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THE DURABLE POWER OF ATTORNEY'S PLACE IN THE FAMILY OF FIDUCIARY RELATIONSHIPS

*Karen E. Boxx**

I. INTRODUCTION

The durable power of attorney is a deceptively simple document that allows one person to handle the affairs of an incapacitated person without court supervision. It is merely an agency relationship, established by a written document, that continues during the principal's incapacity. The durable power of attorney has been in widespread use only for about twenty-five years.¹ It is very easy to

* Assistant Professor of Law, University of Washington. I gratefully acknowledge the invaluable assistance of Todd Maybrown, whose comments have vastly improved this article, and of Professor Thomas R. Andrews, for his continuing support and guidance.

¹ Virginia, by a statute enacted in 1954, was the first state to allow a power of attorney to continue beyond the principal's incapacity, but the concept did not become widely accepted in other states until the Uniform Law Commissioners enacted the Uniform Probate Code in 1969, which included durable power of attorney sections. *See* VA. CODE ANN. § 11-9.2 (Michie 2001); UNIF. PROBATE CODE §§ 5-501 to -505 & prefatory note, 8 U.L.A. 418, 418-24 (1998) (defining and explaining durable power of attorney); FRANCIS J. COLLIN, JR. ET AL., DRAFTING THE DURABLE POWER OF ATTORNEY: A SYSTEMS APPROACH 5 (1984) (noting adoption of durable

draft, and its use escapes most court proceedings or even much need for legal assistance. The durable power of attorney has therefore kept a low profile until now, and any attention it is now receiving focuses primarily on abuse of the document, an admittedly rare occurrence.² However, the durable power of attorney has become extremely widespread as an aging population faces increasing likelihood of periods of disability and as life becomes more complicated, requiring more formal arrangements to handle one's financial affairs.

This quiet little document creates a unique fiduciary relationship that is overdue for analysis. That analysis can begin to identify and answer the many open questions about the nature of the relationship and the scope of duties of an attorney-in-fact. Analysis of the durable power of attorney can also shed light on the broader question that has been open for centuries and is still vigorously debated: what is the nature of a fiduciary?

The status of fiduciary is a well-recognized legal concept with a long history,³ but nevertheless retains considerable ambiguity and confusion in application. There are certain discrete categories of fiduciaries—trustees, guardians, agents, executors—with corresponding discrete lists of rights, duties, and remedies for breach of duties. Courts have sometimes expanded the role of a fiduciary beyond the traditional categories when circumstances indicate that a person's relationship with another should impose a higher duty. Examples of such relationships include priest or minister-parishioner,⁴ employee-employer,⁵ insurance broker-insured,⁶ stockbroker-

power of attorney statutes by various states occurred throughout 1970's and by 1983, all fifty states had enacted such legislation); see also David M. English, *The UPC and the New Durable Powers*, 27 REAL PROP. PROB. & TR. J. 333, 337 (1992) (describing evolution and acceptance of durable power of attorney statutes).

² See E. Thomas Shilling, *Report on ACTEC Elder Law Committee Questionnaire on Possible Abuse of Financial Durable Power of Attorney*, 21 AM. C. OF TR. & EST. COUN. NOTES 247, 247-50 (1995) (reporting results of durable power of attorney survey of members of American College of Trust and Estate Counsel).

³ See Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795 (1983) (noting "the various types of fiduciaries have evolved over the centuries").

⁴ *E.g.*, *Nicholson v. Rose*, 165 Cal. Rptr. 156, 159-60 (Ct. App. 1980) (stating minister breached fiduciary duty to plaintiff where confidential relationship was present); *Moses v. Diocese of Colo.*, 863 P.2d 310, 321-23 (Colo. 1993) (stating bishop's superior position and power over plaintiff was sufficient to support finding of fiduciary relationship); *Erickson v. Christenson*, 781 P.2d 383, 385-86 (Or. Ct. App. 1989) (noting clergy who abuse roles of pastor

client⁷ and school-student.⁸ However, when expanding the definition of fiduciary, courts have adapted the consequences of that characterization to fit the particular situation. The result is now a patchwork, where the traditional categories are surrounded by situational fiduciaries that borrow from an assortment of the established rules to define the scope of that particular fiduciary's duties.

Scholars have long discussed the consequences of the fiduciary label and have tried, without arriving at consensus, to devise a unifying principle or definition of the fiduciary. Much of the discussion has focused on identifying the determining characteristic that makes a relationship "fiduciary" in character. Recently the debate has centered on the question of whether fiduciary duties are merely implied contractual terms, subject to alteration by the parties, or whether fiduciary status is a category separate from contractual relationships.⁹ The purpose of the discussion is not merely descriptive, but is also intended to aid courts in identifying when the heightened duties and stiffer remedies applicable to fiduciaries are justified.

The attorney-in-fact presents a fresh example to use in examining these core concepts because the relationship generally arises in a non-commercial setting and incorporates an unusual level of

and counselor can be held liable for breach of "confidential relationship," analogous to fiduciary relationship). *But see* Langford v. Diocese of Brooklyn, 677 N.Y.S.2d 436, 438-39 (Sup. Ct. 1998) (stating First Amendment Free Exercise clause precluded examination of fiduciary relationship between priest and parishioner). *See generally* Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 37-50 (1996) (arguing clergy-counselee relationship should be deemed fiduciary relationship as matter of law); Lindsey Rosen, *Constitutional Law—In Bad Faith: Breach of Fiduciary Duty by the Clergy—F.G. v. MacDonell*, 696 A.2d 697 (N.J. 1997), 71 TEMP. L. REV. 743, 745 (1998) (arguing fiduciary relationship should apply to clergy and free exercise clause may not always serve as barrier to liability).

