to be accepted, if a scheme for an enduring power of attorney were introduced, that there would inevitably be some risk that it would be used to manage property and affairs for which it would not be the appropriate means. We consider, however, that to limit the exercise of such a power to estates of a certain size, would create more problems than it would solve.

Qualification and number of attorneys

(a) General

82. The recommendations of the Law Reform Commissions of Ontario, Manitoba, British Columbia, New South Wales and the Australian Capital Territory, and the provisions of the United States Model Act, do not impose any special requirements as to who may be appointed as attorney under an enduring power, or the number of attorneys there should be. They treat the appointment of such an attorney like the appointment of an ordinary attorney, i.e. the donor has complete freedom to choose whom he wishes, and to appoint one or more attorneys as he thinks fit.

83. On the other hand, the proposals of The Law Society suggest that, in the case of an enduring power of attorney, there should be special safeguarding provisions in this respect. They consider that to ensure reliability and honesty in the exercise of the power, there should be at least two

joint attorneys, one of whom is not a member of the donor's family, and one of whom is a member of a professional organisation, for example a solicitor, or a trust corporation.

84. As regards ordinary agents and attorneys, there are generally no restrictions on who may be appointed, and it seems that a minor may be appointed (who may act so as to bind his principal, even though he cannot be made personally liable for his acts to the principal or third parties).[91] Co-agents or co-attorneys may be appointed to act jointly, or jointly and severally (so that all or any of the agents can bind the principal).[92]

85. Similarly, no special qualifications are required for appointment as a trustee, although there are certain restrictions as to their age and number. The appointment of a minor as a trustee of any trust or settlement is void.[93] A sole trustee may be appointed, but it is necessary to have at least two trustees, or a trust corporation, to give a valid receipt for any capital money arising under a trust for sale of land or under the Settled Land Act 1925.[94] Trustees are required to act jointly, but the survivor of two or more trustees may continue to act, subject to the restriction as to giving receipts mentioned above.

86. There is no restriction on who may be appointed executors, but probate will not be granted to a minor or a person of unsound mind.[95] The maximum number of proving executors is four, but only one executor need be appointed.

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91 Smally v. Smally (1700) 1 Eq. Cas. Ab. 6; 21 E.R. 831.

92 See, for example, Powers of Attorney Act 1971, s. 10.

93 Law of Property Act 1925, s. 20.

94 Trustee Act 1925, s. 14.

95 Williams on Wills (4th ed., 1974), p.140.

(b) Arguments against restrictions

87. There is much to be said for the view taken by the other law reform bodies, that a donor should be free to appoint whom he likes, and the number he likes, as attorney. The fact of his trusting in the attorney's honesty, reliability and efficiency should be sufficient without imposing other qualifications.

88. If his affairs were simple, a requirement that he should appoint more than one attorney would make the management of his affairs more complicated and cumbersome and, probably, expensive, than would seem necessary. (For these reasons, the Court of Protection is reluctant to appoint joint receivers.) There may be one person ideally suited to the position from the donor's point of view, and no other obvious candidate. Also, if it were mandatory to appoint at least two attorneys, to act jointly, the position of third parties might be made more difficult, as even while the donor was mentally capable, they could not deal with only one attorney.

89. Similarly, the requirement of a professional attorney might be out of place in many cases. The donor's affairs might not justify the expense, or might not be of the sort that a professional person was uniquely qualified to handle, or would even consider it worth his while to deal with. The donor might not have a professional adviser who had been dealing with all his affairs, and might well not wish to entrust them to a comparative stranger, whereas there might be a close friend or relation better qualified from the point of view of knowledge of the donor and his affairs. If it were mandatory to have a professional attorney, this would mean that the grant of an enduring power would inevitably involve expense , which would not necessarily be justified with regard to a particular donor's affairs.

90. A professional qualification is not necessarily the only, or a decisive, factor in assessing a person's suitability to act as attorney in any particular case. It can also be said that there are no legal requirements as to who may be appointed ordinary agents, executors or trustees or, generally, as to the number appointed. It is considered sufficient that they have been chosen by the principal, testator or settlor, and that there are certain controls over the way they operate.

(c) Arguments in favour of restrictions

91. On the other hand, there are strong arguments for saying that the donor's interests would not be adequately safeguarded by allowing him complete freedom in this matter. An attorney under an enduring power would be in a position of considerable trust and responsibility and, after the donor became incapable, no longer under his supervision. The donor might be persuaded to appoint an unsuitable person, or he might simply not be the best judge of the qualities and abilities that his attorney would need to manage his affairs when he could no longer control or advise him.

92. A close friend or relative, if he were sole attorney, might, consciously or otherwise, find it difficult to ignore his own potential interest in the donor's affairs and to exercise objective judgment. Or he might find that his position was more awkward with regard to the rest of the family, who had their own views on what should be done either in the donor's or their own interests, than that of an outsider would be.

93. A requirement of two attorneys would probably result in more consultation and discussion, and more points of view being taken into account, which, although it might be time-consuming, might also well result in better and more balanced management of the donor's affairs.

94. There is also some force in The Law Society's point that if there was a professional person as attorney, he would have valuable expertise, and his membership of a professional organisation might help to guarantee his reliability.

(d) A provisional view

95. As regards requiring special qualifications for attorneys under enduring powers, if such powers were to be permitted, we do not think it should be possible for a minor or person of unsound mind to be appointed, but at present we are provisionally of the view that there should be no other restrictions. In particular, we would not stipulate that an attorney should not be a member of the donor's family, as this might be unduly restrictive. We feel that the arguments against requiring a professional attorney on the whole outweigh the arguments in favour of such a requirement, but we would welcome views on this.

96. As far as the number of attorneys is concerned, we would provisionally suggest that a requirement of at least two joint attorneys would be desirable. We are aware that this could cause some inconvenience, but think that this would be justifiable by the special circumstances in which an enduring power would operate, and the additional safeguard provided by increased consultation about the donor's affairs, and the check of each attorney on the other. We would, however, particularly welcome comments on this, and also on the question of whether the appointment of a trust corporation as attorney should make the appointment of another attorney unnecessary. The requirement that the attorneys should act jointly, rather than jointly and severally, would seem necessary in order to make this a meaningful safeguard. However it would mean that, if the number of attorneys were reduced to one, the enduring power could not be operated, and would have to come to an end. The donor could, however, lessen this risk by appointing more than two attorneys so that any two of them could act jointly.

Filing or registration requirements

97. A possible safeguard, or means of control, in a system of enduring powers of attorney, would be to have some requirement whereby the existence of the power was filed or registered with an independent body. The recommendations of the other law reform bodies who have considered enduring powers of attorney show different approaches to this question.

98. The Australian Capital Territory recommendations require the power to be registered in a special register to be maintained by the Registrar of Titles; those of Manitoba require it to be filed with the Registrar of the appropriate Surrogate Court and the Public Trustee; those of Ontario require filing with the Registrar of the Surrogate Court, and the United States Model Act also requires the power to be filed with the court. The New South Wales proposals contain no special filing requirements, but the power would still have to be registered, like an ordinary power, for certain purposes. The British Columbia proposals, on the other hand, rejected the possibility of a filing requirement as not providing a real safeguard or serving any useful purpose, and The Law Society rejected the possibility of requiring an enduring power to be registered with the Court of Protection.

99. The Law Reform Commission of Ontario considered the reason for a filing requirement to be to place the power on the public record, and to enable interested parties to ascertain its existence and the identity of the attorney. There is some force in this, and obviously if the law of a country requires ordinary powers of attorney to be filed, enduring powers should fall within that requirement.[96]

96 In England and Wales, the possibility of filing ordinary powers of attorney was abolished by section 2 of the Powers of Attorney Act 1971, as recommended by us for the reasons set out in paras. 2-10 of our Report on Powers of Attorney (1970), Law Com. No. 30.

100. On the other hand, a filing requirement could well seem to be a mere formality, and if it were to provide a substantial safeguard it would seem that the body with whom the power was filed should have powers to check that the conditions of a valid grant had been satisfied, and should continue to have active powers of control and supervision. The exercise of such control and supervision would seem out of place while the donor remained mentally capable, however, and would also seem to make the procedure where there was an enduring power of attorney too similar to that of the Court of Protection to justify its introduction. It might also import unnecessary delays and complications.

101. We appreciate that some independent control and supervision should be available, but on the whole consider it preferable that they should be invoked as and when necessary. Initial filing of the power would seem to be of no special use if this view prevailed, and we provisionally consider that there should be no such requirement.

Accounts

(a) General

102. An attorney under any power of attorney, like any other agent, is under a duty "to keep accurate accounts of all his transactions and to be prepared at all times to produce them to his principal."[97] This, however, would be of little assistance to the donor of an enduring power after he had become mentally incapable, and no longer able to call for and inspect accounts. A possible additional safeguard for the donor of an enduring power would be to provide for inspection of the attorney's accounts by an independent body. This is one of the safeguards to which importance is attached in the Court of Protection procedure. Under section 113(2)

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97 Halsbury's Laws of England (4th ed., 1973), Vol. 1, p. 466.

of the Mental Health Act 1959 and Rule 70 of the Court of Protection Rules 1960,[98] a receiver has to lodge accounts with the Court for approval, annually or at such intervals as the Court may direct.

