

# Does The Agency Die When the Principal Becomes Mentally Incapacitated?

*W. Alfred Mukatis\**

## I. INTRODUCTION

The legal problems associated with mental incapacity have recently been brought to the nation's attention in the trial of John Hinckley for the attempted murder of the president. The uproar over the jury verdict of not guilty by reason of insanity prompted a Congressional investigation into the insanity defense.<sup>1</sup> This troublesome relationship between an individual's mental capacity and his legal liability has caused problems in civil law areas as well. The courts have had particular difficulty developing a consistent, rational, and practical approach to mental incapacity in the law of agency.

This article explores the status of an agency when a competent principal enters into an agency relationship and thereafter becomes mentally incapacitated.<sup>2</sup> On the one hand, does the status of the agency depend on factors relating to the principal such as type, length, or permanence of the incapacity? For instance, is the status of the agency the same when a principal lapses into a coma as it is when a conscious principal is incapacitated because of a mental disease such as schizophrenia?<sup>3</sup> If in a coma, how does the length of the coma affect the status of the agency? Is a legal adjudication of insanity required to terminate the agency? On the other hand, is the agency status affected by notice to or knowledge of the agent or a third party dealing with the agent? For instance, is the agency terminated or suspended

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\* Assistant Professor of Business Law, Oregon State University. B.S., 1960, Northwestern University; Ph.D., 1965, California Institute of Technology; J.D., 1976, University of Illinois.

1. 68 A.B.A. J. 908 (1982).

2. This paper does not deal with irrevocable agencies, i.e., those coupled with an interest, or with master-servant relationships involved in tort liability.

3. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1177 (26th ed. 1981) defines schizophrenia as "[a]ny of a group of severe emotional disorders, usually of psychotic proportions, characterized by misinterpretation and retreat from reality, delusions, hallucinations, . . . bizarre, or regressive behavior."

if either the agent or third party is without notice or knowledge of the principal's incapacity when they enter into a transaction for the principal's benefit? After exploring these questions and modifications of the basic common law rule, this article examines whether the modifications have gone far enough. Finally, this article will suggest changes that could be made to avoid the remaining problems.

The frequently cited general common law rule is that an agent's authority automatically terminates upon the permanent loss of mental capacity of the principal, irrespective of knowledge or notice.<sup>4</sup> This rule operates for actual as well as for apparent authority.<sup>5</sup> The reason given for this automatic and immediate cessation of authority is that the principal-agent relationship is a personal one and the agent has no authority to do anything for the principal that the principal, were he present, could not lawfully do for himself.<sup>6</sup> But does the above rule accurately reflect the current status of the law or does the general rule simply receive lip service while the courts and legislatures create exception after exception?

Reuschlein and Gregory state that, although the general rule is harsh, courts, with rare exception, have been reluctant to modify it<sup>7</sup> except in cases involving banks.<sup>8</sup> However, when a rule is harsh, exceptions are inevitably created. Story, very early, pointed out authority for the proposition that an agency relationship could not be revoked or suspended until an adjudication of mental incompetency.<sup>9</sup> Story, for example, cited the case of *Wallis v. Manhattan Bank*,<sup>10</sup> wherein the court held that "lunacy of a person who has executed a power of attorney"<sup>11</sup> does not operate to revoke it, at least until the fact of his lunacy has

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4. H. REUSCHLEIN & W. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* 86-88 (1979); W. SEAVY, *HANDBOOK OF THE LAW OF AGENCY* 88-91 (1964).

5. H. REUSCHLEIN & W. GREGORY, *supra* note 4, at 92; *RESTATEMENT (SECOND) OF AGENCY* § 125 comment a (1958).

6. *Davis v. Lane*, 10 N.H. 156, 158 (1839); J. STORY, *COMMENTARIES ON THE LAW OF AGENCY* 616 (5th ed. 1857); *Jackson v. Hall*, 139 Kan. 832, 836, 32 P.2d 1055, 1057 (1934); *Hart v. Feely*, 109 F. Supp. 3, 5 (D.C.M.D. Pa. 1953).

7. H. REUSCHLEIN & W. GREGORY, *supra* note 4, at 87-88.

8. *See infra* notes 120-22 and accompanying text.

9. J. STORY, *supra* note 6, at 616 n.12.

10. 2 Hall 495 (1829).

11. Power of attorney or letter of attorney is defined in *BLACK'S LAW DICTIONARY* 164, 1334 (rev. 4th ed. 1968) as a written instrument authorizing another to act as his agent or attorney.

been properly established by an inquisition."<sup>12</sup> Since that early case, common law decisions and statutory modifications have led to a number of different results concerning when the principal becomes mentally incapacitated.

## II. COMMON LAW DECISIONS

### A. Principal Adjudicated Mentally Incompetent

Many decisions state that an adjudication of mental incompetence automatically terminates the agency without notice or knowledge.<sup>13</sup> Both the Restatement of the Law of Agency and the Restatement (Second) agree with this proposition.<sup>14</sup>

In the case of *Powell v. Batchelor*,<sup>15</sup> however, the court

12. J. STORY, *supra* note 6, at 616 n.2.

13. *Hart v. Feely*, 109 F. Supp. 3 (D. Pa. 1953); *The Emporium v. Boyle*, 7 Alaska 80 (1928); *Millman v. First Federal Sav. & Loan Ass'n*, 198 So. 2d 338 (Fla. Dist. Ct. App. 1967); *Joost v. Racher*, 148 Ill. App. 548 (1909); *Jackson v. Hall*, 139 Kan. 852, 32 P.2d 1055 (1934); *Harrington v. Bailey*, 351 S.W. 2d 946 (Tex. Civ. App. 1961); *Renfro v. City of Waco*, 33 S.W. 766 (Tex. Civ. App. 1896).

14. Section 122 of the Restatement states that "[t]he authority of the agent to make the principal a party to a transaction is terminated or suspended upon the happening of an event which deprives the principal of capacity to become a party to the transaction. . . ." RESTATEMENT OF AGENCY § 122 (1933). While this basic statement of law is not altogether definitive, it is followed by comment a that "[t]he principal may cease to have capacity to make a contract or to subject himself to liability because of mental incompetency as where there is a judicial determination of insanity or because of other changes in conditions which, by the law of the State which controls the transaction, create such incapacity." *Id.* Furthermore, illustration I of comment b states that "P authorizes A to sell Blackacre for not less than \$5000, the authority to continue for one year and not to terminate on P's death or incapacity. P is adjudicated incompetent without A's knowledge. A's authority to sell Blackacre is terminated." *Id.* Lastly, comment a to Section 125 states that, "revocation of authority or the happening of an event which terminates authority . . . except supervening lack of capacity . . . does not terminate the apparent authority which was created by the third person's knowledge of the agency. . . ." (emphasis added). RESTATEMENT OF AGENCY § 125 comment a (1933).

Thus, it is reasonable to draw the conclusion from the Restatement that an adjudication of insanity terminates all authority, actual and apparent, and notice or knowledge to the agent or third party is irrelevant.

The Restatement (Second) is similar. It states in pertinent part, that "the loss of capacity by the principal has the same effect upon the authority of the agent during the period of incapacity as has the principal's death. . . ." RESTATEMENT (SECOND) OF AGENCY § 122 (1958). Under "Death of Principal," the Restatement (Second) states that "[t]he death of the principal terminates the authority of the agent without notice to him. . . ." RESTATEMENT (SECOND) OF AGENCY § 120 (1958). The illustration on P's adjudication of incompetency mentioned above from the Restatement is also used in the Restatement (Second). In addition, comment a to Section 125 of the Restatement (Second) on revocation of apparent authority is essentially identical to that in the Restatement.

15. 192 Mo. App. 67, 179 S.W. 751 (1915).

departed from this rule. The *Powell* court found evidence that a general agency had been established prior to the principal becoming insane on February 21, 1910, and being placed under guardianship.<sup>16</sup> The court stated that while the acts "occurred [on] March 10, 1910, that is, after [the principal] became insane, . . . such insanity did not have the effect, under the circumstances of this case, [of] terminating [the] authority or . . . releasing [the principal] from liability for the acts of his . . . agent."<sup>17</sup> The court failed to provide a rationale for its holding, but cited *Hill's Executors v. Day*<sup>18</sup> and *Davis v. Lane*,<sup>19</sup> wherein no adjudication of insanity had occurred.

Recently, in *Matter of Estate of Head*,<sup>20</sup> a case decided on the ground that the agency was coupled with an interest,<sup>21</sup> the court stated that "an adjudication of insanity is at most presumptive evidence of the mental capacity of a person at the time of a transaction. The strength of the presumption is lessened in proportion to the remoteness of the adjudication."<sup>22</sup> Thus, while the great weight of authority holds that an adjudication of incompetency terminates or suspends the authority of the agent regardless of knowledge or notice, *Powell* and *Head* support the proposition that even an adjudication may not terminate the agency.