⁵ *E.g.*, Sara Lee Corp. v. Carter, 519 S.E.2d 308, 312-13 (N.C. 1999) (stating employee had fiduciary duty to employer).

⁶ *E.g.*, Moss v. Appel, 718 So. 2d 199, 201 (Fla. Dist. Ct. App. 1998) (stating insurance broker is in fiduciary relationship with insured).

⁷ *E.g.*, Pace v. McEwen, 574 S.W.2d 792, 796 (Tex. App. 1978) (stating fiduciary relationship existed between stockbroker and his client).

⁸ *E.g.*, Schneider v. Plymouth State Coll., 744 A.2d 101, 105 (N.H. 1999) (stating relationship between post-secondary institution and its students is fiduciary in context of sexual harassment by faculty members).

⁹ *See infra* notes 163-231 and accompanying text.

discretion. Fitting the attorney-in-fact into this broader discussion not only advances our thinking about the fiduciary principle, but also helps to bring much needed precision to the attorney-in-fact's defined role.

Part II of this Article will describe the evolution of the durable power of attorney.¹⁰ Part III will summarize general fiduciary principles and their application in both traditional fiduciary roles and fact-based fiduciary settings.¹¹ The precise nature of the fiduciary relationship is subject to considerable debate; that debate is also described in Part III. Part IV discusses how the durable power of attorney, an example of a fiduciary relationship not previously considered in the theoretical debate, illuminates the general discussion.¹² Finally, Part V applies fiduciary principles to the durable power of attorney and points out the numerous ambiguities regarding the attorney-in-fact's duties. This section then makes recommendations to clarify the scope of those duties in order to serve purposes of both curbing abuse of powers of attorney and making them more useful.¹³

II. HISTORY OF THE DURABLE POWER OF ATTORNEY

The power of attorney is simply a written instrument used by a principal to appoint an agent to act on the principal's behalf.¹⁴ The common law principles of agency therefore govern powers of attorney, and since the term attorney-in-fact means an agent appointed via a power of attorney,¹⁵ the attorney-in-fact's duties are determined under the laws of agency.¹⁶ At common law, the agency

¹⁰ See *infra* notes 14-84 and accompanying text.

¹¹ See *infra* notes 85-214 and accompanying text.

¹² See *infra* notes 215-31 and accompanying text.

¹³ See *infra* notes 232-335 and accompanying text.

¹⁴ 1 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 35, at 19 (2d ed. 1914) ("when the [agent's] authority is conferred by formal instrument in writing, it is said to be conferred by 'letter of attorney,' or, more commonly by 'power of attorney.'") (citation omitted). Agency relationships may also be created orally. *Brown v. Poulos*, 411 N.E.2d 712, 714-15 (Ind. Ct. App. 1980); RESTATEMENT (SECOND) OF AGENCY § 26 (1958).

¹⁵ 1 MECHEM, *supra* note 14, at 19 ("When the authority is conferred by power of attorney, the agent is frequently called an 'attorney,' or more commonly, an 'attorney in fact,' in order to distinguish him from the attorney at law.")

¹⁶ William M. McGovern, Jr., *Trusts, Custodianships, and Durable Powers of Attorney*,

relationship and the agent's authority to act terminated on the death or incapacity of the principal.¹⁷ The principal's incapacity automatically terminated the agency because of the assumption that an agent acts at the direction of the principal¹⁸ and the principal has the power to terminate the agency at any time.¹⁹ The principal's incapacity would remove both of those essential elements of the relationship.²⁰

The common law power of attorney was therefore useless as a tool for disability planning.²¹ Prior to the introduction of the durable power of attorney, the legal means of handling an incompetent person's affairs were limited to guardianship proceedings, trust arrangements and other limited private arrangements such as representative payees for Social Security benefits²² and joint tenancy bank accounts.²³ However, guardianships are cumbersome, intrusive and expensive,²⁴ and the other types of arrangements are generally limited in the scope of assets that can be managed.²⁵

27 REAL PROP. PROB. & TR. J. 1, 20 (1992).

¹⁷ RESTATEMENT (SECOND) OF AGENCY §§ 122, 133 (1958); Warren A. Seavey, *The Rationale of Agency*, 29 YALE L.J. 859, 893 (1920).

¹⁸ Seavey, *supra* note 17, at 863.

¹⁹ RESTATEMENT (SECOND) OF AGENCY § 118 (1958).

²⁰ See *Davis v. Lane*, 10 N.H. 156, 158-59 (1839) (holding insanity or incapacity of principal serves as revocation of authority of agent); Maj. Michael M. Schmitt & Capt. Steven A. Hatfield, *The Durable Power of Attorney: Applications and Limitations*, 132 MIL. L. REV. 203, 204 (1991) ("[B]ecause the principal was no longer able to oversee the actions of his agent, a continued agency relationship was imprudent.").

²¹ The terms disability, incompetence, and incapacity will be used interchangeably in this article to mean inability to manage one's affairs, although their precise definitions vary.

²² Social Security Act, 42 U.S.C. § 1383(a) (1994 & Supp. 1999).

²³ See NAT'L COUNCIL ON AGING, GUARDIANSHIP AND PROTECTIVE SERVICES FOR OLDER PEOPLE 55-57 (1963) [hereinafter 1963 COUNCIL ON AGING REPORT] (discussing options for financial management of incapacitated persons).