103. A requirement for an attorney under an enduring power to produce his accounts has been considered in all the proposals we have examined. The Ontario, Manitoba, Australian Capital Territory and British Columbia proposals, and the United States Model Act, all contain provisions (which are not subject to contrary agreement by the parties) whereby the attorney can be ordered to produce his accounts to an independent body, e.g. a court or the Public Trustee. An application for such an order may be made by "any interested party"[99] and also, in the case of Manitoba and British Columbia, on the initiative of the Public Trustee himself. In the Manitoba proposals, the donor of the power may himself stipulate that the attorney file annual accounts with the Public Trustee. The New South Wales proposals empower the court to order production of the attorney's accounts (with ancillary powers to prevent unnecessary disclosure), but the donor of the power can exclude this power of the court. The proposals of The Law Society do not include an accounting requirement, but emphasis is placed on the safeguards provided by the suggestion that attorneys should belong to a professional body.

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98 S.I. 1960, No. 1146.

99 Clause 7 of the Ontario Bill defines an interested party as "any person having a material interest, directly or indirectly, in the estate of the donor". The Manitoba Report (at p. 14) says "Who is an interested party? Either a member of the donor's family or a person who provides board and lodging to the donor. In some circumstances a creditor of the donor would so qualify. The donor's family should be regarded as including not only parents and children, but also siblings, nieces and nephews, in the Court's discretion."

(b) Interested parties

104. Trustees have a duty to account to the beneficiaries of the trust, some or all of whom will either have legal capacity or legal guardians looking after their interests. The beneficiaries or their legal guardians will ask for accounts when the occasion arises. In the case of an enduring power of attorney, however, the only person who would in the absence of special provision be able to call for accounts would be the donor,[100] who would, after the onset of mental incapacity, be unable to act. It may therefore seem desirable that other persons with a legitimate concern for his welfare should be able to intervene on his behalf by calling for the accounts.

105. There would, however, seem to be problems in giving an unrestricted right to call for accounts, and defining the class of people who should have that right. There might well be a wide range of people legitimately concerned to ensure that the donor's affairs were being efficiently managed. People concerned for his welfare might include friends, neighbours and those caring for him, as well as his immediate family. There might also be some who were interested in the conduct of his affairs, directly or indirectly, on their own account: for example those who stood to benefit under his will, or who had a right to be maintained by him, or who provided him with services.

106. A definition which included all those with a legitimate interest in the donor's affairs, whilst excluding those not genuinely so interested, would seem very difficult to achieve. It might also be thought undesirable that even those with such an interest should have unrestricted access to all information about the donor's affairs, and that a scheme

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100 Unless and until a receiver was appointed, or, on the death of the donor, his personal representatives were able to call for accounts.

for an enduring power of attorney should not encourage unwarranted intrusion into the donor's affairs.

(c) Application to an independent body

107. These problems could be solved by requiring anyone concerned about the management of a donor's affairs under an enduring power of attorney, either generally or regarding a particular aspect of them, to apply in the first instance to an independent body. Unwarranted intrusion into the donor's affairs would then be avoided, as the applicant would have to justify his concern to that body. Depending on the circumstances, the application could be for accounts or particular information to be produced either direct to the applicant, or to the independent body for inspection.

108. Such a solution would not be entirely free from difficulties. The necessity of making such an application would impose some burden and expense on concerned parties. If it were desired that the attorney's accounts generally be checked by the independent body, it might need to be furnished with a complete statement of the donor's assets and liabilities, and of his affairs generally. The accounts would then probably have to be properly and thoroughly considered in the context of the whole of the donor's affairs. All this would seem to involve much of the expense and complexity which any new scheme would be aiming to avoid, and in addition would require considerable resources and staff on the part of the inspecting body.

109. On the other hand, a provision that the attorney may be called upon to produce information or accounts to an independent body or any concerned person would have undoubted advantages in deterring fraud and providing supervision and safeguards as to the attorney's conduct of the donor's affairs. It would seem to be a more effective way of ensuring that the attorney fulfilled his normal agent's duty to keep accounts than the possibility that a receiver (if one were ever

appointed), or the donor's personal representatives, would one day exercise the donor's right to call for accounts.

(d) Provisional views

110. On the whole, we do not think that, if a scheme for an enduring power of attorney were introduced, it should make it mandatory for the attorney to file annual accounts with an independent body. This would be an unnecessary complication and expense while the donor was still mentally capable of calling for and inspecting accounts himself. If, however, the requirement only applied after the onset of incapacity, the attorney would have the burden of deciding when that occurred. The complication and expense might also not seem justified if, after the donor became incapable, the attorney was acting efficiently with no cause for complaint by anyone.

111. We do think, however, that it would be important for any such scheme to provide some means whereby the attorney could be required to produce information, or accounts for inspection. Of course, if anyone suspected that the attorney was not performing his functions properly, he could apply for a receiver to be appointed.[101] However, we think that some less drastic alternative should be available, so that a person content to allow the attorney to continue acting as long as he was doing so honestly and efficiently, could be satisfied as to this. The best safeguard would be for an independent body to have power to call for and inspect the attorney's accounts, and thus exercise supervision, if a case for this were made out to it by a concerned person. In suitable cases, however, that body should be empowered to order information or accounts to be produced direct to the applicant.

112. The independent body should also be given further powers to take such action as it deemed necessary. If it

101 See para. 154, below.

discovered some serious defect in the attorney's conduct, it should have the power to initiate an action on behalf of the donor against the attorney. If it considered that the attorney's authority should be terminated (which would be the case if the attorney were found to have acted improperly, but might also be the case if it appeared that the attorney were dilatory or otherwise not promoting the donor's best interests) it should be able to initiate an application for a receivership order.[102] Even if it did not consider that the attorney's management of the donor's affairs necessitated such action, it might consider that there were some aspects of the management which could be improved. In that case it should be able to make recommendations to the attorney, and perhaps require future annual accounting, with the possibility of applying for a receivership order as a sanction. It should also have the power to direct who, of the applicant, the attorney and the donor's estate, should bear the costs of the proceedings before it.

113. It would have to be decided who is to perform the function of the independent body. As some judicial element is involved, the Court of Protection might seem the most appropriate body, as it is experienced in investigating and supervising the affairs of mentally incapable people. It might be thought, however, that the county court would also be suitable, or, as the functions would be administrative as well as judicial, the Official Solicitor, who also has valuable experience in the affairs of the mentally incapable. We would welcome views on this question.

Extent of the attorney's power

(a) General

114. None of the proposals for an enduring power of attorney which we have examined, has imposed any limits on

102 See para. 153, below.

the authority of the attorney under such a power - presumably the general principles applicable to the authority of ordinary attorneys would also apply to that of attorneys under enduring powers. Generally speaking, a person can do anything by an attorney that he can do himself, although there are exceptions. (For example, an attorney cannot make a will for his donor, and there are restrictions on the appointment of attorneys by trustees.) The scope of an attorney's authority under an ordinary power depends upon the construction of the power, and it will be strictly construed. Thus, although it seems that in principle an attorney may make gifts for his donor, it may be that authority to do so must be explicitly given, and that a general authority, however widely expressed, would not be sufficient.

115. We have considered whether, if enduring powers of attorney were permitted, it should be left to the donor to impose what limits, if any, he wished, on his attorney's authority, as is the position with ordinary powers, or whether there should be mandatory limitations. For example, it could be argued that certain transactions should be altogether outside the authority of an attorney under an enduring power, or should only be permissible subject to certain safeguards.

(b) <u>Possible restrictions</u>

116. The most obvious example is the disposal of the donor's home. This sort of transaction is only likely to be effected by an attorney under an ordinary power on the express instructions of an absent donor. If, however, the donor of an enduring power became incapacitated, and needed to go into a hospital or nursing home for the rest of his life, and to have funds raised for the purpose, it might well be necessary for the attorney to effect this transaction on his own initiative. The Court of Protection has a special

procedure for this event, even within its own system of safeguards.[103]

117. *Disposing of the donor's home would obviously be a* major step, and one of such peculiar significance for the donor that special provision might seem justified. There are various possibilities. One would be to provide that this is a transaction outside the scope of the authority of an attorney under an enduring power, so that, if and when it became necessary, an application would have to be made for a receiver to be appointed. Alternatively, disposal of the donor's home could be made permissible only with the consent of the Court of Protection. A further possibility would be to require the attorney to observe certain safeguards when disposing of the donor's home, on the lines of the practice followed by the Court of Protection. These might include a condition that he should obtain medical advice as to the effect on the donor of the disposal of his home, and the likelihood of his being able to live in it in the future. Conditions might also be imposed as to selling it at the best price reasonably obtainable.

118. A transaction which raises similar considerations is disposal of the donor's business, although this would not be likely to occur as frequently as disposal of his home, and might not have the same personal significance. Similarly, the making of gifts by the attorney might be thought to merit special provision. As we have pointed out earlier, although authority to make gifts will not be readily assumed, there is nothing to prevent a donor from conferring it expressly. It might be thought, however, that some restriction on the conferring or exercise of authority to make gifts, should be imposed where the authority might be exercised during the mental incapacity of the donor, when he would not be able to oversee his attorney.

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103 See Heywood & Massey, Court of Protection Practice (9th ed., 1971), p. 154.