*B. Principal Mentally Incapacitated in Fact but Not  
Adjudicated Incompetent—The Restatement and  
Restatement (Second) of Agency*

Although the Restatement of Agency and the Restatement (Second) of Agency are often used by courts to buttress their decisions, neither are much help in deciding what happens to the agent's authority when the mentally incapacitated principal has not been adjudicated incompetent. The basic rule of law, exemplified in section 122 of the Restatement,<sup>23</sup> is that the agent's authority is terminated or suspended by an event which deprives the principal of capacity to become a party to the rela-

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16. *Id.* at 74, 179 S.W. at 753.

17. *Id.*, 179 S.W. at 754.

18. 34 N.J. Eq. 150 (1881).

19. 10 N.H. 156 (1839).

20. 94 N.M. 656, 615 P.2d 271 (1980).

21. *Id.* at 662, 615 P.2d at 278.

22. *Id.* at 660, 615 P.2d at 275.

23. RESTATEMENT OF AGENCY § 122 (1933).

tionship. However, with regard to the triggering event, comment a to Section 122 refers only to a judicial determination of insanity or other changes in conditions.<sup>24</sup> Neither section 122 nor comment a makes clear what events or what other changes cause termination or suspension of the agency. Illustration 1 following comment b to section 122 refers only to a judicial adjudication of insanity.<sup>25</sup> Comment c to section 122 adds to the confusion by stating:

*Temporary incapacity.* The rule stated in this Section applies to mental incompetency only when it creates legal incapacity, as it may do in case of mental disease. Where the incapacity is only temporary, the authority of the agent may be merely suspended. Where the principal becomes mentally incompetent for but a short period, as where he has a delirium accompanying a fever, the agent's authority is not necessarily affected. . . .<sup>26</sup>

The illustration following comment c concludes that where the principal becomes insane for eight hours after drinking wood alcohol, contracts made for him by his agent during that period are valid.<sup>27</sup>

Therefore, according to the Restatement, eight hours of insanity should not affect the agency. Perhaps eight hours were chosen in the illustration to suggest that the agency of a sleeping principal is unaffected. This raises a number of questions. What happens if the mental incapacity lasts one day or one week or one month? At what point is the authority suspended or terminated? The Restatement offers no guidelines. With respect to whether notice to, or knowledge of, the agent or a third party affects the agency, comment b states that the agent's lack of notice does not affect termination of the agent's power. Comment b does not distinguish between situations arising before or after an adjudication of incompetency.<sup>28</sup>

Both illustrations following comment b refer only to situations where the principal is adjudicated incompetent.<sup>29</sup> No illus-

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24. RESTATEMENT OF AGENCY § 122 comment a (1933). See *supra* note 14 for the text of the comment.

25. RESTATEMENT OF AGENCY § 122 comment b, illustration 1 (1933). See *supra* note 14 for the text of the illustration.

26. RESTATEMENT OF AGENCY § 122, comment c (1933).

27. *Id.* illustration 4.

28. RESTATEMENT OF AGENCY § 122 comment b (1933).

29. *Id.* illustrations 1 and 2.

trations are provided to suggest what happens to the agent's power to bind a mentally incapacitated principal prior to an adjudication. Furthermore, the possible prejudice to third parties dealing with the agent in good faith and in ignorance of the principal's incompetence prior to adjudication is not mentioned. The Restatement of Agency, therefore, ignores early case law which carved out an exception to the general rule for the protection of ignorant third parties.<sup>30</sup>

The Restatement (Second) of Agency is even less helpful. The basic rule of law in subsection (1) of section 122, Incompetence of Principal, provides "[e]xcept as stated in the caveat, the loss of capacity by the principal has the same effect upon the authority of the agent during the period of incapacity as has the principal's death."<sup>31</sup> Section 120, Death of Principal, states that "[t]he death of the principal terminates the authority of the agent without notice to him except as stated in subsections (2) and (3) and in the caveat."<sup>32</sup>

The caveat and comment a under Death of Principal point out possible exceptions to the rule of termination without notice. In cases dependent upon a special relation, such as trustee and beneficiary, or in transactions with special rules such as in dealings involving negotiable instruments, an exception may govern.<sup>33</sup> Comment a discusses the possible prejudice to an unknow-

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30. *Drew v. Nunn*, 4 Q.B.D. 661 (1879); *Hill's Executor v. Day*, 34 N.J. Eq. 150 (1881).

31. RESTATEMENT (SECOND) OF AGENCY § 122 (1) (1957).

32. RESTATEMENT (SECOND) OF AGENCY § 120 (1) (1958). Subsections (2) and (3) refer to the special situation of collection on a check after death and are not germane to the argument except for being one of the few long recognized exceptions. *See supra* note 8 and accompanying text.

33. The caveat states that "[n]o inference is to be drawn from the rule stated in this Section that an agent does not have power to bind the estate of a deceased principal in transactions dependent upon a special relation between the agent and the principal, such as trustee and beneficiary, or in transactions in which special rules are applicable, as in dealings with negotiable instruments." RESTATEMENT (SECOND) OF AGENCY § 120 caveat (1957). Comment a after the caveat in pertinent part adds the following:

When the agent has notice of the death, there is a manifestation that this power is terminated. Without such notice, however, both justice and expediency require that the former agent should be entitled to act as he has reason to believe the principal wishes him to. . . . For an agent employed to do business, the common law result presents dangers from either action or inaction. If his principal is alive, the agent is under a duty to act, since that is what he is employed to do. Normally, one in a position in which he has duty to act on facts reasonably known to him is protected if he makes a reasonable mistake, as in the case of a sheriff who mistakenly arrests a person whom he reasonably suspects has committed a felony. If the agent reasonably believes his principal

ing agent or third party and concludes that the courts have begun to make inroads on the general rule. However, besides these two situations, section 120 does not describe the inroads the courts have made on the general rule and section 120 provides no guidance for application of the exceptions to the incompetent principal.

Neither section 122, Incompetency of Principal, the caveat to section 122, nor the comments to these sections provide further clarity. The comment to section 122, subsection (1), states that "[t]o the extent to which the death of the principal terminates authority without notice to the agent, the *permanent* loss of capacity equally terminates it"<sup>34</sup> [emphasis added]. The comment refers only to permanent loss of capacity and, again, the illustration following the comment deals with an adjudication of incompetence of the principal. Lastly, the caveat to section 122 and the comment to the caveat sum up the ambiguity of the Restatement (Second) when they state respectively that the Institute expressed no opinion where the principal's incapacity is only temporary and that the matter is too amorphous for a definitive rule.<sup>35</sup>

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to be dead, he is protected if he does not act, and the same should be true when he acts in justifiable ignorance of the death. It is true that he can contract with the principal for indemnity in case he is made liable to third persons for acting without power to bind (see § 438, comment f), but that is a precaution which would seldom be taken. Further, this precaution would protect only indirectly an innocent third person also ignorant of the death. As between the risks to the estate and the harm to business which results from the common law rule, the protection of business is preferable.

For these reasons the courts have begun to make inroads upon the generality of the rule, and hence it is proper to make the statements in . . . the caveat.

*Id.* comment a. See generally RESTATEMENT (SECOND) OF AGENCY § 120 (1958).

34. RESTATEMENT (SECOND) OF AGENCY § 122 (1) comment b (1957).

35. The caveat and comment d thereafter respectively state as follows:

The Institute expresses no opinion as to the effect of the principal's temporary incapacity due to a mental disease.

Comment on caveat:

d. . . . So, too, a declaration by a court having jurisdiction that the principal is insane or otherwise incompetent to act in his own affairs terminates or suspends the authority of his agent. On the other hand, the agent of one who becomes mentally incompetent to act on his own account or to appoint an agent, does not necessarily lose authority to act for the principal. Very brief periods of insanity caused by the temporary mental or physical illness of the principal do not destroy the power of a previously appointed agent to act in his behalf. Further, the mental disease causing insanity has no definite boundary at which a person loses capacity. Thus, one may have capacity to make a will without having capacity to conduct an intricate business transaction. Even

While the Restatement of Agency at least is willing to offer a guideline that a temporary insanity of eight hours should not affect an agency, the Restatement (Second) formulates no guidelines where there has been no adjudication of incompetency. This, however, has not precluded courts from using the Restatement and Restatement (Second) to support their decisions where no adjudication has occurred.

C. *Conscious Principal Mentally Incapacitated in Fact but Not Adjudicated Incompetent—Common Law Cases*<sup>36</sup>

States of mental incapacity are distinguishable. On the one hand, there are those mentally incapacitated individuals who are conscious and appear to be functioning normally, but who, because of some mental disease, defect, or physical accident do not understand the nature of a contractual transaction. On the other hand, there are those individuals who are unconscious and clearly cannot understand the nature of a contractual transaction. In between those two extremes exist many gradations. However, for discussion purposes, the categories are divided into conscious and unconscious individuals.