²⁴ See Ralph M. Engel, *Estate Planning for the Handicapped, Part IV, Alternatives to Incompetency Proceedings or If You're Going to Become Incompetent, You'd Better Be Rich*, 111 TR. & EST. 782, 782 (1972) (noting proceeding establishing guardianship would cost at least \$10,000 in 1972, which would not include costs of maintaining guardianship); William S. Huff, *The Power of Attorney—Durable and Nondurable: Boon or Trap?*, in 11 INST. ON EST. PLAN. ch. 3 ¶ 300 (Philip E. Heckerling ed., 1997) (noting "many features of court appointed guardianship may make it unattractive prospect").

²⁵ For example, representative payee status covers only social security benefits, and joint tenancy designations would have to be made for each of the incapacitated person's assets in order to be comprehensive. That may not be possible if the incapacitated person owns an asset that is not conducive to joint tenancy form. See JESSE DUKEMINIER & STANLEY JOHANSON, WILLS, TRUSTS & ESTATES 350 (6th ed. 2000) (noting joint tenancy would create

Virginia enacted the prototype for durable powers of attorney in 1954.²⁶ The Virginia statute provided that if the document creating the power of attorney stated that the agent's power continued after the principal became incapacitated, then the agent's power did not terminate on the incapacity of the principal.²⁷

The idea did not receive national consideration, however, until the plight of the elderly and incapacitated became the subject of national study by the American Bar Foundation,²⁸ the National Council on the Aging,²⁹ and the National Conference of Commissioners on Uniform State Laws³⁰ in the late 1950's and early 1960's. Those studies found that state laws gave few viable provisions for management of the financial affairs of mentally incapacitated adults.³¹ The National Conference of Commissioners on Uniform

presumption overriding incapacitated person's will, or right of his or her heirs to inherit via intestacy, and give property to surviving joint tenant upon death of incapacitated person). The other heirs may be able to rebut the presumption of survivorship rights depending on the state statute in force. See, e.g., WASH. REV. CODE ANN. § 30.22.100(3) (West 1986 & Supp. 2001) (describing ownership of funds after death of depositor). However, where the principal only wants to appoint someone to care for the principal's needs in the event the principal becomes incapacitated, but does not want to leave all remaining property to that caretaker upon the principal's death, the survivorship feature makes joint tenancy an undesirable method of disability planning. Trust arrangements can, in most cases, handle all of the incapacitated person's financial affairs, if properly funded. However, they cannot address many personal matters, such as health care, and are perceived as very expensive. See 1963 COUNCIL ON AGING REPORT, *supra* note 23, at 56 ("[A trust] is not practical, however, unless the assets are of considerable value.").

²⁶ 1954 Va. Acts ch. 486 (codified at VA. CODE ANN. § 11-9.1 (Michie 2001)).

²⁷ *Id.*

²⁸ AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW (Donald M. McIntyre, Jr. & Frank T. Lindman eds., 1961) [hereinafter ABA REPORT].

²⁹ 1963 COUNCIL ON AGING REPORT, *supra* note 23, at 55-57.

³⁰ NAT'L CONFERENCE OF COMM'S ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR, 273 (1964) [hereinafter 1964 HANDBOOK]. The National Law Commissioners created the Special Committee on the Civil Rights of Persons of Questionable Competency in 1957, at the request of the ABA Real Property, Probate and Trust section. The ABA section was responding to problems addressed in two papers that had been presented to the section, whose titles indicate the perceived problems: "A VACUUM IN OUR LAW: MANAGEMENT OF PROPERTY OF QUASI-INCOMPETENT PERSONS," and "THE NOT-QUITE INCOMPETENT INCOMPETENT." *Id.* Both papers concluded that most state laws did not provide adequate methods for assisting marginally incapacitated persons with their financial affairs. *Id.*

³¹ For example, the National Council on Aging study concluded that different aged persons' difficulties with financial management was a matter of degree, but the legal solutions used an either-or approach. 1963 COUNCIL ON AGING REPORT, *supra* note 23, at 10. Similarly, the ABA study concluded that state laws governing property rights of the mentally disabled

State Laws responded to the studies with a rather modest proposal: the Model Special Power of Attorney for Small Property Interests Act (the "Model Act").³² The prefatory note to this Act states that the National Conference of Commissioners had determined that its committee was "relieved of its original obligation to undertake the drafting of comprehensive legislation,"³³ because of the activities of other groups, and that the committee instead focused on creating a power of attorney that could be used for assisting the mentally disabled.³⁴ The prefatory note further stated that:

[t]he purpose of this model Special Power of Attorney Act is primarily to provide a simple and inexpensive legal procedure for the assistance of persons with relatively small property interests, whose incomes are small, such as pensions or social security payments, and who, in anticipation or because of physical handicap or infirmity resulting from injury, old age, senility, blindness, disease or other related or similar causes, wish to make provision for the care of their personal or property rights or interests, or both when unable adequately to take care of their own affairs. It is not contemplated that a power of attorney executed under this Act will be used for the general handling of sizable commercial property interests. Neither is it intended wholly to replace conservatorship or guardianship, but rather it is designed as a less expensive alternative.³⁵

This proposal contained restrictive provisions that illustrate the tentative attitude of the drafting committee. First, in order to be enforceable as a durable power, that is, one that would be unaffected

were unclear and recommended that limitations on financial dealings of incapacitated persons should be a matter of degree, related to the extent and nature of the disability. ABA REPORT, *supra* note 28, at 272.

³² 1964 HANDBOOK, *supra* note 30, at 275.

³³ *Id.* at 273.