119. Investment is another field where some safeguards might be thought desirable. One possible view is that the investment powers specified in the Trustee Investments Act 1961 should apply to attorneys under enduring powers (and should not be capable of variation). This would mean that the classes of securities in which the donor's assets could be invested would be regulated by that Act, and the attorney would only be able to invest in a limited class of securities on his own initiative. Before investing in other permitted classes of security he would have to take professional advice, which would have to pay regard to the need for diversification, so far as appropriate, and the suitability of the investment proposed to the donor's affairs. Alternatively, the attorney could be required to obtain the consent of the Court of Protection to all investments other than those of a limited class. A less restrictive possibility would be to require the attorney, before purchasing an investment or an annuity, to take independent expert advice as to the most appropriate purchases having regard to the donor's affairs and needs. He could also be required to obtain a periodic professional review of the donor's portfolio of investments.

(c) Provisional views

120. After considering the various transactions where special provision might seem appropriate in the context of an enduring power of attorney, and some possible restrictions and safeguards, we have come to the tentative conclusion that it would not be satisfactory to impose statutory limitations on the scope or exercise of the authority of an attorney under an enduring power. Although we think there is much in principle in favour of such limitations, it would be extremely difficult to formulate them in a way which would be practicable and appropriate in all the circumstances where an enduring power might be used. Standard limitations might be unduly restrictive in some cases, perhaps where the attorney was an experienced professional man, but not give sufficient guidance to the amateur attorney.

121. There is also the difficulty that any inherent limitations would apply to the enduring power before, as well as after, the donor became mentally incapable. Although the enduring power itself could only be exercised at all times subject to such limitations, the donor could always, before the onset of incapacity, confer specific authority (free of any limitations) on his attorney, perhaps by a separate power, to effect a particular transaction. This, however, would impose on the attorney the burden, which it is desired to remove, of judging the donor's mental capacity, in order to decide whether he is safe in omitting to observe the limitations. Whilst we think it would in many ways be desirable to safeguard a donor against his attorney's having unrestricted authority to deal with his property, we have been unable to devise a solution which does not give rise to this problem.

Power or duty to act

(a) Introductory

122. Powers of attorney are described in Farwell on Powers as "mere instruments of agency".[104] They confer authority to act, but do not in themselves impose a requirement to act. The extent of the authority and the nature of what, if anything, the attorney is under an obligation to do depend on the construction of the power and the relationship of the parties. There are also certain basic obligations imposed on the attorney by law, by virtue of the fiduciary nature of the agency relationship. An important question is whether, if enduring powers of attorney were permitted, the law should impose greater responsibilities and duties on attorneys under such powers than it imposes on ordinary attorneys.

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204 (3rd ed., 1916), p. 1.

(b) Position of attorney under an ordinary power

123. Clearly, an attorney is under a duty not to exceed the terms of his authority. In addition, certain fiduciary duties are imposed on him by law, including the duty to account for money or other property that he holds on his principal's behalf, and not to use his powers for personal gain - for example by making a personal profit out of a transaction entered into on behalf of his principal[105] or by accepting bribes. If he does so he holds the money so received on a constructive trust for his principal.[106]

124. An attorney is also under a duty to act honestly, and with skill and care in relation to his principal's affairs. The standard of care depends on whether the attorney is acting gratuitously or for reward. A gratuitous attorney must usually exercise the same care in relation to his principal's affairs as he exercises in relation to his own; he cannot be expected to exercise more skill than he in fact possesses, unless he has held himself out as having some special skill. A higher standard is imposed on an agent acting for reward. "If he carries on a particular occupation, and holds himself out for employment as such, he must show such care and diligence as are exercised in the ordinary and proper course, and such skill as is usual and requisite, in that occupation.[107]

125. The duties imposed by law are directed more to the way in which the attorney acts, when he acts, than to requiring him to act in the first place. A duty to act will arise, if at all, from a contractually binding promise to do so made by the attorney to his principal. If there is a gratuitous attorney, this is unlikely to be the case ; even if he undertakes to attend to certain matters for the

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105 Turnbull v. Garden (1869) 20. L.T. 218.

106 Reading v. A.-G. [1951] A.C. 507.

107 Beal v. South Devon Railway Co. (1864) 3 H. & C. 337, 341, 342; 159 E.R. 560, 562.

principal, unless the undertaking is by deed or supported by consideration, it would not be enforceable. If the attorney is acting for reward, any undertaking to attend to particular matters for his principal is more likely to be enforceable. If, however, a professional attorney is given a general power (perhaps when the donor goes abroad) with no specific instructions, a duty to do a specific act (such as to pay an insurance premium) might not necessarily be implied.

126. Thus, a power of attorney in suitable terms gives the attorney authority, for example, to bring proceedings in the donor's name, to prepare his tax returns for him, to pay the rent, rates and insurance on his house, and to collect debts due to him. It does not of itself, however, without further agreement, impose any obligation on him to do these things. If he simply fails to act in such matters, and the donor suffers loss as a result, he cannot recover it from the attorney simply because he had authority to act.

(c) Special considerations for an enduring power

127. The fact that granting a power does not of itself impose any obligation to act would, however, be more likely to cause problems in the case of an enduring power of attorney, intended to be acted on during the donor's mental incapacity. Until the onset of mental incapacity, the donor would be able to direct and control the activities of his attorney, and in fact might well intend to manage his affairs himself as long as he was capable of doing so. After the onset of incapacity, however, the need would be for comprehensive management of his affairs; they might require substantial reorganisation to take account of his change of circumstances. (This is the function performed by the Court of Protection, when the affairs of a mentally incapable person come under its supervision.)

128. If the attorney under an enduring power were a professional person, who was to be paid for his services, an

undertaking to play a positive part in the management of the donor's affairs would be more likely to be implied than it would be with a gratuitous agent.[108] It is also possible that the higher standard of care imposed on him[109] might require him to be aware of the need for preventive or remedial action in certain circumstances. We do not think, however, that either of these factors would necessarily be sufficient to impose on a professional attorney the duty to give the continuous and active attention to the affairs of an incapacitated donor that they might well require. In any event, the attorney might not be a professional person.[110] Many donors would wish to appoint close friends or relatives, in circumstances where, under the present law, it would be very difficult to imply any positive duty or responsibility.

129. We therefore consider that the introduction of enduring powers of attorney would carry a risk that attorneys might take little or no action in the donor's affairs, at a time when he was not able to rectify the position. It might be said that this risk would not be so serious in practice. The donor would have appointed his attorney with his own incapacity in mind, so he should have appointed someone conscientious and trustworthy; even if the attorney did nothing, the donor would be in no worse position than if he had not granted the power (although it might have created a false sense of security); and people concerned at the attorney's conduct would be able to apply to the Court of Protection.[111] These arguments are far from conclusive, however, and we think that the risk is such that serious consideration should be given to making special provision to alleviate it as far as possible.

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108 See para. 125, above.

109 See para. 124, above.

110 We have tentatively rejected the possibility of restricting attorneys under enduring powers to professional people; see para. 95, above.

111 See para. 154, below.

(d) Provisional views

130. The first question to be considered is whether an attorney under an enduring power of attorney should be obliged to do more for his donor than act, if and when he acted at all, with honesty and care. Should he, in other words, be bound to intervene in the management of his donor's affairs? He would have no such duty under the existing law unless he had given contractually binding undertakings to this effect. Should such a duty be imposed by operation of law even where it has not been provided by contract?

131. Of the various law reform bodies that have considered the topic of enduring powers of attorney only the British Columbia Law Reform Commission has provided an answer to the "duty" question. They say that it is in their view desirable that, at some point, certain positive duties should be cast upon attorneys under enduring powers to act for the benefit of their donors. Otherwise, they say, the appointment of such an attorney may be an act of futility on the part of the donor. The argument seems to us to be a strong one. Unless the attorney were required, at some stage, to intervene, the mentally incapable donor would have no right of redress if the attorney sat back and did nothing at the time when his services were most urgently required. The difficulty could be met by having the attorney execute a deed containing all the relevant undertakings but this would seem to be unnecessarily formalistic and we suspect that donor and attorney alike would regard it as a distasteful and unnecessary arrangement. We therefore consider that it would be desirable for any scheme for an enduring power of attorney to impose a statutory duty on the attorney under such a power, actionable at the suit of the donor (by his next friend) and enuring for the benefit of his estate. Such a duty should not be subject to exclusion or modification by agreement.

132. The second question is what that duty should be. The British Columbia Law Reform Commission suggest that a

positive duty of "prudent management" should be imposed upon the attorney who is given an enduring power and that he should be required positively to exercise his powers for the benefit of his donor, having regard to the nature and value of the donor's property and the needs of the donor and his family. It would need to be recognised that acting as attorney for a mentally incapable person would involve comprehensive and active supervision and management of his affairs generally, and that the attorney would be assuming considerable responsibilities. We think that the attorney's duties should, for example, include the duty to ascertain the nature and extent of the donor's property and responsibilities, so that he would know what action was required to be taken. Our provisional view is that the attorney should be under a duty of "prudent management", by which we mean that he should be placed under a positive requirement to do for the benefit of the donor all those acts which the attorney should reasonably be expected to do, having regard to the incapacity of the donor. The precise nature and extent of the duty should depend on all the circumstances, including the extent and nature of the donor's property, the needs of the donor and of those for whom he might reasonably be expected to provide, the donor's other commitments and liabilities, and also any particular qualifications of the attorney himself, and whether he is receiving payment for his services. The question of the nature and extent of the duty to be imposed on an attorney under an enduring power is, however, one on which we would particularly welcome views and suggestions.