In *Wallis v. Manhattan Bank*,<sup>37</sup> the court stated that "[t]he mere existence of lunacy never operates to revoke a power, until the fact is judicially established by proper proceedings in Chancery. . . . [T]he only rule which the court can safely adopt, is to consider the power as subsisting and operative, until the fact of . . . [the principal's] . . . lunacy shall be established by a proper course of legal proceedings."<sup>38</sup> The view that an adjudication is required before an agency is terminated or revoked has not been generally followed, although the recent comatose principal cases<sup>39</sup> do make the agent's acts prior to adjudication voidable instead of void.

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where there is a pronounced mental incompetency, there may be ratification of previously executed transactions during lucid intervals. The matter is too amorphous for a statement of a definite rule.

RESTATEMENT (SECOND) OF AGENCY § 122 caveat and comment d (1957).

36. In some of these cases, it is unclear that the principal is conscious. Where the facts do not indicate an unconscious principal, I have assumed that the principal was conscious. Cases where the fact of unconsciousness is stated are discussed in subsection D of this article.

37. 2 Hall 495 (1829).

38. *Id.* at 500.

39. See *infra* notes 75, 76, 78, 86 and accompanying text.



In *Drew v. Nunn*,<sup>40</sup> a principal empowered his wife to draw checks, and was present when the wife ordered goods from Drew. Subsequently he became insane and was confined to an asylum. While incapacitated, his wife ordered goods from Drew who was ignorant of the principal's condition. When the husband recovered his reason, he revoked his authority and refused to pay. Drew sued and on appeal the court stated:

[t]he satisfactory principle to be adopted is that, where such a change occurs as to the principal that he can no longer act for himself, the agent who he has appointed can no longer act for him. In the present case a great change had occurred in the condition of the principal: he was so far afflicted with insanity as to be disabled from acting for himself; therefore his wife who was his agent, could no longer act for him . . . her authority was terminated.<sup>41</sup>

The court, however, held that the husband was liable for the debt based on his having made representations that Drew could rely upon until Drew had notice of the insanity.<sup>42</sup> Two concurring courts, each using slightly different reasoning, agreed that notice was required before the defendant could escape liability.<sup>43</sup> One concurring judge thought that the facts resembled the case of a guarantee.<sup>44</sup> The other judge did not wish to decide whether the wife's authority was terminated or existed until a committee was appointed. He agreed, however, that the plaintiff was entitled to act on the defendant's representations.<sup>45</sup>

Other courts have concurred with the principle in *Drew* that an adjudication is not required to terminate, revoke, or suspend the agency. Some courts have stated that the agency is terminated or revoked as to all who have notice although these cases fail to address the consequences of lack of notice. Other courts have stated that the agency is terminated or revoked except as to third parties who give consideration and are ignorant of the principal's incapacity. Grounds for protection of these third parties have been apparent authority and estoppel.

*Hill's Executors v. Day*<sup>46</sup> addressed the ignorant third party

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40. 4 Q.B.D. 661 (1879).

41. *Id.* at 666.

42. *Id.* at 668 (Bramwell, L.J., and Brett, L.J., separate concurrences).

43. *Id.* at 668-69.

44. *Id.* at 669 (Bramwell, L.J., concurring).

45. *Id.* at 669 (Brett, L.J., concurring).

46. 34 N.J. Eq. 150 (1881).

who supplies consideration. In *Hill*, the principal, Mr. Hill, gave authority to Edward Day to pledge a mortgage.<sup>47</sup> A year later, Mr. Hill was declared of unsound mind; this declaration was made retroactive to two years prior with the exception of some lucid intervals.<sup>48</sup> During the year before the declaration of incompetence, the authority had been exercised. After Mr. Hill's death, his executors sought to have a transaction set aside on the ground of mental incapacity. The court stated that the principal's insanity per se revoked or suspended the agent's authority except where a third party had given consideration in a transaction with the purported agent "trusting [in] an apparent authority, and in ignorance of the principal's incapacity."<sup>49</sup> Thus, the court implied that mental incapacity in fact would end the agent's authority, but that an ignorant third party who furnished consideration could rely on an apparent authority until knowledge or notice.

In two appellate opinions arising from *Merritt v. Merritt*<sup>50</sup> the court enunciated the general rule regarding an incompetent principal and also addressed the ignorant third party who supplies consideration. In *Merritt I*, Hanna Merritt, while sane, gave a power of attorney to George Merritt to execute a mortgage. When the execution occurred, Hanna was in poor health and had completely lost her mind. This was known to the mortgagee's assignees when the mortgage was executed.<sup>51</sup> The trial court held that the lunacy did not revoke the power of attorney,<sup>52</sup> but the appellate court reversed and remanded.<sup>53</sup> The appellate court quoted at length from *Davis v. Lane*,<sup>54</sup> a case where the principal was unconscious<sup>55</sup> when the transaction occurred between the agent and the third party. The *Davis* court laid down the rule that the physical event which deprives the principal of his mind and ability to act for himself revokes or suspends the agency, because the agent has only a derivative

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47. *Id.* at 156-57.

48. *Id.* at 151.

49. *Id.* at 157.

50. 27 A.D. 208, 50 N.Y.S. 604 (1898); 43 A.D. 68, 59 N.Y.S. 357 (1899).

51. 27 A.D. at 209, 50 N.Y.S. at 605.

52. *Id.* at 210, 50 N.Y.S. at 606.

53. *Id.* at 211-12, 50 N.Y.S. at 608.

54. 10 N.H. 156 (1839).

55. The court in *Davis* does not use the word "unconscious" but uses the phrases, "on the day of his decease, . . . when he was entirely senseless," and "was utterly insensible and incapable of any volition whatever. . . ." *Id.* at 156-57.

power and can do nothing that the principal could not lawfully do were he present.<sup>56</sup> The *Merritt I* court ignored the issue of an uninformed third party<sup>57</sup> until a further appeal in *Merritt II*. In *Merritt II*, the court decided that a third party, giving consideration in reliance on an apparent authority and ignorant of the principal's incapacity, would be protected.<sup>58</sup>

The court in *Watkins v. Hagerty*<sup>59</sup> utilized an estoppel theory to deal with the case of an incompetent principal. Whether the principal had been adjudicated insane was unclear in *Watkins*, although the defense was raised that the principal had become non compos mentis before the transaction in question.<sup>60</sup> While the principal was allegedly incompetent, the attorney in fact, and son of the principal, executed a mortgage allegedly for his father's benefit. After the death of the principal, the mortgage was foreclosed and the heirs (siblings of the attorney in fact) resisted. The court examined whether the third party knew of the mental condition of the principal at the time of the mortgage execution.<sup>61</sup> The court concluded that the mortgagees did not know of the principal's mental condition, and since the power of attorney was regular on its face, duly recorded, and recognized in all its force by the heirs, they were estopped from denying its validity.<sup>62</sup> Interestingly, the court did not consider the power of attorney to be a representation by the principal resulting in apparent authority until the third party had notice of its revocation. Instead, the court relied upon an estoppel theory to protect the third party who gave consideration and was ignorant of the mental incapacity.

Finally, two cases illustrate the general rule in operation in slightly different contexts. In *Parrish v. Rigell*,<sup>63</sup> the brother of an alleged mental incompetent brought an action to have a guardian appointed. The brother alleged that Parrish, by fraudulent practices upon the incompetent, had obtained an unrestricted power of attorney and that the power of attorney was void and should be surrendered.<sup>64</sup> The court applied the

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56. *Id.*

57. 27 A.D. at 213, 50 N.Y.S. at 607.

58. 43 A.D. at 72-73, 59 N.Y.S. at 360-61.

59. 104 Neb. 414, 177 N.W. 654 (1920).

60. *Id.* at 416, 177 N.W. at 655.

61. *Id.* at 419, 177 N.W. at 656.

62. *Id.*

63. 183 Ga. 218, 188 S.E. 15 (1936).

64. *Id.* at 219, 188 S.E. at 17.

general rule that there need not be an adjudication of mental incompetence to terminate or revoke the agency, provided that the insanity is known and of a character that affects the exercise of the principal's will.<sup>65</sup> In *First National Bank of Cincinnati v. Oppenheimer*,<sup>66</sup> the principal, after executing a new will, handed it to his brother for delivery to the trust department of the principal's bank. Two days later, the principal suffered a skull fracture and was confined to a wheel chair. The principal had to be restrained and could not carry on a conversation.<sup>67</sup> The will was delivered after the injury. The court cited the basic rule of law in the Restatement (Second) of Agency: "[T]he loss of capacity by the principal has the same effect upon the authority of the agent during the period of incapacity as has the principal's death."<sup>68</sup> The court held that the agency was revoked as to all who had notice of the fact.<sup>69</sup> The *Oppenheimer* court, as in *Parrish*, did not require a judicial determination of insanity to terminate or suspend the agency. This was in accord with previous courts which had applied this rule as long as the third party had notice. However, neither the *Oppenheimer* court nor the *Parrish* court addressed the consequences of lack of notice to, or knowledge of, the agent or third party.