³⁴ *Id.*

³⁵ *Id.* at 274.

by the principal's incapacity, it had to be signed before a judge who approved the document.³⁶ The comments to the Act express the quaint hope that the principal would be known to the judge who was asked to approve the power of attorney.³⁷ Second, the power of attorney had to state the annual income and the nature and extent of any property that would be affected by the power,³⁸ and had to be filed with the court clerk and recorded in the principal's county of residence and in each county where affected real property was located.³⁹ Finally, the property affected by a power of attorney had to be less than a certain "relatively small" amount.⁴⁰ The Model Act left the actual amounts blank, to be set by the individual state legislatures,⁴¹ but the comments stated that "in order to keep the procedures under the Act simple and inexpensive so as best to serve the interests of those for whose benefit the Act is primarily designed, it was found necessary to restrict the property value and the annual income to be covered by the Act to relatively small amounts, within the judgment of each state legislature adopting the Act."⁴² The power of attorney would terminate if the value of the property subject to the power of attorney grew to exceed the permissible amounts.⁴³ None of these restrictions were retained in the later versions of the durable power of attorney provisions adopted by the Uniform Law Commissioners or in the versions of the later uniform laws adopted by individual states.⁴⁴

The Model Act also included provisions that required the attorney-in-fact to account to the principal or the principal's legal representative if the power of attorney required such accountings or

³⁶ *Id.* at 275.

³⁷ *Id.*

³⁸ *Id.* at 276.

³⁹ *Id.* at 277.

⁴⁰ *Id.*

⁴¹ The states that adopted the Model Act filled in the blank with amounts ranging from \$3,000 to \$60,000 or property that produced annual income ranging from \$2,400 to \$10,000, except for North Dakota, which did not limit amounts. ARK. CODE ANN. §§ 28-68-301 to -313 (Michie 1987); Act of July 17, 1974, ch. 452, 59 Del. Laws 1544 (1973) (repealed 1982); Act of Mar. 18, 1971, ch. 582, 1971 N.D. Laws 1243 (repealed 1973); Act of June 16, 1965, ch. 217, 1965 Okla. Sess. Laws 381 (repealed 1974); Act of Mar. 4, 1965, ch. 187, 1965 Wyo. Sess. Laws 481 (repealed 1985).

⁴² 1964 HANDBOOK, *supra* note 30, at 277.

⁴³ *Id.* at 278.

⁴⁴ See UNIF. PROBATE CODE §§ 5-501 to -505, 8 U.L.A. 419, 419-24 (1998).

if the judge who approved the power directed an accounting, and upon termination of the attorney-in-fact's authority.⁴⁵ The Model Act also gave three alternative standards of liability of the attorney-in-fact.⁴⁶ One version would only hold the attorney-in-fact liable for intentional wrongdoing or fraud, the second would hold a compensated attorney-in-fact to the standards of other fiduciaries, and the third version would hold any attorney-in-fact to the standard of care applicable to other fiduciaries, unless the document provided otherwise.⁴⁷ The alternatives were offered because the Commissioners could not agree on this issue. Those who wanted to limit liability assumed that in most cases the attorney-in-fact would be a family member serving without compensation and that such a person should be subject only to very limited liability.⁴⁸ Again, the later versions of the durable power of attorney statute adopted by the Uniform Law Commissioners did not contain these protective provisions,⁴⁹ but comparable provisions exist in some state power of attorney statutes.⁵⁰

The limitations and timidity of the initial proposal are significant for the purpose of discussing the scope of an attorney-in-fact's fiduciary duty. They illustrate that the initial idea of a durable power of attorney, extending authority into a principal's incapacity, would not have needed to redefine the fiduciary duty of such an agent, since the amounts were to be limited and the original proposal included some judicial oversight. In fact, the comments to the first Model Act state that if the durable power of attorney was extended to include unlimited amounts of property, then "extensive safeguards and more detailed and complicated procedures with attendant increased expenses"⁵¹ would be necessary, and that

⁴⁵ 1964 HANDBOOK, *supra* note 30, at 280.

⁴⁶ *Id.* at 279.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See UNIF. PROBATE CODE §§ 5-501 to -505, 8 U.L.A. 419, 419-24 (1998 & Supp. 2001) (failing to include protective provisions).

⁵⁰ See, e.g., CAL. PROB. CODE § 4231 (West 1991 & Supp. 2001) (outlining standard of care for attorney-in-fact); N.C. GEN. STAT. § 32A-11(b) (1999) (requiring accountings to be filed with court once principal becomes incapacitated); OKLA. STAT. tit. 58 § 1081 (1991) (outlining same standard of care for attorney-in-fact as for other fiduciaries).

⁵¹ 1964 HANDBOOK, *supra* note 30, at 277.

extension would defeat the purpose of the Act, which was to provide an inexpensive alternative to guardianship for persons of modest means.⁵² It is interesting to note, however, that at least some of the drafters thought that a person acting under a durable power of attorney should be held to the same standard as "other fiduciaries,"⁵³ and that an alternative section requiring that standard was included in the Model Act.⁵⁴

The Model Act received little attention,⁵⁵ and the concept of a durable power of attorney did not receive widespread acceptance until the adoption of the Uniform Probate Code (UPC) in 1969, which included a provision allowing powers of attorney to continue after the incapacity of the principal.⁵⁶ The durable power of attorney provision appeared in early drafts of the legislation,⁵⁷ and the provision that was included in the final draft was, according to the comments, modeled on the Virginia statute.⁵⁸ It therefore was very brief, consisting of just one section,⁵⁹ and did not include the protections and limitations contained in the Model Act.⁶⁰ In fact, the

⁵² *Id.* at 274, 277.