133. The third question is when the duty should arise. Should it rest upon the attorney from the moment of his appointment or only when the donor became mentally incapable? The British Columbia Law Reform Commission suggest that it should rest on the attorney from the outset but that it should be subject to a proviso that the attorney should not be liable for breach of such a duty in respect of any exercise of his powers that the donor had given him explicit instructions

to carry out, while mentally capable. We wonder whether this may not put too heavy an onus on the attorney. Why should we have any positive obligation to intervene in his donor's affairs while the donor is competent? Should he really have to check that the bills were being paid, that the house was insured, that the money was properly invested, when the donor is legally competent to do all these things for himself? Yet under the proposal of the British Columbia Law Reform Commission the attorney who failed to do these things might later be liable to the donor's estate for breach of statutory duty even where the donor remained sane until the day he died.

134. An alternative would be to provide that a positive duty should not arise until the onset of the donor's mental incapacity. The British Columbia Law Reform Commission have pointed out, in our view rightly, that it would only be at this stage that a positive duty would become important, but that the attorney would have difficulty in determining when such a stage had been reached. Despite this difficulty, it seems to us that if positive duties of management are to be imposed at all they should not be imposed before the attorney first knows of his donor's incapacity.[112]

135. There is also a fourth question to be considered, namely, if positive duties were to be imposed on an attorney under an enduring power, whether he should be subject to them merely by virtue of being appointed or only if he had indicated his agreement to act as such and therefore to assume the responsibilities involved. We have already indicated[113] that it would be desirable for an attorney to signify his acceptance formally, for example by executing the grant of the power, but that it should not be a mandatory requirement.

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112 Cf. the Powers of Attorney Act 1971, s. 5(1) in relation to the revocation of ordinary powers of attorney; here too the agent's liability depends upon his knowledge of his principal's incapacity where this is the basis of the revocation.

113 See para. 72, above.

Without such a requirement, however, there would be a possibility that a person might be appointed without his consent or knowledge. It would seem undesirable to impose on such a person the responsibilities and duties that it is suggested should be imposed on an attorney under an enduring power. We therefore consider that a positive duty should only be imposed on an attorney who has accepted the power, either expressly, or informally by acting on it at any time.

Remuneration of the attorney

136. Whether or not an attorney under an enduring power would be paid for his services (as distinct from reimbursement for proper expenses, to which he has an implied right) would presumably, as in the case of an ordinary attorney, depend upon agreement between the donor and the attorney. Most of the proposals we have considered have left the question of payment to be settled on this basis, and have made no specific provision about it.

137. The United States Model Act, however, allows the attorney "reasonable" payment for his services, subject to restrictions on payment in the power itself. The Manitoba proposals go further and require an enduring power to state on the face of it whether or not it is fee-bearing. This has the advantage of providing a record, in case of subsequent dispute, of the agreement between the parties as to remuneration. This would be particularly useful after the donor had become incapacitated and we think that it would be desirable for the instrument creating an enduring power to incorporate any agreed charging provision. The Manitoba proposal also provides some means of control over the fees charged, as the power has to be filed with the Public Trustee, who is therefore aware of the fact that the administration is fee-bearing, and is also given power to ensure that the fees charged by the attorney are reasonable.

138. The principle behind these proposals is that otherwise the only person able to challenge the fees charged, or have them taxed, would be the donor, and if he became mentally incapable he might well not be in a position to do so. Where there is a receivership, and a professional receiver has been appointed, the Court of Protection keeps a check on the fees charged, so that this problem does not arise.

139. Supervision of an attorney's charges by an independent body, however, would be neither necessary nor desirable so long as the donor was mentally capable and could do this himself. If, however, provision were made for independent supervision of the attorney's charges which was only to operate after the donor became mentally incapable, someone would have to decide when this occurred. It might be possible to provide that an attorney who had reason to believe that his donor had become mentally incapable should, before paying his charges out of the donor's assets, have them approved or taxed by an independent body or his own professional organisation. We do not think, however, that this would be a satisfactory or practicable solution.

140. On the whole we do not think that special provision for supervision of an attorney's charges should be required. An interested party who suspected the attorney of overcharging could apply for the attorney's accounts to be called for and investigated under the provision we have proposed at paragraph 111 above. The powers of the inspecting body could include the power to challenge the attorney's charges, to require a proportion of them to be repaid, and to require the attorney to submit future bills of costs for approval before they are paid out of the donor's assets. An interested party could also in these circumstances apply to the Court of Protection for a receivership order, which would terminate the attorney's authority altogether. This is dealt with in more detail below.[114]

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114. See para. 154, below.

Time limit on the power

141. One question which has to be decided is whether an enduring power of attorney should continue indefinitely (although, as with an ordinary power of attorney, the donor could expressly limit it to a particular period), or whether it should have some time limit built into it. The other law reform bodies who have made proposals on this subject have taken the view that an enduring power should be permitted to continue indefinitely, until determined by the provisions of the general law, the legislation governing enduring powers,[115] or of the power itself.

142. The Law Society, on the other hand, considered it "wrong to bind a donor indefinitely during his incapacity to a choice made by him when circumstances might have been different", and suggested that an enduring power should only remain valid for a limited period (to be specified in the power but not to exceed five years) from its creation, unless renewed by the donor while mentally capable.

143. They thought that the main use of an enduring power should be for elderly people whose faculties were failing, and chose the five year period as being "long enough to cover the usual time taken for the decline of an old person's faculties through senility or incapacitating illness to his death." Whilst conceding that this process could well take longer than five years, they thought that after that time changes of circumstances would make the appointment of a receiver more desirable. They did not consider that an enduring power of attorney would be an appropriate means of managing the affairs of a younger person who became mentally incapable and was likely to remain so.

115. E.g. a provision giving the court discretion to determine the power.

144. Another possibility is that an enduring power of attorney should only remain valid for a limited period after the onset of mental incapacity. This has the obvious disadvantage that it would impose on the attorney and third parties the burden (which it would be one of the aims of changing the law to remove) of deciding when mental incapacity occurred, and therefore from when the period ran. Although in the context of the attorney's duties under an enduring power, we felt that this decision on the part of the attorney would be unavoidable,[116] we do not think that it would be acceptable in the context of any time limit on the power. A duty arising on the onset of the donor's incapacity would not require knowledge of the precise time when that occurred; it could be assumed gradually. A time limit, on the other hand, would have to run from a readily ascertainable date; there would be no room for doubt as to its commencement or expiry, because at any date the power must be recognisable as valid or invalid. Our provisional view is accordingly that a time limit running from the onset of incapacity would not be desirable.

145. Another means of controlling the time for which an enduring power could continue would be to provide that it should be renewed periodically, perhaps annually, by the donor while he had capacity, and, after he had become incapable, by the court in its discretion, on the application of the attorney. This, however, would also involve a decision as to when incapacity occurred.

146. The problem with any time limit on an enduring power is that, as the limit would seem necessarily to run from the creation of the power and not the onset of incapacity, incapacity might well occur towards the end of the period, so that the usefulness of the power would be curtailed.

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116 See paras. 133, 134, above.

147. On the one hand, The Law Society has a strong argument that changing circumstances may make indefinite duration of the power undesirable, and that the lack of any time limit might encourage the use of the power in cases to which it might not be suited. On the other hand, a time limit could well operate to prevent the power being exercised in those circumstances where the donor wished and intended it to be effective.

148. These are difficult questions, and an ideal solution would seem difficult, if not impossible, to achieve. Our provisional view is that there should not be a mandatory time limit on enduring powers of attorney. We accept that the circumstances might change so as to make the continuance of the power undesirable, but think that this is a risk that would have to be accepted. Many changes of circumstances would bring about an application to the Court of Protection[117] without the need for compulsion. If, however, there was no substantial change of circumstances necessitating such action, it would seem pointless to bring the power to an end arbitrarily, when it could continue to function usefully.

Termination of an enduring power of attorney

(a) Appointment of receiver

(i) General

149. Under the present law, an ordinary power of attorney is terminated by the appointment of a receiver,[118] and we consider that if enduring powers of attorney were permitted, they should be similarly terminable. The Law Reform Commissions of Ontario, Manitoba and British Columbia all recommend that an enduring power should be terminated on the appointment of a receiver (or equivalent) under the relevant mental health legislation, and a similar provision is contained in the United States Model Act. Under the New South Wales

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117 And thus the termination of the enduring power; see paras. 149-151, below.

118 See para. 11, above.

proposals, the appointment of a receiver (or equivalent) would suspend, rather than terminate, the power, and it would be possible for it to continue to operate in certain circumstances.

150. In this country the procedure where there is a receiver, under the supervision of the Court of Protection, is so comprehensive that there would seem little scope for an enduring power of attorney to continue in useful operation.[119] Although a receiver may appoint an attorney in certain circumstances, the functions of a receiver and an attorney under an enduring power would overlap each other to such an extent that confusion and inefficiency would almost certainly result if they were allowed to exist concurrently.

151. We would in fact emphasise that, if a scheme for an enduring power of attorney were introduced, nothing in it should restrict or discourage an application to the Court of Protection in the ordinary way. There is no restriction on the class of people who may approach the Court of Protection informally about the affairs of a mentally incapable person: anyone concerned for his welfare may do so, although, if the Court directs a formal application for a receivership order to be made, it will normally expect this to be done by the closest relative if possible. The possibility of such an application being made would be an important element in any proposal for an enduring power of attorney. As the appointment of a receiver would itself bring the power to an end, it would provide the means of terminating it when circumstances required this, but the donor was no longer capable of doing it.