Therefore, with the exception of *Wallis*, the courts have consistently stated that an adjudication of incompetency is not necessary to terminate or suspend the agency of a conscious principal. Rather, the physical event which causes the principal's loss of capacity triggers the termination or suspension. Courts, however, have either qualified the general rule or made an exception. The courts protect an unknowing agent or third party who furnishes consideration. Further, the courts have stated that the termination occurs when the agent or third party has notice or knowledge of the incapacity.

#### *D. Unconscious Principal Mentally Incapacitated in Fact but Not Adjudicated Incompetent—Common Law Cases*

Since unconscious individuals generally have lost all ability

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65. *Id.* at 223, 188 S.E. at 19.

66. 23 Ohio Op. 2d 19, 190 N.E. 2d 70 (1963).

67. *Id.* at 23, 190 N.E. 2d at 74.

68. RESTATEMENT (SECOND) OF AGENCY § 122, (1957).

69. 23 Ohio Op.2d at 24, 190 N.E. 2d at 75; see also *Dann v. Sands*, 38 A.D. 2d 661, 663, 327 N.Y.S. 2d 222, 226 (1971), *appeal dismissed* 30 N.Y. 2d 944, 287 N.E. 2d 387, 335 N.Y.S. 2d 696 (1972).

to enter into contracts, one might expect decisions similar to the cases on conscious principals. In the conscious principal cases, the rule that the agency is terminated or suspended is based on the reasoning that the event which deprives the principal of the ability to act for himself revokes the agency because the agent has only a derivative power and can do nothing that the principal, were he present, could not do himself.<sup>70</sup> The unconscious principal cases through 1972 are consistent with this reasoning.

*Davis v. Lane*<sup>71</sup> involved a principal entirely senseless and very near death. On the day the principal died, the decedent's wife delivered a note held by the principal against Davis to one of the principal's creditors, Prescott. Davis paid Prescott, but then Davis sued the decedent's estate to recover the amount of the note on the ground that the wife lacked authority to deliver it.<sup>72</sup> At trial, evidence was presented that the wife had acted as general agent for the decedent for several years prior to his death. The jury returned a verdict for the estate. On appeal, the court stated that the act of Providence which deprived the principal of his mind revoked the agency which was a derivative power and the agent could accomplish nothing that the principal could not do were he present.<sup>73</sup>

*Davis* clearly followed the general rule that no adjudication of insanity is required to revoke the agency. The *Davis* court did not discuss permanence of the mental incapacity nor the issue of notice to, or knowledge of, the agent or third parties dealing with the agent. The court did state, however, that "it would be preposterous . . . to hold that the principal was . . . present . . . when he was in fact lying insensible upon his death bed, and this fact was well known to those who undertook to act with and for him."<sup>74</sup>

Two later comatose principal cases, *Foster v. Reiss*,<sup>75</sup> and *In re Berry*,<sup>76</sup> both used reasoning nearly identical to that in *Davis* to reach the same conclusion that the agency terminated upon the principal falling into a coma. In both cases, the courts cited the basic rule of law found in the Restatement (Second) of

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70. 190 N.E. 2d at 75.

71. 10 N.H. 156 (1839).

72. *Id.*

73. *Id.* at 158.

74. *Id.* at 159.

75. 18 N.J. 41, 112 A.2d 553 (1955).

76. 69 Misc. 2d 397, 329 N.Y.S. 2d 915 (1972).

Agency section 122 and comments a and b.<sup>77</sup> The court in neither case, however, addressed protection of unknowing agents or third parties who rely on representations of authority. In another comatose principal case, *Clark Car Co. of New Jersey v. Clark*,<sup>78</sup> the court agreed with the basic rule of law, but the court precluded any exceptions when it stated that “[u]nder the weight of federal authorities, a contract executed by the attorney in fact for an insane person is absolutely void regardless of the other party’s good faith, or whether or not he had notice of the insanity.”<sup>79</sup>

Although the unconscious principal cases through 1972 accord with the general view that the physical event which causes the incapacity terminates or suspends the agency, the courts in none of these cases carve out an exception for the third party who relies on representations of authority. Although some courts in the conscious principal cases expressly create an exception protecting unknowing agents, the case law prior to 1972 does not expressly address that issue.

Beginning in 1977, an interesting series of comatose principal cases emerged.<sup>80</sup> The courts in seven of these eight cases reversed the general rule that the agency is terminated or suspended automatically upon the principal lapsing into a coma. Each case dealt with a principal who, while competent, created either an agency orally or executed a formal power of attorney, and who later became comatose (or semi-comatose) and died without recovering. In none of these cases was there an adjudication of incompetency. During the period of mental incapacity, the agent in each case, knowing of the incapacity, purchased flower bonds.<sup>81</sup> After the principal died, the U.S. government

77. 18 N.J. at 55, 112 A.2d at 561-62; 69 Misc. 2d at 398, 329 N.Y.S. 2d at 916-17. See *supra* notes 14 and 28 and accompanying text.

78. 11 F.2d 814 (W.D. Pa. 1925).

79. *Id.* at 819.

80. *United States v. Price*, 514 F. Supp. 477 (S.D. Iowa 1981); *Silver v. United States*, 498 F. Supp. 610 (N.D. Ill. 1980); *United States v. Manny*, 463 F. Supp. 444 (S.D.N.Y. 1978); *Estate of Watson v. Simon*, 442 F. Supp. 1000 (S.D.N.Y. 1977), *rev'd on other grounds* 586 F.2d 925 (2d Cir. 1978); *Campbell v. United States*, 657 F.2d 1174 (U.S. Ct. Claims, 1981); *United States v. Estate of Dean*, 80-2 U.S. Tax Cas. (CCH) ¶13,358 (1980); *United States v. Stanley*, 80-1 U.S. Tax Cas. (CCH) ¶13,334 (1980); *Estate of Pfohl v. Commissioner*, 70 T.C. 630 (1978).

81. Flower bonds, issued by the U.S. Treasury Department, have been so named because they bloom at the death of their owner. They carry very low interest rates and trade well below par value, but there is a steady market for these bonds because they may be used at par or face value for the payment of estate taxes so long as the conditions

resisted the attempts of personal representatives in each case to redeem the bonds at par or face value. The courts concluded in seven of the eight cases that the principal was the owner of the bonds at the time of his death, but the rationales given for these holdings were not always consistent. In the eighth case, *United States v. Estate of Dean*,<sup>82</sup> the court reaches the opposite conclusion.

In *Dean*, the court concluded that the bonds were not owned by the principal at the time of her death.<sup>83</sup> The opinion lacks analysis and support. The court stated that the law of Indiana controlled,<sup>84</sup> and that when the agent for Dean purchased the bonds, the law of Indiana did not allow for an agent's authority to continue during the time that the principal was physically and mentally incapacitated.<sup>85</sup> The *Dean* court, however, supplied no citations to Indiana law for this conclusion. The court went on to say that the executors had no power to act prior to the decedent's death, and that any ratification of the decedent's agent's unauthorized acts by the executors did not relate back to the time of the agent's acts done during the lifetime of the decedent.<sup>86</sup> Again, however, the *Dean* court provided no authority for this conclusion.

Except for the *Dean* court, the post 1972 courts seem to forge a new but not fully delineated common law rule for oral or written agencies validly created by a competent principal who later becomes comatose. Under the new rule, when a principal has not been adjudicated mentally incompetent, the agency is not absolutely void but only voidable. A blend of agency and contract principles has been used to reach this conclusion. Some courts cite the Restatement and Restatement (Second) of Agency for the principle that a temporary insanity does not necessarily terminate or suspend the agency. Other courts refer to contract principles for the proposition that the act or contract of a mentally incapacitated person who has not been adjudicated incompetent is at most voidable. References to the Restatement of Agency characterize the coma as a temporary incapacity even

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promulgated by the Treasury Department are met. *United States v. Manny*, 463 F.Supp. 444, 445 n.1 (S.D.N.Y. 1978).

82. 80-2 U.S.Tax Cas. (CCH) ¶13,358 (1980).

83. *Id.* at ¶13,359.

84. *Id.* at ¶13,358.

85. *Id.* at ¶13,358-59.

86. *Id.* at ¶13,359.

though in all cases the principal died without recovering. References to contract principles imply that the act of the agent is of itself no more than the act of the principal, and if the principal has not been adjudicated incompetent then his acts are at most voidable.