⁵³ *See id.* at 279, 280 (discussing variances in fiduciary duty). The comments to this section rephrase the liability as "full fiduciary liability" without identifying the type of fiduciary or whether the general fiduciary duty of an agent would be extended in this case to the more extensive fiduciary duties of a trustee or guardian. *Id.*

⁵⁴ *Id.*

⁵⁵ Only Arkansas, Delaware, North Dakota, Oklahoma and Wyoming adopted the Model Act. ARK. CODE ANN. §§ 28-68-301 to -313 (Michie 1987); Act of July 17, 1974, ch. 452, 59 Del. Laws 1544 (1973) (repealed 1982); Act of Mar. 18, 1971 ch. 582, 1971 N.D. Laws 1243 (repealed 1973); Act of June 16, 1965, ch. 217, 1965 Okla. Sess. Laws 381 (repealed 1974); Act of Mar. 4, 1965, ch. 187, 1965 Wyo. Sess. Laws 481 (repealed 1985). *See* ARK. CODE ANN. §§ 28-68-201 to -203 (Michie 1987) (retaining more limited Model Act provision and adopting provisions similar to Uniform Probate Code discussed *infra* at notes 64-65 and accompanying text).

⁵⁶ UNIF. PROBATE CODE § 5-501, 8 U.L.A. 419, 419 (1998).

⁵⁷ *See, e.g.*, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIF. PROBATE CODE WORKING DRAFT NUMBER 3 § 5-301, 15,266 (1967) [hereinafter WORKING DRAFT 3] (illustrating early version of durable power of attorney provision).

⁵⁸ NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIF. PROBATE CODE WORKING DRAFT NUMBER 5 at 242-43 (1969) [hereinafter WORKING DRAFT 5].

⁵⁹ *See* UNIF. PROBATE CODE § 5-502, 8 U.L.A. 420, 420 (1998) (including another section that provided for continued authority of agent under either durable or nondurable power until agent had actual knowledge of incapacity or death of principal). The purpose of that section was to adopt the civil law rule, applicable to both durable and common law powers of attorney, that actual knowledge of an event terminating the agent's authority was necessary. *Id.*

⁶⁰ *See* Richard V. Wellman, *Some Effects of the Uniform Probate Code on Estate Planning*,

UPC provision was criticized by the California Bar for not requiring more formality of execution.⁶¹ The official comments to the UPC do not state why the drafters used the abbreviated Virginia form rather than the Model Act's approach, but the statement of purpose for the section indicates that the drafters were ready to make the device available for a broad constituency as an economic alternative to guardianship.⁶² Commentators have suggested that the streamlining of the durable power of attorney was intended to increase its "practical utility" in order to "encourage widespread use of the device."⁶³

The UPC provision altered the common law rule of automatic revocation upon incapacity of the principal and provided that the agent's authority could continue under a power of attorney only if the document contained the words: "This power of attorney shall not be affected by disability of the principal," or similar words indicating the principal's intent that the authority continue.⁶⁴ The provision also provided that if a conservator was later appointed for the principal, then the attorney-in-fact would account to the conservator rather than the principal, and the conservator would

in 4 INST. ON EST. PLAN. ch. 70 ¶ 70.1900 (Philip E. Heckerling ed., 1970) (noting UPC drafters began project in 1962, and were separate committee from the Model Act drafters). This may explain why the UPC makes no reference to the Model Act.

⁶¹ STATE BAR OF CAL., THE UNIFORM PROBATE CODE: ANALYSIS AND CRITIQUE 182 (Mar. 1973) ("The concept of a power of attorney that would not be affected by disability, as provided under UPC 5-501, has a great deal of merit, although some consideration might be given to requiring the power to be notarized or witnessed to impress the principal with the extensiveness of the power and authority being granted.")

⁶² "It should be emphasized that the Article [Article V, 'Protection of Persons under Disability and Their Property,' which includes guardianship and conservatorship provisions as well as the durable power of attorney provision] contains many provisions designed to minimize or avoid the necessity of guardianship and protective proceedings, as well as provisions designed to simplify and minimize arrangements which become necessary for care of persons or their property. The power of attorney which confers authority notwithstanding later incompetence is one example of the former." UNIFORM PROBATE CODE: OFFICIAL TEXT WITH COMMENTS art. 5 general cmt. (1971). The UPC drafters, unlike the Model Act drafters, were therefore concerned with the entire system of guardianships and alternatives and had an overall goal of minimizing use of the formal court procedures and simplifying them as much as possible.

⁶³ JONATHAN FEDERMAN & MEG REED, ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM 14 (1994) ("Ultimately, this was the beginning of what has become a legislative tendency to make the power of attorney easier to use.")

⁶⁴ UNIF. PROBATE CODE § 5-501, 8 U.L.A. 419, 419 (1998).

have the power to revoke the power of attorney.⁶⁵ The UPC provision gave no other details, however, on the operation of a durable power of attorney.