(ii) <u>On application of attorney</u>

152. If an attorney under an enduring power wished to renounce the power after his donor had become mentally

119 See e.g. para. 8, above.

incapable and thus unable to understand the effect of this or to take the appropriate steps, he should only be able to do so by making an application to the Court of Protection for a receiver to be appointed. He would have to do this if, for example, he found his position too onerous, or he was going abroad, or if he decided that management by a receiver would be more in the donor's interests (which would be the case if he did not have authority to carry out beneficial transactions, or if the donor were prejudicing his own interests by improvident acts).

(iii) On application of other parties

153. Instituting an application for a receivership would also be the appropriate course if the independent body which was empowered to inspect the attorney's accounts considered as a result of its inspection that the attorney's authority should be terminated.[120]

154. In addition, an application would give interested parties the opportunity of having an enduring power terminated, if they considered that it was not operating in the donor's best interests. This would be an important safeguard, since, if the attorney appeared to be dilatory or inefficient or to be acting improperly in any way when the donor was unable to do anything about it, interested parties would be able to challenge the continuance of his authority.

155. An application to the Court of Protection would also be the appropriate course if someone considered that the enduring power had been granted when the donor, because of weakness of mind, was not well able to exercise his own judgment on the matter, or that it was the result of pressure from his family or advisers, and that in the circumstances it was not the appropriate solution for the management of the particular donor's affairs. (Of course, if the weakness of mind amounted to mental incapacity, or the pressure amounted

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120 See paras. 111-112, above.

to undue influence, remedies would be available under the general law without the necessity of terminating the power by a receivership order.)

156. Since, in proceedings for the appointment of a receiver, the Court of Protection may make any inquiries it thinks fit as to any dealing with the patient's property before the commencement of the proceedings,[121] and a receiver may, with the Court's sanction, bring an action on behalf of the patient, the possibility of a receiver being appointed would obviously be an important deterrent to the attorney's acting improperly, and would thus provide some additional safeguard.

(iv) Discretion to refuse receivership

157. There is one point which we think requires consideration in the context of termination of an enduring power by the appointment of a receiver. A person who applied for a receivership order while an enduring power of attorney was subsisting might be well-intentioned, but his suspicions of the attorney's conduct which led him to make the application might be groundless. On the other hand, he might make the application, not because he had any doubts about the attorney's suitability, but simply because he wished to manage the donor's affairs himself. In both these cases it would seem undesirable for the application for a receivership order to be granted automatically, as this would defeat the donor's intention, by terminating the authority of the attorney he chose, when nothing in the attorney's conduct justified this. It would therefore seem preferable for there to be some enquiry as to the desirability of terminating the power, and for giving the attorney an opportunity of justifying his conduct of the donor's affairs.

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121 Court of Proetection Rules 1960, S.I. 1960, No. 1146, r. 78.

158. The best course seems to us to be to give the Court of Protection discretion, on an application for a receivership order during the subsistence of an enduring power of attorney, to refuse to appoint a receiver and to allow the attorney to go on acting, if this appeared to be in the best interests of the donor. The Court of Protection on entertaining an ordinary application for a receivership will examine the affairs of the person in question, consider how they can best be managed and whether a receivership order is the appropriate solution and, if so, who should be appointed. It would therefore seem to have the necessary resources and experience to consider the management of a person's affairs by an attorney under an enduring power, and to decide whether or not the attorney should be allowed to continue managing them.

(b) Termination by the courts and appointment of substitute attorney

159. Apart from providing that the appointment of a receiver (or equivalent) should terminate an enduring power of attorney, the proposals of the Ontario, Manitoba and New South Wales Law Reform Commissions, and the provisions of the United States Model Act, also give the courts jurisdiction, if the attorney for any reason becomes unable, unwilling or unsuitable to act, to terminate the power altogether or to remove the attorney and substitute another.

160. We do not think it would be necessary or desirable to give the courts apart from the Court of Protection special jurisdiction in the termination of enduring powers, apart from their jurisdiction where a power had been granted when the donor lacked the necessary mental capacity or was subject to undue influence. The Court of Protection has experience in assessing the affairs of mentally incapable people, and it would seem superfluous for there to be an alternative procedure. There is also the point that, once the Court of Protection had assumed jurisdiction, there would be no lacuna in the management of the incapable person's affairs. This would not be so if another court terminated an enduring power;

proceedings would then have to be commenced afresh for the appointment of a receiver.

161. Nor would we agree that there should be provision for the appointment of a substitute attorney by the courts. Although it could be said that the wish and intention of the donor that his affairs should be dealt with by means of an enduring power of attorney rather than under the mental health legislation should not be defeated by the inability or unsuitability of the original attorney to act, we consider that the donor's choice of the particular attorney would be as important as his choice of this means of management. The fact that the donor had specifically chosen the attorney as someone he trusted would be one of the main justifications for permitting this means of management despite its inherent risks. If someone not chosen by the donor could be appointed attorney, we think he should be subject to more stringent independent supervision; in which case, it would be preferable for a receiver to be appointed.

(c) Termination under the general law

162. We have already said[122] that we think that the principle that the appointment of a receiver terminates a power of attorney should apply to enduring as well as to ordinary powers. An enduring power of attorney would also generally be terminable in the same way as an ordinary power under the general law (except that, by its very nature, it would not be terminated by reason of the donor becoming of unsound mind). Thus it would be terminated by the death or bankruptcy of the donor, the death or (in certain circumstances) the bankruptcy of the attorney, revocation by the donor, renunciation by the attorney or, if it had been granted for a limited period, effluxion of time. In addition, if the

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122 See paras. 149-150, above.

suggestion that there should be at least two joint attorneys under an enduring power[123] were adopted, it would come to an end on the number of attorneys being reduced to one.

163. There would, however, be certain problems relating to the termination of an enduring power after the donor had become mentally incapacitated. For example, an attorney who had accepted the power, either expressly or impliedly by acting on it, should then no longer be able merely to renounce the power, and would have to achieve this result by applying to the Court of Protection.[124] The attorney's position would also be difficult if the donor purported to revoke the power at a time when the attorney did not consider him capable of managing his own affairs. No formalities seem necessary to revoke a power of attorney, and the attorney who continued to act despite a purported revocation would risk doing so without authority. The safest course would seem to be for him to treat the revocation as effective, but in this case he should be required to invoke the jurisdiction of the Court of Protection, rather than merely leave the donor's affairs unattended. A more serious case would arise where circumstances required that the power should be revoked, but the donor was not capable of realising this or doing anything about it. A scheme for an enduring power of attorney would in such cases have to rely on other interested parties taking the initiative by applying to the Court of Protection.[125]

164. If an enduring power terminated, either under the provisions of the general law or under the suggested provision as to there being at least two joint attorneys, at a time when the donor did not have the necessary mental capacity to create a new power or attend to his affairs himself, there would of course be the risk of them being left without effective management. This position would not

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123 See para. 96, above.

124 See para. 152, above.

125 See para. 154, above.

be worse, however, than if no enduring power had been given (except insofar as it created a false sense of security among the donor's friends and relatives), and an application would have to be made to the Court of Protection for a receivership order. In certain cases the attorney would be required to make an application.[126] In this context it seems inevitable that someone would have to make the decision, which a scheme for an enduring power of attorney would aim to avoid, as to whether the donor had the necessary mental capacity to create a new power, or whether the only course is to apply to the Court of Protection. This problem exists under the present law, however, and we see no way of removing it.

Third parties

165. Section 5(1) of the Powers of Attorney Act 1971 gives a measure of protection to the third party who deals with the donee of a power of attorney. Where the power had been validly granted but later revoked and the third party deals with the donee without knowing of the revocation, the transaction is, in favour of the third party, as valid as if the power had continued in existence. If, however, he knows of the revocation, which includes knowing of any event (such as the death of the donor) that has the effect of revoking the power,[127] then he may not rely on the provisions of the Powers of Attorney Act; the transaction is invalid.

166. Under the existing law a power of attorney may be revoked by the supervening incapacity of the donor. However the main characteristic of the proposed enduring power would be that it would not be revoked by the subsequent mental incapacity of the donor. Since the supervening mental incapacity of the donor would not revoke the enduring power the third party would not be prejudiced by it even if he were

126 See para. 152, above.

127 Powers of Attorney Act 1971, s. 5(5).

to know of it: thus he might safely enter upon transactions with the donees of an enduring power which would be invalid under the existing law.

Ademption

167. The problem of ademption is one which exists to some extent where there is an ordinary power of attorney under the present law. The attorney carrying out transactions on behalf of the donor may, in ignorance of the terms of the donor's will, dispose of property which was the subject of disposition under that will to the detriment of the beneficiaries.

168. We think, however, that this does not give rise to many problems in practice. An ordinary attorney's power will usually be exercised for specific transactions, or for a limited period of time, and often after consultation with, or directions from, the donor. Further, if something done by the attorney has the effect of adeeming a disposition in the donor's will, the donor is, if he wishes, able to make a fresh will.