The concept of nontermination is most completely developed in *United States v. Manny*,<sup>87</sup> (Manny II). *Manny II* represents a consolidation of two cases, *United States v. Manny*,<sup>88</sup> (Manny I), a U.S. district court case, and *United States v. Stanley*,<sup>89</sup> a U.S. Tax Court case. In affirming both lower court decisions that the decedents were the owners of the flowers bonds at their respective deaths, and hence, that the government was required to redeem the bonds, the court came to the following six important conclusions:

1. *Berry* was decided incorrectly when the *Berry* court characterized the transaction of the attorney in fact as void. In *Berry*, the invalidation of the transaction was based on the general rule of agency of automatic termination or suspension. The *Manny II* opinion therefore rejected the rule that the transaction was void and characterized it as merely voidable.<sup>90</sup>

2. The mental incapacity of a principal who has not been adjudicated incompetent does not deprive the agent of capacity to act except where the incapacity of the principal is known to be permanent from the outset. The *Manny II* court relied on comment d to section 122 of the Restatement (Second) of Agency<sup>91</sup> that the authority is not necessarily lost where the incapacity is temporary. The court pointed out that an agent cannot necessarily tell whether the incapacity is permanent or temporary. The court construed the Restatement (Second) to mean that the agent is deprived of capacity only where he knows the incapacity of the principal is permanent from the outset; otherwise the transactions are not void but merely voidable. The court concluded that in Mr. Manny's case the incapacity was not permanent even though Mr. Manny had suffered a massive stroke on June 6, 1972 and had remained comatose until he died twenty-one days later.<sup>92</sup> If a massive stroke immediately fol-

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87. 645 F.2d 163 (2d Cir. 1981).

88. 463 F.Supp. 444 (S.D.N.Y. 1978).

89. 80-1 U.S.Tax Cas. (CCH) ¶13,334 (1980).

90. 645 F.2d at 168.

91. See *supra* note 35 for the text of comment d.

92. 645 F.2d at 165.



lowed by a twenty-one day coma which results in death is not a known, permanent incapacity from the outset, then very few situations will be deemed to incapacitate a principal.<sup>93</sup> Although the court did not expressly extend this conclusion to cases where the principal is conscious, although mentally incapacitated, no reason exists for not making this extension. And one may conclude that it would be even more difficult to establish the permanent incapacity of conscious principals, since today a plethora of drugs are used routinely to restore many individuals, previously considered insane, to a reasonably normal life.<sup>94</sup>

3. The acts of an agent for the nonadjudicated, incompetent principal are at most voidable. The *Manny II* court relied on an earlier New York case, *Bankers Trust Co. of Albany, N.A. v. Martin*,<sup>95</sup> wherein the court invoked the contract principle that a contract and a power of attorney created by a nonadjudicated incompetent are voidable. The court specifically applied that contract principle to the agency setting wherein a competent principal creates a valid power of attorney and subsequently, when the principal becomes incompetent, the agent contracts for the principal under that power.

4. Ratification is not required since a voidable transaction is valid unless disaffirmed. Although no citations to either agency or contract law were given, the court must have relied on contract principles since it stated that, "a voidable contract does not require ratification to come into existence, rather it requires disaffirmance, before its existence may be extinguished."<sup>96</sup> Ratification receives a slightly different treatment under the Restatement (Second) of Agency,<sup>97</sup> where ratification in the agency sense means, "affirmance by a person of a prior act which did not bind him. . . ." "Ratification is to be distinguished from the affirmance of a voidable transaction because of fraud or mistake, and from the affirmance of a transaction, voidable because of partial lack of capacity."<sup>98</sup> None of the other post

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93. In *United States v. Price*, 514 F. Supp. 477 (S.D. Iowa 1981), a principal became comatose upon suffering a massive stroke and died ten days later. The treating physician in *Price* stated that it was impossible to say with certainty whether the patient would recover.

94. H. KAPLAN, M.D., and B. SADOCK, M.D., *MODERN SYNOPSIS OF PSYCHIATRY III* 771 (3rd ed. 1981).

95. 51 A.D. 2d 411, 381 N.Y.S. 2d 1001 (1976).

96. 645 F.2d at 167.

97. RESTATEMENT (SECOND) OF AGENCY § 82 (1957).

98. *Id.*

1972 comatose principal cases clarifies this point.<sup>99</sup>

5. A nonparty to such a contract cannot assert voidability and disaffirm; this right is reserved to the mental incompetent or his legal representative.<sup>100</sup> The *Manny II* court cited *Bankers Trust*,<sup>101</sup> and *Blinn v. Schwartz*,<sup>102</sup> two New York cases in which the courts equate a contract made by a mentally incapacitated individual with a contract made by his attorney in fact.

6. The seller of the bonds, i.e., a third party dealing with the agent, cannot disaffirm. The *Manny II* court cited *Estate of Pfohl v. Commissioner*.<sup>103</sup> The *Pfohl* court made the same statement regarding disaffirmance as the *Manny II* court and cited *Atwell v. Jenkins*<sup>104</sup> and *Moore v. New York Life Ins. Co.*<sup>105</sup> for support. *Atwell* and *Moore* both dealt with contracts made by mental incompetents rather than contracts made by their appointed agents. In *Silver v. United States*,<sup>106</sup> another of the eight comatose principal cases, the court stated that while the transactions of a mental incompetent are voidable, and not void, the right of ratification or disaffirmance rests solely with the principal once he regains competence, or with the estate, and does not extend to the other party to the contract. The *Silver* court stated in a footnote that the issue was basically one of agency law,<sup>107</sup> but the *Silver* court cited Williston on Contracts to sustain its conclusion that the transaction was at most voidable. The court's only citation to agency law is to comment d in

99. See, e.g., *Estate of Watson v. Simon*, 442 F. Supp. 1000 (S.D.N.Y. 1977), *rev'd on other grounds* 586 F.2d 925 (2d Cir. 1978) where the court states that:

Mr. Watson's illness did not operate to revoke the power of attorney . . . [However, had the decedent recovered] there might well have been questions about ratifying or avoiding transactions which occurred during the illness. . . . [Since he] did not recover . . . his estate and executrices are the only parties who have the power to either avoid or ratify transactions of the attorneys-in-fact. The estate and executrices have clearly ratified the purchase . . . .

*Id.* at 1002. See also *Estate of Pfohl v. Commissioner*, 70 T.C. 630, 635 (1978) where the court states that: "A contract entered into by one lacking in capacity can be ratified or disaffirmed by the incompetent party upon his regaining competency . . . or by a duly appointed committee . . . or by the incompetent's estate after the death of the incompetent."

100. 645 F.2d at 167.

101. 51 A.D. 2d 411, 381 N.Y.S. 2d 1001 (1976).

102. 177 N.Y. 252, 69 N.E. 542 (1904).

103. 70 T.C. 630 (1978).

104. 163 Mass. 362, 40 N.E. 178 (1895).

105. 266 N.C. 440, 146 S.E.2d 492 (1966).

106. 498 F. Supp. 610 (N.D. Ill. 1980).

107. *Id.* at 612 n.3.

section 122 of the Restatement (Second) of Agency which states that the area is "amorphous" with no clearcut answers.<sup>108</sup>

Two important points are not addressed by the *Manny II* court. The first is whether an innocent third party, ignorant of the mental incapacity, could prevent a recovered principal or his legally appointed representative from avoiding (disaffirming) the transaction. None of the other seven cases address the issue; however, the right of a third party who has no notice or knowledge of the principal's incapacity to maintain the transaction is well recognized in agency law.<sup>109</sup> The second is whether all agencies or only powers of attorney are voidable. The *Manny II* court refers only to contracts and powers of attorney though there seems to be no reason not to extend the voidability to all agencies.

The courts preceding *United States v. Price*<sup>110</sup> used only common law principles to support their conclusions. The *Price* court, however, was faced with a recently adopted "durable power of attorney" statute which stated in effect that a written power of attorney was exercisable during a principal's later disability if it used words indicating such an intent.<sup>111</sup> The *Price* court reasoned that the statutes were designed to extend the effectiveness of powers of attorney and agency relationships to avoid the rule in Iowa that death or incompetence of the principal terminates the authority of the agent, and that since the statute was not followed, the agent's acts should have been voided.<sup>112</sup> The court, however, simply characterized the incompetence as temporary and stated that the statute did not apply to situations of temporary incapacity of the principal.<sup>113</sup> This was a tenuous argument at best, since the statute nowhere uses the words "permanent" or "temporary" and does not make any distinction between the two states.<sup>114</sup> Whether this reasoning will stand the test of time is questionable.

In *Campbell v. United States*<sup>115</sup> the court was also faced with a durable power of attorney statute.<sup>116</sup> Again, one might

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108. *Id.* at 612.

109. See *supra* notes 40-62 and accompanying text.

110. 514 F. Supp. 477 (S.D. Iowa 1981).

111. *Id.* at 480 n.3; IOWA CODE ANN. §§ 633.705-.706 (West Supp. 1982-83).

112. 514 F.Supp. at 480-81.

113. *Id.* at 481.

114. *Id.* at 480 n.3; IOWA CODE ANN. § 633.705 (West Supp. 1982-83).

115. 657 F.2d 1174 (Ct. Cl. 1981).

116. *Id.* at 1177-78; TEX. PROB. CODE ANN. § 36A (Vernon 1980).

initially think that the statute would control the case since the facts and the statute dealt with powers of attorney. However, the *Campbell* court stated that the statute merely provided one method by which a principal might authorize an agent to act during periods when the principal was mentally incapacitated.<sup>117</sup> The court then used recent common law principles from other comatose principal cases to decide that the agency was not void. In effect, the court ignored the statute.