Upon adoption of the UPC, individual states began to accept the concept and adopt comparable provisions.⁶⁶ By 1984, all states and the District of Columbia had enacted durable power of attorney provisions, and the document has now become a staple ingredient of estate plans.⁶⁷

The simplicity and ease of use of the durable power of attorney, the lack of restrictions and limitations on its use, and the inclusion of statutory provisions protecting third parties, such as banks and other financial institutions, when accepting durable powers of attorney⁶⁸ led to increasing use of the document. That expansion in turn led to increased instances of abuse, where an attorney-in-fact would use his or her authority to misappropriate the principal's property. The power of attorney's greatest advantage, its ease of use and informality, is also its greatest flaw since it becomes easy to abuse in the hands of a dishonest person. Articles appeared in the press, detailing stories of dishonest attorneys-in-fact,⁶⁹ and by the

⁶⁵ *Id.*

⁶⁶ See Rene A. Wormser et al., *Planning for the Protection of Incompetents, Young and Old*, in 6 INST. ON EST. PLAN. ch. 72 ¶¶ 72.1500, 72.1507 (Philip E. Heckerling ed., 1972) (noting transcript of panel discussion of estate planning experts in 1972 discussed powers of attorney without acknowledging concept of durable powers). By 1977, an article noted that thirty-three states had enacted either the UPC provisions or other statutory authority for durable powers of attorney. Huff, *supra* note 24, ¶ 311. By 1981, forty-two states had durable power of attorney legislation, and by 1983, all fifty states authorized durable powers of attorney. COLLIN ET AL., *supra* note 1, at 5. The District of Columbia was the last hold-out, but passed durable power of attorney legislation in 1987. D.C. CODE ANN. § 21-2081 (1997).

⁶⁷ See FEDERMAN & REED, *supra* note 63, at 1 (calling durable power of attorney "very popular estate planning tool"); Carolyn Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 584 (1996).

⁶⁸ See, e.g., MO. ANN. STAT. § 404.719 (West 2001) (indicating third parties acting in good faith may rely on any power of attorney executed by principal); TEX. PROB. CODE ANN. § 487 (Vernon Supp. 2001) (noting when durable power of attorney is used, third party who relies in good faith on acts of attorney within scope of power of attorney is not liable to agent). Third party acceptance is critical to the durable power of attorney's usefulness, because under most state statutes there is no mechanism to force a third party to accept the authority of an attorney-in-fact. McGovern, *supra* note 16, at 39; cf. CAL. PROB. CODE § 4541(f) (West 1991 & Supp. 2001) (allowing attorney-in-fact to ask court to compel third party acceptance).

⁶⁹ See, e.g., Michael Sacks, *Quick Orphan's Court Action Recovers Estate Funds*, PENN. L. WKLY., Oct. 27, 1997, at 1; Marvin Greene, *Man Charged with Bilking Woman, 83, Out of \$6,000*, COURIER-JOURNAL (Louisville, Ky.), Oct. 2, 1991, at 4B; Jim Burns, *Protecting the*

early 1990's, studies began to be conducted investigating the frequency and severity of abuse.⁷⁰ Although the general response was that abuse was unusual when compared to the frequency of use of durable powers of attorney without problems,⁷¹ commentators began to discuss the possibility of abuse as a planning consideration as well as a consideration for legislative reform.⁷²

Later in the 1990's, elder abuse in general became a prominent concern,⁷³ and legislatures responded with a variety of statutory penalties.⁷⁴ Because the durable power of attorney was sometimes a method of financial abuse, some states adopted provisions that would impose enhanced penalties when a durable power of attorney is abused,⁷⁵ and other states adopted significant oversight mecha-

Elderly: Cases of Financial Abuse Against Senior Citizens Are Rising Dramatically But There Are Ways to Fight Back, L.A. TIMES, Valley ed., Dec. 11, 1992, at 25, available at 1992 WL 2826975; *Jury Indicts Secretary on Charges of Stealing from Elderly Man*, HOUSTON CHRON., June 20, 1992, at A28, available at 1992 WL 8072589; Tillie Fong, *Memories of Lifetime Disappear—95 Year Old Finds Power of Attorney May Have Given 'Friend' the Right to Rob*, ROCKY MTN. NEWS, Nov. 13, 1995, at 4A, available at 1995 WL 10617357; Liza N. Burby, *Financial Abuse of the Elderly Spreads*, N.Y. TIMES, Jan. 2, 1994, at 4B.

⁷⁰ See, e.g., Shilling, *supra* note 2, at 247-50 (reporting on survey results of members of American College of Trust and Estate Counsel); David M. English & Kimberly K. Wolff, *Survey Results Use of Durable Powers*, PROB. & PROP., Jan.-Feb. 1996, at 33 (surveying members of ABA Real Property, Probate and Trust Law section); FEDERMAN & REED, *supra* note 63, at 1-3 (reporting survey by Government Law Center of Albany Law School, which included responses from attorneys, social service providers, district attorneys and judges, and employees of area agencies on aging).

⁷¹ Schilling, *supra* note 2, at 248, 250.

⁷² See Mark E. Zumdahl, *Preventing Power of Attorney Abuses*, ILL. BAR. J., Oct. 1995, at 537 (describing ways to prevent abuse); see generally Nina Santo, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 MCGEORGE L. REV. 801, 828-29 (2000); Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 222-26 (2000) [hereinafter, Dessin, *Financial Abuse*].

⁷³ In 1981, the House Select Committee on Aging released a report calling elder abuse a "hidden problem" and calling for protective services to prevent and treat elder abuse. HOUSE SELECT COMMITTEE ON AGING, 97TH CONG., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM (Comm. Print 1981). In 1990, a follow-up study on the response to the 1981 study was issued. *Elder Abuse: A Decade of Shame and Inaction: Hearing Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 101st Cong. (1990).

⁷⁴ E.g., WASH. REV. CODE ANN. § 74.34 (West 2001) (providing for vulnerable adult civil protection proceedings); see Timothy H. Barron, *Financial Exploitation of the Infirm Elderly: A Delaware Perspective*, 18 DEL. LAW. at 12 (Spr. 2000) (describing Delaware legislation criminalizing financial exploitation of vulnerable adults).