169. The exercise of an enduring power of attorney after the donor had become incapacitated, on the other hand, would be more likely to involve transactions carrying the risk of ademption. The attorney would probably be managing the donor's affairs as a whole and possibly for a long period, and he might well find it necessary to dispose of the donor's house and its contents, if it should be necessary for the donor to be cared for in an institution, or to sell a considerable amount of securities or other property in order to pay for the maintenance of the donor. By this stage, the donor would no longer have the capacity to make a new will in order to remedy the position.

170. Where a receiver has been appointed under the Mental Health Act 1959, this problem is dealt with in various ways. First, the Court of Protection will be aware of the contents of any will made by the patient (as a copy of it should be filed on the first application for a receivership order). Whilst it treats the interests of the patient as paramount in the management of his property, it will as a matter of well-established practice do its best not to alter the character of his property or interfere with the rights of succession.[128] Secondly, under section 107 of the Mental Health Act 1959, if a disposal of a patient's property sanctioned by the Court of Protection adeems a disposition made by his will, the legatee is given an appropriate interest in the assets representing the property disposed of. Thirdly, if the patient does not have testamentary capacity, the Court of Protection may in certain circumstances provide for the making of a will or codicil for the patient.[129]

171. None of the schemes for an enduring power of attorney which we have studied have have made any recommendation for dealing with this problem, but we think that it is one to which it is worth drawing attention. One possible solution would be to require that the attorney should see a copy of the donor's will and, so far as was compatible with the donor's interests, do his best not to disrupt its dispositions. Such a requirement could, however, only be directory, and not mandatory, and would seem of little benefit. A more practicable solution would be to introduce a provision equivalent to section 107 of the Mental Health Act 1959, with regard to dispositions by attorneys under enduring powers. Such a solution would involve some problems - for example, a legatee would have to prove that the relevant ademption took place during the donor's incapacity, and it would introduce an element of complexity - but we put it forward as a possibility, and would welcome comments or alternative suggestions.

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128 See Heywood & Massey, Court of Protection Practice (9th ed., 1971), p. 121.

129 Mental Health Act 1959, s. 103(1)(dd) (added by the Administration of Justice Act 1969, s. 17(1)).

PART V CONCLUSIONS

The incapacitated principal: a restatement of the problem

172. Our terms of reference are "to consider the law and practice governing powers of attorney and other forms of agency in relation to the mental incapacity of the principal and to make recommendations". We have examined the relevant existing law and practice in paragraphs 7 to 33 and in our provisional view the only point of legal difficulty is the one with which the rest of this working paper has been concerned, namely that an agent's authority to act for his principal is only valid so long as the principal has the mental capacity to act for himself. If the principal becomes mentally incapable the agent's authority comes to and end and may only be revested in him by or under the direction of the Court of Protection. This is so even though the principal has, when mentally capable, signified his intention that the authority should continue and though the agent is willing to go on acting. In such a situation it would sometimes be simpler, cheaper and more convenient for all the parties concerned if the agent's authority were to remain valid after the principal had become mentally incapacitated; then an application to the Court of Protection would not have to be made. The difficulty is that this apparently sensible solution is not possible under the existing law.

Possible solutions

173. If the problem of the incapacitated principal, as described in the preceding paragraph, were to merit a change in the existing law then, in our provisional view, that change might take one of two forms. The law relating to the care of the property of the mentally ill might be revised. This would mean a thorough review of the jurisdiction and practice of the Court of Protection and would take us beyond our present terms of reference. It has not been attempted in this working paper. The other possibility is to change the existing law of agency so as to provide that an agent's

authority should not cease with the onset of mental incapacity in the principal. We have considered several law reform proposals along these lines; they are summarised in the Appendix and all of them centre on a legal innovation that we have described in this paper as an "enduring" power of attorney. We should welcome suggestions on other ways in which the problem of the incapacitated principal might be tackled.

Other problems

174. We have treated the problem of the incapacitated principal as the only difficulty within our present terms of reference that might justify changes in the existing law. We should welcome information and comments on any other problems they may exist in this branch of the law.

The enduring power of attorney

175. The main arguments for and against the introduction into English law of an enduring power of attorney are summarised in paragraphs 34 to 48. At least two major considerations of policy are involved and they are here in opposition to each other. One is that a person should have the freedom, when mentally capable, to provide for the future management of his property and affairs in whatever way pleases him. The other is that the law should protect the interests of those who are no longer able to protect themselves. The proposals for an enduring power of attorney attempt to reconcile these two major considerations of policy by giving the principal the right to provide for the management of his property and affairs in the event of his becoming mentally incapable but providing safeguards against mismanagement during the period of his incapacity. The aim is to provide a reasonably simple, cheap and convenient device for managing the property and affairs of the mentally incapable otherwise than under the direction and control of the Court of Protection.

176. The ultimate question for consideration is whether an enduring power of attorney would be an acceptable legal

innovation but this must depend on the formalities and conditions to be met for its creation and the safeguards to be provided against abuse. At one extreme it might be provided that an enduring power of attorney, however created, should give the donee "carte blanche" to do as he liked with the incapacitated donor's property and affairs without being answerable for his conduct to the donor, the Court of Protection or to any other person or body. At the other extreme it might be provided that the appointment of an attorney by the grant of an enduring power should require the sanction of the Court of Protection and that its exercise should be subject at every stage to that Court's approval and control. The former would seem to give the donor too little protection; the latter would make the power of attorney so similar to a Court of Protection order for receivership as to allow it no useful role of its own. Our provisional view is that if an acceptable solution is to be found it must lie somewhere between the two. In paragraphs 49 to 171 we have examined the various conditions and safeguards that might be provided and have endeavoured to separate those that might be practicable from those that would not.

Conditions and safeguards

(a) Formalities of the grant

177. The first point concerns the donor's capacity to grant an enduring power of attorney and the formalities that ought reasonably to be required. The validity of the grant must depend on the donor's having the mental capacity to grant it. Our provisional view is that the test should be the ordinary test for contractual capacity and should not have to be supported by medical evidence (paras. 53 to 63). The formalities should be the same as for the grant of a power of attorney under the provisions of the Powers of Attorney Act 1971 with two additional requirements (i) that to constitute an enduring power the grant should incorporate an express statement of the donor's intention that the power should survive his supervening mental incapacity (paras. 64-66) and (ii) that it should be executed in the presence of

one witness who should not be the attorney himself (paras. 67-70). It would be advisable for the attorney to accept the power expressly, but this should not be a condition of the power's validity (paras. 71-72).

(b) Property in respect of which an enduring power of attorney may be granted

178. Another point which we have considered is whether there should be any limit on the value of property in respect of which it should be possible to grant an enduring power. The aim of such a limit would be to prevent an enduring power being granted in respect of a large or complex estate, where it would not provide an appropriate means of management. Our provisional view is that it would not be practicable, or even necessarily desirable, to impose such a limit (paras. 73-81).

(c) Qualification and number of attorneys

179. As regards restrictions on who should be able to be appointed as attorney under an enduring power, we do not think that it should be possible for a minor or a mentally incapable person to be appointed. Our provisional view, however, is that there should not be any further restrictions, such as a requirement that an attorney should be a member of a particular profession, or that he should not be a member of the donor's family. We would suggest that at least two attorneys should be appointed, and that they should be required to act jointly (paras. 83-96).

(d) Filing or registration requirements

180. Our provisional view is that there should be no requirement for an enduring power of attorney to be registered or filed with an independent body. Such a requirement would seem to serve no useful purpose unless the independent body was given powers of supervision and control over the exercise of the power, which we do not think would be desirable (paras. 97-101).

(e) Accounts

181. We do not think that an attorney acting under an enduring power should be required to file annual accounts with an independent body. Our provisional view is, however, that some independent body should be empowered, on the application of any concerned person, to call for information or accounts from the attorney. It should be empowered to order production direct to the applicant, or to investigate the accounts itself, and to take such further action as it deemed necessary (paras. 102-113).

(f) Extent of the attorney's power

182. We have also considered the possibility of imposing mandatory limitations or restrictions on the exercise of the attorney's authority in respect of certain transactions, for example the disposal of the donor's home or business, the making of gifts and investment. Our provisional view is that it would not be practicable for there to be inherent limitations on the scope or exercise of an enduring power of attorney (paras. 114-121).

(g) Power or duty to act

183. The grant of a power of attorney confers authority, but does not of itself impose a duty to do anything. We have considered whether, as the purpose of an enduring power of attorney would be to provide for management of a person's affairs after he became mentally incapable, an attorney under such a power should be under positive duty to act. Our provisional view is that such an attorney who has expressly or impliedly accepted the power should be under a positive duty of "prudent management", which would arise when he first knows that the donor has become mentally incapable (paras. 122-135).

(h) Remuneration of the attorney

184. Another question we have considered is whether there should be provision for independent supervision of the charges of a professional attorney under an enduring power. Our provisional view is that this would not be desirable, but that the independent body empowered to call for information or accounts (see para. (e), above) should be able to challenge the attorney's charges. Overcharging could also be a ground for an application for a receivership order (paras. 136-140).

(i) Time limit on the power

185. Our provisional view is that the imposition of a mandatory time limit on the continuance of an enduring power of attorney, whether running from its creation or from the onset of mental incapacity, would not be desirable (paras. 141-148).