None of the courts in the comatose principal cases expressly considered whether protection is afforded an agent who enters into a contract for the principal without notice or knowledge of his principal's mental incapacity. The Restatement gives no protection to an agent who acts in ignorance<sup>118</sup> and the Restatement (Second) equivocates on the matter.<sup>119</sup> Only the *Pfohl* court referred to avoiding prejudice to the rights of third persons, but *Pfohl* did not identify those third persons.<sup>120</sup>

### *E. Summary*

In summary, the common law cases decided by using an exception to the general rule—that the agency is automatically terminated or suspended by the principal's mental incapacity far outnumber those where the general rule is applied. The exceptions include the following three categories:

1. The very early exceptions protecting ignorant third parties who justifiably rely on some apparent authority or who are estopped from challenging the agency's validity,
2. The recent exception for comatose principals where the agency is either characterized as voidable subject to disaffirmance or ratification by a recovered principal or his legally appointed representative, and
3. The exception where the incapacity is of a very short duration such as that mentioned in the Restatement (Second) of Agency. The agency is said to be unaffected.

## III. STATUTORY MODIFICATIONS

In addition to the common law exceptions to the general rule of automatic termination or suspension of the agency upon

117. 657 F.2d at 1178.

118. See *supra* note 26 and accompanying text.

119. See *supra* notes 31-32 and accompanying text.

120. 70 T.C. 630, 636 (1978).

the principal's mental incapacitation, numerous statutory exceptions exist. Probably the most well known and universal exception is the provision in the Uniform Commercial Code (UCC) relating to a bank's right to accept, pay, or collect an item until the bank has actual knowledge of a customer's incompetence.<sup>121</sup> All fifty states have adopted Article 4 of the UCC<sup>122</sup> and only six states have adopted minor variations of Article 4.<sup>123</sup>

Another significant statutory exception relates to the large and growing majority of states<sup>124</sup> which have adopted some form of a durable power of attorney statute.<sup>125</sup> While several states had durable power of attorney statutes<sup>126</sup> prior to promulgation of the Uniform Probate Code (UPC),<sup>127</sup> the UPC provision has

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121. U.C.C. § 4-405 (1978).

122. U.C.C. § 4-405; 2A U.L.A. 185-86 (1977).

123. *Id.* The six states are: California, Colorado, Louisiana, Nevada, North Carolina and Utah.

124. The author examined the statutes of each of the 50 states to determine which had "durable power of attorney" statutes.

125. This article does not consider those statutes relating to powers of attorney established by individuals connected with the military or listed as missing in action whose later *death* is uncertain. This article considers only those power of attorney or agency statutes where the later incapacity, or disability of the principal is involved.

126. *See, e.g.*, VA. CODE § 11-9.1 (1978). The statute was enacted in 1954.

127. Unif. Prob. Code §§ 5-501 and 5-502, 8 U.L.A. 555-56 (1972) (approved by the Commissioners on Uniform State Laws and the American Bar Association in August 1969). The provisions state:

Section 5-501. [When Power of Attorney Not Affected by Disability.]

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 representative 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.

Section 5-502. [Other Powers of Attorney Not Revoked Until Notice of Death or Disability.]

(a) The death, disability, or incompetence of any principal who has exe-

served as the model for many current state statutes.

The original UPC provision has two relevant sections, sections 5-501 and 5-502. Section 5-501 authorizes continuance of a proper power of attorney during periods of the principal's disability or the principal's incapacity at law, even when the agent knows of the disability or incapacity. In order for the power to continue to exist during the principal's incapacity, the power must be expressly stated. Only when a conservator is appointed is the attorney in fact accountable to anyone after the principal becomes incapacitated.<sup>128</sup>

Section 5-502 allows an attorney in fact under a nondurable power of attorney to act validly for the principal if he does not have actual knowledge of the principal's death, disability or incompetence. Therefore, contrary to common law principles, section 5-502 gives protection to an agent acting in ignorance, at least where the agency is a power of attorney.<sup>129</sup>

Section 5-502 is ambiguous as to whether a third person dealing in good faith with the alleged agent would also be protected. Section 5-502(a), however, refers to the "attorney, agent or other person, who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney. . . ." While section 5-502(b) has a procedure for the attorney in fact to establish that he acted in good faith without knowledge, it does not have a procedure for a third party to establish his ignorance and good faith dealing with the agent.<sup>130</sup>

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cluded a power of attorney in writing other than a power as described by Section 5-501, does not revoke or terminate the agency as to the attorney in fact, agent or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(b) An affidavit, executed by the attorney in fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability or incompetence, is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

128. Unif. Prob. Code Commissioners' Comment to § 5-501; 8 U.L.A. 555 (1972).

129. Unif. Prob. Code Commissioners' Comment to § 5-502; 8 U.L.A. 556 (1972).

130. In the Uniform Durable Power of Attorney Act, §§ 1-10, 8 U.L.A. 81 (1983) [hereinafter cited as UDPOA] a later, similar statute to the originally enacted UPC provisions on durable powers of attorney, the Commissioners' comment to Section 4 states that "[t]he discussion of the Committee . . . is intended to refer to persons who transact

Recently, the Commission on Uniform Laws promulgated a newer version of sections 5-501 and 5-502 of the UPC called the Uniform Durable Powers of Attorney Act<sup>131</sup> (UDPOA). Instead of two sections as in the UPC, the UDPOA has ten sections. There are, however, very few differences between the two statutes. The only significant differences between the two statutes concerning durable powers of attorney for mentally incapacitated principals are found in sections 4(b) and 5 of the UDPOA.<sup>132</sup>

Section 4(b) of the UDPOA does not change the UPC provision that the nondurable power of attorney is revoked only after the "attorney in fact, agent or other person has actual knowledge of the . . . disability or incompetence of the principal. . . ."<sup>133</sup> The Commissioners' comment to section 4 of UDPOA, however, does clarify the previously ambiguous phrase "or other person."<sup>134</sup> The comment states that the phrase "or other person" in section 504(b) of the UPC is intended to give

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business with the attorney in fact under the authority conferred by the power. Consequently, persons in this category who act in good faith and without the actual knowledge described in the subsections are protected by the statute." Yet there is still no procedure similar to that afforded an agent by which the third party can establish his good faith and lack of knowledge.

131. UDPOA § 1-10, 8 U.L.A. 81 (1983). The Act was approved by the National Conference of Commissioners on Uniform State Laws in 1979. Sections 1 to 5 of the Act are identical to current sections 5-501 to 5-505 of the Uniform Probate Code. Those sections of the Uniform Probate Code were amended at the 1979 conference to conform to the UDPOA. For purposes of analysis, the author will refer to the new sections as § 1-10 of the UDPOA.

132. UDPOA § 4(b) and § 5 read respectively as follows:

4.(b) The disability or incapacity of a principal who has previously executed a power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

5. As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

133. *Id.*

134. *Id.*

the same protection to those who transact business with the attorney in fact as to the attorney in fact who acts in good faith and without actual knowledge of the principal's death, disability, or incapacity. Unfortunately, ambiguities still remain, because the UDPOA, like the UPC, contains no procedure similar to that afforded an agent by which a third party can establish his good faith and lack of knowledge.

Section 5 of the UDPOA extends the affidavit procedure in the UPC for nondurable powers to durable powers. Under the UPC it was not clear that an attorney in fact under a durable power could prove his lack of knowledge of the death, disability or incapacity of the principal.<sup>135</sup> Again, the UDPOA makes no mention of how third parties can prove their lack of knowledge of the principal's incapacity.

At present there are forty-four states that have enacted some form of durable power of attorney statute.<sup>136</sup> These statutes may be placed in five broad categories: (a) statutes identical with, or similar to, sections 5-501 and 5-502 of the UPC;<sup>137</sup> (b) statutes identical with, or similar to, the UDPOA;<sup>138</sup> (c) statutes identical with, or similar to, section 5-501 of the UPC;<sup>139</sup> (d)

135. UDPOA Commissioner Comment to § 5, 8 U.L.A. 86 (1983).

136. The six states for which no durable power of attorney statute exists are: Michigan, Missouri, Nevada, Vermont, Wyoming and Wisconsin.