⁷⁵ E.g., 720 ILL. COMP. STAT. § 5/16-1.3(a)-(c) (West 1992 & Supp. 2001) (imposing criminal penalties).

nisms.⁷⁶ The Arizona durable power of attorney statute is an extreme example of this trend; revised in 1998, the potential penalties for misuse are now so foreboding that some practitioners are advising clients to use revocable trusts rather than powers of attorney for disability planning.⁷⁷ For example, unless the benefits are specifically identified in detail within the power of attorney or within a written contract, an agent cannot receive any benefits from the principal.⁷⁸ Otherwise, the agent could be subject to criminal prosecution.⁷⁹ The agent could also be subject to the penalty provisions of Arizona's slayer statute, which authorize the loss of the agent's right to inherit assets or property from the principal and permits the recovery of treble damages and attorneys' fees against the agent.⁸⁰ In addition, the new provisions increase the execution formalities for durable powers of attorney,⁸¹ and make it easier to challenge the principal's capacity when signing the power of attorney.⁸²

Currently, the durable power of attorney enjoys a well-established position as an efficient estate planning tool,⁸³ garnering little attention from the courts, but receiving a certain amount of criticism and constriction from state legislatures and others who are on the front lines battling elder abuse. The durable power of attorney was originally designed to meet the need for economical disability planning, which is much greater now than when it was originally proposed. However, its usefulness is threatened by well-meaning proposals intended to curb abuse.⁸⁴

⁷⁶ *E.g.*, N.H. REV. STAT. ANN. § 506:7 (1997) (allowing interested persons to petition court for oversight of attorney-in-fact).

⁷⁷ Thomas J. Murphy, *Drafting Durable Powers of Attorney to Comply with the New Legislative Changes*, ARIZ. ATTY, Dec. 1998, at 22, 23.

⁷⁸ ARIZ. REV. STAT. § 14-5506(B) (1995).

⁷⁹ *Id.* § 14-5506(A).

⁸⁰ *Id.* §§ 46-456(C)-(E).

⁸¹ *See id.* § 14-5501(d) (enumerating requirements written powers of attorney must satisfy).

⁸² *See id.* § 14-5506(d) (requiring witness to attest principal willingly signed power of attorney); *see* Murphy, *supra* note 77, at 23 (discussing changes in burden of proving principal's incapacity at time of execution).

⁸³ *See, e.g.*, Schmitt & Hatfield, *supra* note 20, at 230 (concluding for military members, who are relatively young and therefore more likely in short term to become disabled rather than to die, "the durable power of attorney actually may be more useful than a will").

⁸⁴ *See* John J. Lombard, Jr., *Planning for Disability, Health Care Issues and Develop-*

III. SUMMARY OF FIDUCIARY PRINCIPLES AND CATEGORIES

Analysis of the attorney-in-fact's role, which is clearly fiduciary,⁸⁵ must start with general fiduciary principles. A clear characterization of fiduciary obligation is elusive and its exact nature is much debated.⁸⁶ Review of settled (and unsettled) principles of fiduciary law, as well as their application to the durable power of attorney, will assist decisions on how to define the attorney-in-fact's role and shed new light on the essence of the fiduciary.

This section will begin by setting forth what is well-established as general fiduciary law, and will then describe the application of that law to the traditional sub-classes of fiduciaries, such as trustees and agents. Next, this section will describe the "situational fiduciary," where courts have expanded the fiduciary principle to include nontraditional settings. Finally, this section will briefly describe the controversy regarding the underpinnings and proper theoretical characterization of the fiduciary principle.

A. SUMMARY OF GENERALLY ACCEPTED FIDUCIARY PRINCIPLES

Fiduciary rules consider the following two issues: how to identify a fiduciary, and the consequences that flow from being classified as a fiduciary.⁸⁷ As to the first question, Professor Bogert defines a fiduciary relationship as "one in which the law demands of one party

ments in Assisted Suicide, in 32 INST. ON EST. PLAN. ch. 18 ¶¶ 1800, 1802.5 (Tina Portuondo ed., 1998) (arguing statutory changes aimed at abuse make durable powers of attorney harder to use, "do little to address the underlying dishonesty of certain members of the human race who would not be deterred by more stringent requirements," and instead, existing criminal penalties for theft and civil remedies, together with education of attorneys-in-fact, should be used).

⁸⁵ See *Schock v. Nash*, 732 A.2d 217, 224-25 (Del. 1999) ("The creation of a power of attorney imposes the fiduciary duty of loyalty on the attorney-in-fact.").

⁸⁶ See, e.g., Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 923 ("Fiduciary obligation has a number of characteristics that classify it among the law's most exotic species.").