(j) Termination of an enduring power of attorney

186. We consider that an enduring power of attorney, like an ordinary power, should be terminated by the appointment of a receiver under the Mental Health Act 1959. In certain circumstances, an attorney who had accepted the power would be under an obligation to make an application to the Court of Protection, for example if he wished to resign his position (paras. 149-156). The Court of Protection should have discretion to refuse to make a receivership order, and to allow an attorney under an enduring power to continue acting, if this appeared to be in the donor's interests (paras. 157-158). No special powers should be given to the courts other than the Court of Protection, to terminate an enduring power, or to appoint a substitute attorney (paras. 159-161). An enduring power of attorney would also be terminable under the general principles of law applicable to ordinary powers (paras. 162-164).

(k) Third parties

187. Section 5(1) of the Powers of Attorney Act 1971 should apply to people dealing with attorneys under an enduring power in the same way as it applies to ordinary powers of attorney. Third parties would not be affected by the donor's mental incapacity (paras. 165-166).

(l) Ademption

188. An enduring power of attorney would seem to carry a greater risk of ademption than an ordinary power. A possible solution would be to import a similar provision to that in section 107 of the Mental Health Act 1959, but this would involve some problems and we would welcome comments (paras. 167-171).

Provisional proposal

189. We have identified a clear conflict between recommending what is desirable and recommending what would be safe in all circumstances. It is desirable that wherever possible persons should be permitted by the law to do what they wish to do with their own property. It would however only be safe in all circumstances if there were no risk that an attorney chosen by the donor might abuse his position of trust (whether deliberately or negligently).

190. The risks of fraud and negligence can never be completely eliminated in any human activity. In connection with the enduring power of attorney there are, we think, two particular problems that must be faced. One is the risk that someone will be persuaded to execute an enduring power of attorney when it is not in his own best interests to do so, particularly if he is losing his mental grasp (though still having full legal capacity). The other is that if the donor becomes mentally incapable after granting an enduring power he will lose the ability to control or terminate the activities of the donee.

191. We would be interested to learn whether experience has shown any greater risk of undue influence or fraudulent pressure leading to the grant of a power of attorney than to a will or outright disposition of property. A conveyance executed as a result of pressure, whether fraud or undue influence, may lead to inconvenience at least as great as that likely to result from the grant of an enduring power of attorney; but if the grantor is not mentally incapable there are no special safeguards in the law to prevent advantage being taken of him at the time. The conditions and safeguards we have listed in paragraphs 177 to 188 above (and in particular those requiring at least two attorneys, empowering an independent body to call for accounts and providing for termination of an enduring power of attorney on the grant of a receivership order) will, we think, afford some protection.

192. We are clearly of the view that the law should not place unnecessary obstacles in the way of the person of full capacity who wishes to make plans to deal with the eventuality of his future mental incapacity. This will involve some risks which cannot be eliminated completely, but we think that the safeguards we have outlined above will effectively limit the opportunity for abuse.

193. We are therefore of the provisional view that the law should enable a person of sound mind to grant an enduring power of attorney subject to the conditions and safeguards mentioned in paragraphs 177 to 188 above. We think this would enable the law to supply what we believe is a genuine need. We would welcome comments on this provisional proposal.

APPENDIX

VIEWS AND PROPOSALS OF OTHER BODIES

The Law Society

In their Council's Memorandum on The Court of Protection (March 1970) The Law Society proposed "the introduction of a special type of power of attorney, capable of surviving such incapacity of the donor as would normally operate to revoke a power", subject to the following safeguards and limitations:-

(a) The execution of the power should be witnessed by a medical practioner, who should make a statutory declaration (to be incorporated in or annexed to the power, for the benefit of third parties) "to the effect that the donor was of sound mind and understanding at the time of execution and that he clearly understood the nature and effect of what he was signing".

(b) The power should contain an express statement that it is the donor's intention that, even if mental incapacity should intervene, the power is not to be thereby revoked.

(c) In order to ensure the reliability of attorneys under special powers and to protect those who may be unfitted for the responsibilities from being pressed to undertake them, there should be not less than two joint attorneys, at least one of whom is not a member of the donor's family, and at least one of whom must be, and remain, a member of a professional body or an organisation which is, for practical purposes, in a position to guarantee his honesty. The latter requirement would be satisfied by a solicitor holding a practising certificate or a trust corporation.

(d) There should be a time limit on the power, as it would seem undesirable to bind a donor indefinitely during his incapacity to a choice made by him when circumstances might have been very different, and the power was not proposed for use in cases of long-term incapacity. The time limit should be a period of not more than five years from the date of the creation of the power, the period to be specified in the document.

(e) Unless it appears on the face of the power that the necessary requirements have not been complied with, third parties dealing in good faith should be entitled to rely on the power throughout the stated period.

(f) Such a power should not be revoked by the supervening incapacity of the donor during the period stated, although it should be revoked by any other circumstances, such as death or bankruptcy, which at present operate as a revocation, and should also be revocable by the donor while he is capable of doing so.

The Ontario Law Reform Commission

The Ontario Law Reform Commission, in their Report on Powers of Attorney (1972), recommended legislation to "allow a donor of a power of attorney to provide expressly for the power to survive his subsequent incapacity...." The following conditions should apply to such a power:-

(a) As with any other power of attorney, the donor must be in full possession of his faculties when he executes the power, but there should not be a requirement for the power to be witnessed by a medical practioner, or for a statutory declaration as to this condition being satisfied, as this would be "an unnecessary complexity".

(b) The donor must expressly state in the power of attorney that he intends the power to survive and be valid if mental incapacity should supervene.

(c) The power of attorney must be executed in the presence of at least one witness, who should not be the donee or the spouse of the donee.

(d) The attorney should file a notarial copy of the power of attorney with the registrar of the surrogate court of the appropriate district, not later than fifteen days after learning that the donor has become incapacitated, or the power could not be exercised validly subsequent to the donor's incapacity. The court should, however, have the power to extend the time limit and validate the exercise of the power after the donor's incapacity.

(e) Interested parties should be able to apply to the surrogate court for an order that the attorney be directed to pass his accounts, and the Public Trustee should similarly be able to apply on behalf of interested parties if a complaint is made to him. "Interested parties" would mean "any person having a material interest, directly or indirectly, in the estate of the donor."

(f) The court should have power, if the attorney dies, or himself becomes incapable of acting subsequent to the donor becoming incapacitated, to substitute another attorney for the attorney named in the power, on the application of an interested party or the Public Trustee.

(g) If, after the donor has become incapable of appointing a new attorney, the attorney becomes

unable or unwilling to act, he may, having notified interested parties and the Public Trustee, apply to the court to be relieved of his authority, and to have another attorney substituted.

(h) The power should cease to be valid on a declaration of mental incapacity and appointment of a committee under the Mental Incompetency Act 1970.

(i) The power should be revocable by the donor at any time except during mental incapacity.

(j) The conditions recommended should apply to such a power of attorney notwithstanding any agreement to the contrary.

(k) Even if no such power has been executed, the court should have the power to appoint an attorney to act on behalf of a person who is incapacitated, for limited and specific purposes, on such terms as may be set out in the order.

In Ontario procedures for the management of the affairs of a mental incompetent are provided by the Mental Incompetency Act R.S.O. 1970, c. 271; the Commission explained that they were not concerned, in their Report, with the declared mental incompetent for whom a committee had been appointed nor with those confined to psychiatric institutions.

The Manitoba Law Reform Commission

The Manitoba Law Reform Commission, in their Report on "Special, Enduring Powers of Attorney" (1974) recommended legislation making it possible for a donor of a power of attorney to provide expressly for the power to survive his subsequent incapacity. There is in Manitoba no Court of Protection or court of equivalent jurisdiction.

The main elements of their proposals are as follows:-

(a) The form of the special power of attorney should specifically state in clear, unambiguous language, that the donor intends that the power shall continue to be valid despite any subsequent mental incapacity.

(b) The form should direct the attorney to file accounts with the Public Trustee annually, unless the donor indicates on the form that this is not required. There should be penalties for not complying with a direction to file accounts.

(c) The power should contain a form of acceptance by the donee of the power, showing that he is aware of its implications, and any conditions (as to accounts, remuneration etc.) attached to it.

(d) The donor may specify in the power whether or not the administration of his estate shall be fee-bearing. The attorney should be able to apply to the Surrogate Court to have the administration made fee-bearing, if the circumstances change and justify this. The Public Trustee should have power to ensure that fees charged by an attorney are reasonable.

(e) The power should be executed by the donor in the presence of at least two witnesses (i) neither of whom must be the donee or the spouse of the donee and (ii) one of whom must be a doctor or lawyer and (iii) not more than one of whom is a member of the donor's family. A supporting affidavit of execution confirming that these requirements have been met should also be made, the witnesses testifying

that (a) they know the donor personally and (b) they have reason to believe the donor and the person executing the power of attorney are one and the same person and (c) that the donor appears to be of sound mind and that he appeared to understand what was being executed.

(f) Copies of the power should be filed with the Registrar of the Surrogate Court and the Public Trustee within fifteen days of the donee signing his acceptance of the power. Failure to file would render the power ineffective, but the Surrogate Court should have power to extend the time and thus validate the exercise of the power subsequent to the donor's mental incapacity.

(g) In the absence of an accounting requirement by the donor ((b) above), the Public Trustee may, on complaint by an interested party, require a special attorney to file accounts. The Public Trustee should have the power to investigate accounts filed with him, and take such action as he considers necessary, for example applying to the court for the removal and substitution of the attorney.