137. ALASKA STAT. §§ 13.26.325 to .326 (1972); ARIZ. REV. STAT. ANN. §§ 14-5501 to -5502 (1975); COLO. REV. STAT. §§ 15-14-501 to -502 (1973 & Supp. 1982); IDAHO CODE §§ 15-5-501 to -502 (1979); IND. CODE ANN. §§ 30-2-1.5-1 to .5-2 (Burns Supp. 1982); IOWA CODE ANN. §§ 633.705 to .706 (West Supp. 1982-83); ME. REV. STAT. ANN. tit. 18-A, §§ 5-501 to -502 (1981); MD. EST. & TRUSTS CODE ANN. §§ 13-601 to -602 (1974); MINN. STAT. ANN. §§ 524.5-501 to -502 (West 1975); MISS. CODE ANN. § 87-3-13 (Supp. 1982); MONT. CODE ANN. §§ 91A-5-501 to -502 (Supp. 1977); NEB. REV. STAT. §§ 30-2662 to -2663 (1979); N.J. STAT. ANN. §§ 46:2B-8 to -9 (West Supp. 1982-83); N.M. STAT. ANN. §§ 45-5-501 to -502 (1978); N.D. CENT. CODE §§ 30.1-30-01 to -02 (1976); OHIO REV. CODE ANN. §§ 1337.09 to 09.1 (page 1979 & Supp. 1982); 20 PA. CONS. STAT. ANN. §§ 5601 to 5602 (Purdon 1975); S.D. CODIFIED LAWS ANN. §§ 59-7-2.1 to -7.7 (1977); UTAH CODE ANN. §§ 75-5-501 to -502 (1978); VA. CODE §§ 11-9.1 to -9.2 (1978); WASH. REV. CODE ANN. §§ 11.94.010 to .020 (Supp. 1983-84).

138. ALA. CODE § 26-1-2 (Supp. 1982); ARK. STAT. ANN. §§ 58-701 to -704 (Supp. 1981); CAL. CIV. CODE §§ 2400-2405 (West Supp. 1982); KAN. STAT. ANN. §§ 58-610 to 617 (Supp. 1982); MASS. GEN. LAWS ANN. Ch. 201B, §§ 1-7 (West Supp. 1983-84).

139. CONN. GEN. STAT. § 45-69a (West 1981 & Supp. 1982); DEL. CODE ANN. tit. 12, §§ 4901 to 4905 (Supp. 1982); FLA. STAT. ANN. § 709.08 (West Supp. 1982); HAWAII REV. STAT. §§ 560-5-501 to -502 (1976 & Supp. 1981); KY. REV. STAT. § 386.093 (Supp. 1982); N.H. REV. STAT. ANN. § 506:6 (Supp. 1979); N.Y. GEN. OBLIG. LAW § 5-1601 (McKinney 1978); N.C. GEN. STAT. § 47-115.1 (1976 & Supp. 1981); OKLA. STAT. ANN. tit. 58, §§ 1051 to 1056 (West Supp. 1982-83); S.C. CODE ANN. § 32-13-10 (Law. Co-op Supp. 1981); TENN. CODE ANN. § 66-5-105 (1982); TEX. PROB. CODE ANN. art. 36A (Vernon 1980); W. VA. CODE § 27-11-6 (Supp. 1982).



statutes identical with, or similar to, section 5-502 of the UPC;<sup>140</sup> and (e) statutes which state that any written power of attorney continues during the later disability or incapacity of the principal unless the power expressly limits the period of time of its effectiveness.<sup>141</sup> In other words, statutes in category (e), by contrast with those in categories (a)-(d), reverse the presumption of the principal's intent and are effective upon the later disability of the principal unless he expressly states his intent to limit or revoke that effectiveness.

One state, South Dakota, has gone so far as to extend statutory protection in all agency transactions to any party who does not have notice of the principal's incapacity.<sup>142</sup> In *Fischer v. Gorman*,<sup>143</sup> a case decided under the South Dakota statute, the principal orally authorized her maidservant to deliver some executed deeds whenever the servant was advised that her principal would not recover. One evening, the principal suffered a stroke at 10:30 p.m. The principal died at 12:30 p.m. the next day. During the morning of the day that the principal died, while the principal lay conscious but often incoherent, the deeds were delivered.<sup>144</sup> The court held that under the statute the principal was incapacitated, and that the transfer was invalid.<sup>145</sup> The statute upon which the court based its decision reads in part as follows: "Unless the power of an agent is coupled with an interest . . . it is terminated as to every person having notice thereof, by . . . (3) his incapacity to contract."<sup>146</sup> The statute does not require that an adjudication of incompetency occur to hold the act of the agent invalid. This is consistent with the weight of common law authority. An unclarified point is whether the agent's transaction is void or voidable when the power is terminated. The statute bases the termination on the principal's ability to contract. However, some contractual incapacities result in voidable transactions and others in void transactions. The statute seems to create an exception to termination not only for third parties but also for agents, since the statute provides that

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140. R.I. GEN. LAWS § 34-22-7 (1970).

141. GA. CODE ANN. § 4-214.1 (1981 & Supp. 1982); ILL. ANN. STAT. ch. 110-½, § 11a-23 (Smith-Hurd Supp. 1982); LA. CIV. CODE ANN. arts. 3027 to 3034 (West 1952 & Supp. 1982); OR. REV. STAT. §§ 126.407 to .413 (1981).

142. S.D. CODIFIED LAWS ANN. § 59-7-2 (1977).

143. 65 S.D. 453, 274 N.W. 866 (1937).

144. *Id.* at 456, 274 N.W. at 868.

145. *Id.* at 462-63, 274 N.W. at 871.

146. *Id.* at 458, 274 N.W. at 869.

the agency is terminated as to every person having notice. Although the exception is stated in the negative, it would appear that the agency is not terminated for any person without notice and this should include agents as well as third parties.

#### IV. THE CURRENT STATUS OF THE AGENCY OF MENTALLY INCAPACITATED PRINCIPALS

##### A. *Common Law Decisions*

Where a principal has been adjudicated mentally incompetent the great weight of authority is that the agency is revoked or suspended irrespective of knowledge or notice to the agent or third party. Yet one can still argue on the basis of *Head*<sup>147</sup> that an adjudication of mental incompetency should only be evidence of the incapacity of the principal and given more weight the closer in time the adjudication is to the agent's exercise of authority. Either position is consistent with the rationale that the agent cannot do what the principal cannot lawfully do for himself. The phrase gives no information itself as to when revocation or suspension will occur, and the outcome of the case may depend on how state law defines that phrase. Moreover, just as there are states today that do not allow a minor to categorically avoid his contracts without consequences,<sup>148</sup> a state could decide that justice requires even a principal adjudicated mentally incompetent to establish at the time of the transaction that he did not understand the nature of the dealings. Certainly the adjudication of incompetency does not in and of itself make the principal less capable of understanding a transaction or of controlling the agent. Primarily, the adjudication serves to create a public record of the incompetency. In these cases, it is not an onerous burden on an agent or third party to ascertain that fact. A telephone call to the appropriate courthouse could resolve the question. Thus, the common law rule that the adjudication immediately terminates the agency and is constructive notice to all, does not place a difficult burden on the agent or third party. The idea in *Head* that the adjudication should be no more than evidence of the principal's incapacity wastes court time when the matter has already been litigated and the complaining party

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147. See *supra* notes 20-22 and accompanying text.

148. For instance, Oregon requires a minor who disaffirms a contract to pay for the reasonable use of the consideration given to him. See *Gaither v. Wallingford*, 101 Or. 389, 200 P. 910 (1921).

could easily have ascertained the fact of adjudication. The automatic termination provides maximum protection to the incapacitated principal but also precludes certain benefits since the recovered principal or his appointed representative cannot treat a contract as voidable. Furthermore, all protection is lost to an unknowing agent or third party who justifiably relies and gives consideration. That this may not be the best balance of equities is discussed below.

The results of case law are not so consistent where the principal is mentally incapacitated in fact but has not been adjudicated incompetent. The Restatement and Restatement (Second) use permanence of the incapacity as a test for termination of the agency but the Restatements offer little guidance where there has been no adjudication.<sup>149</sup> Most of the earlier cases held that the agency was automatically terminated or suspended on occurrence of the event which causes the principal's mental incapacity in fact. Yet, even some of these cases expressly gave protection to a third party who furnished consideration in ignorance of the principal's incapacity.<sup>150</sup> In seven of the eight post 1972 cases, the courts gave the choice of avoidance to the principal or to his legally appointed representative.<sup>151</sup>

In this writer's opinion, the paramount questions are who are the persons that need protection, and, how can protection best be accorded without exacerbating the serious time constraints of the courts?<sup>152</sup> In answering these questions, one need not treat the adjudicated and nonadjudicated principals differently. The same concerns apply to both situations. For instance, should a mentally incapacitated individual who recovers (or his legally appointed representative if he does not) be foreclosed from an advantageous transaction entered into by his alleged agent or should he be able to disaffirm? Furthermore, should the principal always be liable for the transaction until the third party or agent has notice or knowledge of his incapacity? In the case of a principal mentally incapacitated in fact, if one attempts to apply the common law rule of automatic termination or suspension on the basis that the agent's authority is derivative and the agent can do nothing that the principal could

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149. See *supra* notes 24 and 32 and accompanying text.

150. See *supra* notes 37-60 and accompanying text.

151. See *supra* notes 72 and 92-105 and accompanying text.

152. See Burger, *Isn't There a Better Way*, 68 A.B.A. J. 274-75 (1982); Stanley, *Minor Dispute Resolution*, 68 A.B.A. J. 62 (1982).

not lawfully do himself were he present, one runs into all sorts of difficulties. If the principal is asleep when the agent enters into the transaction, is the transaction void? What if the principal is unconscious for a few moments or a few hours or a few days? Is the agency terminated, suspended or not affected?