(h) The donor may revoke the power at any time while he is mentally capable, and it would cease on a declaration of mental incompetence and appointment of a committee under the Mental Health Act.

(i) A special attorney may renounce his duties and responsibilities on giving written notice to the donor and the Public Trustee.

(j) Where the donor is incapacitated, and (i) the attorney dies or becomes incapacitated, or (ii) any interested party or the Public Trustee

considers that the attorney is not performing his duties in a competent manner, the Public Trustee or any interested party should be able to apply to the Court for the appointment of a new attorney, or for the appointment of the Public Trustee to administer the donor's estate. "Interested party" would include a member of the donor's family, a person who provides board and lodging to the donor, and in some circumstances a creditor of the donor.

(k) The donor of a special power should not be able to waive the recommended conditions.

(l) Where no special power has been granted, the Court should have the supplementary power, in suitable cases, and where it is in the interests of the donor, to confer the status of a special attorney on the donee of an ordinary power of attorney, subject to such limitations and conditions as the Court thought fit.

The Law Reform Commission of British Columbia

The Law Reform Commission of British Columbia, in its Report on "The Law of Agency Part 2 - Powers of Attorney and Mental Incapacity" (1975) also recommended legislation providing for an enduring power of attorney. The Patients' Estates Act S.B.C. 1962 c. 44 provides a procedure in British Columbia for the appointment of a committee to manage the affairs of someone who has been declared no longer capable of managing them himself. The Commission's recommendations were for the introduction of another procedure outside the ambit of the Patients' Estates Act.

The main features of their proposals are as follows:-

(a) In order to be valid, an enduring power of attorney must be in writing and dated, signed

by the principal and express the intention of the principal that the power should endure despite any supervening incapacity.

(b) The principal's signature ought to be witnessed; the principal ought to acknowledge the creation of the power of attorney before a person competent to take an affidavit and that person should complete an acknowledgment form incorporating some reference to the principal's apparent mental competence and understanding of the document; and the power ought to be executed under seal. Failure to comply with these requirements would not however invalidate the power, as such, for all purposes.

(c) An enduring power of attorney should terminate on the appointment of a committee under the Patients' Estates Act. This would be the greatest single safeguard against abuse of the power. The power should also terminate upon revocation by the principal.

(d) An enduring attorney should be under a duty, from the date of his appointment, to exercise his powers as a man of ordinary prudence would manage his own private affairs, for the benefit of the principal and his family having regard to the nature and value of the property of the principal and the circumstances and needs of the principal and his family. This duty should be subject to any express instructions given by the principal while mentally competent, and the attorney should not be liable if he acts in good faith in obeying the instructions of the principal while apparently mentally competent, or in disobeying instructions which seem contrary to his duty when the principal was apparently not mentally competent.

(e) The Public Trustee should be empowered to investigate and audit the attorney's accounts, and to require such information from the attorney as may be necessary for this purpose.

(f) It should be made clear that, where an attorney accepts an enduring power, the relationship between him and the principal is a fiduciary one by operation of law.

(g) The principal should not be able to waive any special statutory provision which is aimed at his protection.

The Commission recommended that there should be no filing requirements nor limits on who should be eligible to act as attorney.

The Law Reform Commission of the Australian Capital Territory

The Law Reform Commission of the Australian Capital Territory, in its Report on the Management of the Property and Affairs of Mentally Infirm Persons (1973), recommended that provision should be made for an enduring power of attorney along the lines set out in the Ontario Report. They recommended that such powers should be registered in a special register as soon as there were grounds for believing the donor to be incapable and that there should be provision for the Protective Commissioner to call for and investigate the attorney's accounts. The Protective Commissioner is a court officer who exercises most of the powers and functions of the Master in the Protective Jurisdiction of the Supreme Court of New South Wales.

The New South Wales Law Reform Commission

The New South Wales Law Reform Commission, in its Report on Powers of Attorney and Unsoundness of Body or Mind

(1975), recommended the introduction of a "protected power of attorney", capable of surviving the principal's supervening mental incapacity. The existing procedures for managing the affairs of those who are mentally ill and incapable of managing their affairs themselves are provided in New South Wales by the Mental Health Act 1958; management, known as "surrogate management", is usually provided by a committee or manager appointed by the Supreme Court or by the Protective Commissioner. The Law Reform Commission recommended the introduction of a new procedure based on a "protected power of attorney" and subject to the following conditions:-

(a) As is the case with ordinary powers of attorney, the power must be created by an instrument, which should also contain an expression of the principal's intention that it should continue to be valid despite any supervening mental incapacity on his part.

(b) The principal must be of sound mind at the time the power is given, but there should not be any mandatory requirement as to medical or other evidence certifying this. However the court should be empowered to make an order of "confirmation" to remove possible doubts about the validity of the initial grant.

(c) The Supreme Court should have power (although the principal could specifically exclude it) to appoint a substitute attorney in place of an unsatisfactory one, to order the attorney to produce accounts and information, to order an inquiry into the attorney's conduct, or to alter the scope of the power with regard to particular transactions. It should also have the power (which could not be excluded) to terminate a protected power of attorney altogether. These powers should be exercisable by the Supreme Court on an application made in

the name of the incapacitated principal by another person as his next friend or tutor.

(d) The commencement of surrogate management under the Mental Health Act 1958 should make a protected power of attorney liable to termination but should not terminate it automatically. The Supreme Court should be able to permit the continuance of the power during surrogate management, subject to such terms and conditions as it thinks fit.

United States Model Act

The National Conference of Commissioners on Uniform State Laws in 1964 adopted a Model Act - the Special Power of Attorney for Small Property Interests Act - aimed primarily at providing "a simple and inexpensive legal procedure for the assistance of persons with relatively small property interests ... who ... wish to make provision for the care of their personal or property rights or interests ... when unable adequately to take care of their own affairs." The Act provided for a power of attorney which would not "... be invalidated by reason of any subsequent change in the mental or physical condition of the principal, including but not restricted to incompetency." The Act should only apply to powers granted in respect of property of not more than a specified value and income of not more than a specified annual amount, it being for each enacting State to impose what limits it thinks fit. The main provisions of the Model Act are as follows:-

(a) The power is to be signed in the presence of and with the approval of a judge. This approval is only to be given if:-

(i) the principal requests it;

(ii) the attorney consents to serve; and

(iii) the judge is satisfied, after any

investigation he deems appropriate, that the principal is a person covered by the Act, that the property and income to be covered by the power are within the specified limits, that the principal reasonably understands the nature and purpose of the power, and that the attorney is a suitable person to act.

The approval, which may be given informally without the service of any summons or notice, is to be endorsed on the original instrument.

(b) The power shall state, inter alia, that it was executed under the provisions of the Act and shall describe the extent of the power conferred and the annual income, nature and estimated value of the property covered by the instrument.

(c) The original power is to be filed with the clerk of the court of the approving judge, and a certified copy is to be filed with the recorder of the county where the principal resides, and the recorder of each county where there is real property which is to be affected by the exercise of the power.

(d) If an attorney dies, resigns, refuses or is unable to act, or is removed for cause by the court, and the principal fails or is unable to appoint a successor, a judge of the court which approved the original power may appoint a successor (unless specifically precluded by the original power). The appointment of a successor must be in writing, (and, if done by the principal, must be approved by a judge of the same court as the original) and is subject to the same filing requirements as the original.

(e) The power terminates altogether on:-

(i) written revocation by the principal;

(ii) the death of the principal;

(iii) a court order appointing a committee (i.e. a receiver), unless the order provides to the contrary;

(iv) termination as specified in the power;

(v) determination by the approving judge that the value of the property or the amount of annual income has increased beyond the limits of the Act.

(f) Any document proving the termination of the power (e.g. the attorney's resignation, the principal's revocation, a certified copy of the death certificate of either, or a court order) shall be subject to the same filing requirements as the original power.

(g) The attorney is entitled to be reimbursed for reasonable expenses incurred in the performance of his duties and, unless precluded by the power, to reasonable compensation (which may be fixed in the power) for his services. (There is no restriction on who may be appointed attorney, and it is anticipated that it will be a close friend or relative, but the compensation provision is included in case there is none, or the attorney's duties are such that compensation is justified.)

(h) The attorney shall submit accounts to the principal or his legal representative at the times specified in the power, at any time when directed to do so by a judge of the approving court, and on the termination of his authority.

The Model Act has been adopted in the following States:-

Arkansas, North Dakota,
Oklahoma, Wyoming, Delaware.

United States Uniform Probate Code

In 1969 a Uniform Probate Code was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association. The greater part of the Code is concerned with wills, intestacies and the administration of the estates of deceased persons. However Article V provides for "Protection of Persons Under Disability and Their Property" and includes provisions, in Part 5, for an enduring power of attorney for use by adults approaching senility or incompetence to avoid the necessity for other kinds of protective regimes. The only section of immediate relevance to the present study is Section 5-501 which provides as follows:-

> "Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words 'This power of attorney shall not be affected by disability of the principal,' or 'This power of attorney shall become effective upon the disability of the principal,' or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representatives as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency."

This Section is based in part on the Code of Virginia (1950), Section 11-9.1, and is remarkable for including hardly any of the safeguards which are in the United States Model Act. This part of Article V of the Uniform Probate Code has been adopted by the following States: Alaska, Arizona, Colorado, Idaho, Minnesota, Montana, Nebraska, New Jersey, North Dakota and South Dakota.

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