One might better ask whether the principal needs protection regardless of whether he is adjudged mentally incompetent. The mentally incapacitated principal is not like the minor or mentally incapacitated individual who personally enters into a contract and does not have the capacity to fully understand the legal consequences of his actions. Rather, the principal is represented by a competent agent<sup>153</sup> who should be able to protect the principal's interests whether the principal is competent or not. Furthermore, if the incapacitated principal (or his appointed representative) is given the power to avoid the transaction, he is further protected whether or not adjudicated incompetent.

It is not unreasonable to use the contract principles set forth in *Manny II* to sustain the propositions that the agency is voidable at most; ratification is not needed to validate the transaction, and only the principal or his appointed representative may disaffirm. There is no reason that those principles cannot be extended to adjudicated principals. The English courts have for some time applied contract rules governing mental incapacity to cases involving a principal and a third party in agency transactions.<sup>154</sup>

The agent, according to the Restatement (Second), does not warrant his principal's capacity and should need no protection.<sup>155</sup> However, in this writer's opinion, in states which have not followed the Restatement (Second), the agent should be given protection in all agency transactions where he has no actual knowledge. South Dakota, as has been mentioned, does this by statute for all agency transactions but uses a "notice" rather than an actual knowledge standard, which could afford less protection to the agent under a constructive notice theory. Civil Law countries, using an actual knowledge standard, provide protection to agents under all powers of attorney as does

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153. We assume the agent is competent. If the agent becomes mentally incapacitated, that involves different issues not dealt with here.

154. See 37 CAN. B.J. 497 (1959) and references therein.

155. RESTATEMENT (SECOND) OF AGENCY § 332 (1958).

the UDPOA.<sup>156</sup>

The third party who reasonably relies on the agent's alleged authority and who gives consideration can also be afforded protection. The principal or his appointed representative should be bound in all transactions that the agent enters into with a third party who, without actual knowledge, *justifiably relies* on the agent's authority and who gives consideration. A number of the early common law decisions accomplished this result using concepts of apparent authority or estoppel. Allowing the recovered principal, or his legally appointed representative, the choice of disaffirming except in the case of an unknowing agent or third party who justifiably relies and gives consideration, affords a significant amount of protection to the principal, the third party, and the agent. Cases where the agent is involved in double dealing can be dealt with as a violation of fiduciary duty by a recovered principal or a later appointed representative.

With respect to saving court time, the *Manny II* test provides a reasonable solution by requiring that the incapacity be permanent and known to be permanent from the outset before an agent would lose all capacity to act. In cases where there has been an adjudication of incompetency, the adjudication could be used as a conclusive presumption of permanent incapacity. This would avoid litigation of the principal's mental status. Where there has been no adjudication, few cases would arise where a known permanent incapacity could be established.<sup>157</sup> Therefore, in either situation, litigation of the mental status of the principal would be reduced. Additional savings in court time could be obtained by allowing an agent or third party who acted without actual knowledge to prove that fact by affidavit, as provided for in the UDPOA.<sup>158</sup> Court time could be saved by not allowing disinterested nonparties<sup>159</sup> to question the principal's capacity.

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156. H. CACHARD, *THE FRENCH CIVIL CODE*, §§ 1991, 2010 (1930); UDPOA Commissioners' comment to § 5, 8 U.L.A. 86 (1983).

157. *See supra* notes 89 and 90 and accompanying text.

158. *See supra* notes 131-32 and accompanying text.

159. Although the United States is not a party to the transaction in the "flower bond" cases, it obviously has a financial interest in the matter. However, this is more a question of whether the U.S. Government has standing to sue. The court in *Manny II* discusses whether there is any Federal law which would allow a challenge by the U.S. Government and concludes there is none. *See* 645 F.2d at 166, 168-69.

### B. Statutory Modifications

The UCC provision for banks and the durable power of attorney statutes have undoubtedly already reduced litigation. The UCC provision protecting banks which cash checks written by a principal who has become mentally incapacitated is reasonable since banks are involved in more than 35 billion of these transactions each year.<sup>160</sup> However, some protection for the principal is lost. It seems that in these cases the smooth functioning of banks has simply been given priority because of the great difficulty in monitoring this astronomical number of transactions.

Most durable power of attorney statutes have also probably taken away some protection from the principal since there is no right to avoid the transaction at least before a conservator is appointed. However, careful drafting for the principal of the power of attorney when the principal is competent could avoid actual losses in most cases. Furthermore, the agent who attempts to use the power of attorney for his own benefit after the principal has become mentally incapacitated can be held for a violation of his fiduciary duty.

At the same time, most durable power of attorney statutes have done a great deal to totally avoid the question of the mental status of the principal when a proper instrument has been drafted. In these situations, litigation should be avoided. These statutes can also be used to save court time and to conserve the assets of small estates by creating a durable power of attorney before mental incapacity occurs. Creating a power of attorney as opposed to petitioning for a guardianship usually requires no court time,<sup>161</sup> and it is also less expensive and more flexible.<sup>162</sup>

But as seen in *Price*,<sup>163</sup> and *Campbell*,<sup>164</sup> the statutes may not help avoid litigation of the principal's mental status in states which still follow basic common law principles and where an oral agency is involved or where the power is not a durable one. In *Price* and *Campbell*, the courts relied on recent common law

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160. Wall St. Journal, Oct. 26, 1982 at 31, col. 4.

161. Some states do require the power of attorney to be executed before a judge. See, e.g., OKLA. STAT. ANN. tit. 58 § 1051 (West Supp. 1982-83). However, this procedure should not be as time consuming in most cases as establishing a guardianship.

162. Muses & Pope, *Estate Planning, Disability, and the Durable Power of Attorney*, 30 S.C.L. Rev. 511, 537-38 (1979).

163. 514 F. Supp. at 477. See *supra* notes 108-11 and accompanying text.

164. 657 F.2d at 1174. See *supra* notes 113-14 and accompanying text.

exceptions established in other post 1972 "comatose principal" cases to validate the transaction, although the reasoning used was questionable.

States might consider adopting a durable power of attorney statute such as those found in Illinois, Oregon, Louisiana, or Georgia, where the attorney in fact can act during a principal's later incapacity unless the principal expressly states otherwise. This could be extended to all agencies. The issue of incapacity would become irrelevant in all agency transactions, and this would in turn save court time. Perhaps with no formal writing, much mischief might be created by an alleged agent upon a principal who, because of lack of capacity, could not refute the creation of the agency. But since the burden of establishing the agency would be on the agent and/or third party, and since the state could use a "clear and convincing" burden of proof test, much of the potential litigation over establishing a questionable agency could be avoided.

If a state does not wish to go so far for oral agencies, it could still offer protection in these cases to agents and third parties who act in ignorance of the incapacity, as does South Dakota. The agent and/or third party would have to establish that they acted without actual knowledge and in good faith in order to maintain the transaction. Third parties, in order to prevent avoidance, would additionally have to establish that they justifiably relied on the agent's authority and gave consideration. Justifiable reliance might consist of a series of past dealings or some prior indication by the principal of the agency's existence. Having to satisfy these criteria would probably limit litigation. Again, the use of an affidavit procedure such as that employed in the UPC or UDPOA to establish the requirements of lack of knowledge and good faith could also save court time.

## V. CONCLUSION

The early common law rule that the agency is terminated or suspended automatically and without notice to anyone is today so fraught with both common law and statutory exceptions that it can scarcely be relied upon as a rule. Even where no statutory change has occurred, the cases are split where there has been no adjudication of insanity. In addition, forty-four states have some form of durable power of attorney statute, and these statutes fall into five categories which provide various exceptions to the common law general rule.

Where no durable power of attorney is involved, for consistency in decisions, to save court time, and to afford reasonable protection to all parties, the principles set forth in *Manny II* should be adopted. Also, states should consider extending these principles to adjudicated principals and giving the appointed representative the power of avoidance. This power should be subject to protection of unknowing agents and third parties who have furnished consideration and acted in good faith as laid out in the UPC and UDPOA. States that wish to treat the adjudication as a conclusive presumption of the principal's incapacity should also consider affording protection to unknowing agents and third parties.

The states which have not already done so should at a minimum consider adopting the UPC or UDPOA durable power of attorney statute with the latter preferred because it goes farther in clarifying some inconsistencies and ambiguities in the UPC. Other suggestions for saving court time such as using the affidavit procedure to establish lack of knowledge and good faith in all agency transactions are worth consideration by the states.

The primary difference between use of the UPC or UDPOA statute and the *Manny II* common law principles, as extended to adjudicated principals, would be that under the statute, the principal (or his appointed representative) would not have the power of avoidance. However, protection of the principal could be maintained under the statute through careful drafting of the power of attorney and prosecution of errant attorneys in fact for violation of their fiduciary duties.