⁸⁷ Professor DeMott inquired "First, in what circumstances does fiduciary obligation apply? Second, what does the obligation require a person to do?" DeMott, *supra* note 86, at 882. See also *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943) ("[T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?").

an unusually high standard of ethical or moral conduct with reference to another."⁸⁸ Similarly, Professor Scott states that "[a] fiduciary relationship involves a duty on the part of the fiduciary to act for the benefit of the other party to the relation as to matters within the scope of the relation."⁸⁹ Both definitions are conclusory and do nothing to identify the circumstances where the relationship arises. *Black's Law Dictionary* restates Professor Scott's definition, and goes on to describe the following four situations where the fiduciary relationship "usually" arises: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first; (2) when one person assumes control and responsibility over another; (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship; or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client.⁹⁰ As pointed out by Professor Scott, a person is labeled a fiduciary only when he or she has in some way accepted the role.⁹¹

Certain types of relationships have traditionally been categorized as fiduciary in nature, including trustee-beneficiary, principal-agent, guardian-ward, attorney-client, executor-estate beneficiary, partner-partner, director-corporation and shareholders, and majority shareholder-minority shareholder.⁹²

In addition to the traditional categories, courts have found a fiduciary relationship in other contexts, depending on the circumstances. For example, an insurance company may be a fiduciary to its insureds,⁹³ an employee may be a fiduciary to her employer,⁹⁴ a

⁸⁸ 1 GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 1, at 3 (2d rev. ed. 1984).

⁸⁹ 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 2.5 (4th ed. 1987).

⁹⁰ *BLACK'S LAW DICTIONARY* 640 (7th ed. 1999).

⁹¹ 1 SCOTT & FRATCHER, *supra* note 89, § 35 (discussing acceptance in trustee context).

⁹² Frankel, *supra* note 3, at 795-96; Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 541 (1949).

⁹³ *E.g.*, *Lloyd's & Inst. of London Underwriting Cos. v. Fulton*, 2 P.3d 1199, 1208 (Alaska 2000) (noting "special fiduciary relationship that exists between an insurer and its insureds"); *Employers Ins. of Wausau v. Didion Mid-South Corp.*, 987 S.W.2d 745, 748 (Ark. Ct. App. 1999) (holding mismanagement of claims by workers' compensation insurer constituted breach of fiduciary duty to employer).

⁹⁴ *E.g.*, *Sara Lee Corp. v. Carter*, 519 S.E.2d 308, 310-12 (N.C. 1999) (stating employee

priest may be a fiduciary to a penitent,⁹⁵ and a bank may be a fiduciary to a customer.⁹⁶ In order to determine whether a relationship that does not fit within a traditional category is nonetheless fiduciary in nature, courts will analogize to the traditional relationships.⁹⁷

There is a core of fiduciary duties that sets forth the consequences of the characterization, although the duties of each type of fiduciary will vary somewhat.⁹⁸ Generally, fiduciary responsibilities are as follows: to refrain from intentionally exploiting the relationship for personal gain (the duty of loyalty), and to carry out the fiduciary actions competently and without negligence (the duty of care).⁹⁹

The basic duty of a fiduciary is the duty of loyalty.¹⁰⁰ An article discussing fiduciary duty would not be complete without a reference to the definitive quote from Justice Cardozo: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."¹⁰¹ While that duty is impossible to define with precision, it prohibits the fiduciary from placing his own interests above the interests of the beneficiary.¹⁰² It also gives rise

who sells computer parts and services to employer from companies owned by employee owes fiduciary duty to employer).

⁹⁵ *E.g.*, *Moses v. Diocese of Colorado*, 863 P.2d 310, 322-23 (Colo. 1993) (finding record below supporting existence of fiduciary relationship between bishop and parishioner).

⁹⁶ *Succession of McKnight*, 768 So. 2d 794, 798 (La. Ct. App. 2000), *cert. denied*, 785 So. 2d 822 (La. 2001) (explaining ordinarily bank not fiduciary to customer, but where bank negligently represented to customer what was necessary for payable on death provision, bank breached duty and was liable to intended beneficiary); see generally Kenneth W. Curtis, *The Fiduciary Controversy: Injection of Fiduciary Principles into the Bank-Depositor and Bank-Borrower Relationships*, 20 LOY. L.A. L. REV. 795, 800-06 (1987).

⁹⁷ DeMott, *supra* note 86, at 879.

⁹⁸ See Scott, *supra* note 92, at 541 (noting scope of duty varies with scope of authority held by fiduciary); see *infra* notes 115-33 and accompanying text (discussing specific variations in duty).

⁹⁹ See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 655 (1995) ("The law of fiduciary administration . . . resolves into two great principles, the duties of loyalty and prudence.").

¹⁰⁰ RESTATEMENT (SECOND) OF TRUSTS § 170 (1959); Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 909 (1994).

¹⁰¹ *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (involving duty of one joint venturer owed to another, rather than traditional fiduciary relationship).

¹⁰² Scallen, *supra* note 100, at 908-10.

to more specific duties, such as the prohibition against self-dealing and conflicts of interest.¹⁰³

The duty of care imposes on a fiduciary a duty to carry out the fiduciary purpose,¹⁰⁴ to be prudent in his actions,¹⁰⁵ to protect property entrusted to the fiduciary in the fiduciary capacity,¹⁰⁶ to earmark such property and not to commingle it with the fiduciary's own assets,¹⁰⁷ to invest such property prudently,¹⁰⁸ which may include a duty to diversify,¹⁰⁹ to account to the beneficiaries,¹¹⁰ and to be impartial in his treatment of the persons who hold an interest in the fiduciary property.¹¹¹

Remedies for breach of fiduciary duty go beyond compensating the beneficiary. A fiduciary who breaches the duty of loyalty must disgorge any profits the fiduciary received as a result of the wrongdoing.¹¹² Unlike contract remedies that aim to put the aggrieved party in the same position as he would have been in absent the breach, the disgorgement remedy's goal is to put the fiduciary-wrongdoer in the same position she would have occupied had she not breached her duties.¹¹³ In addition, once the beneficiary or other protected party has shown facts indicating self-dealing or any other conflict of interest, the burden shifts to the fiduciary to show that the transaction was fair.¹¹⁴

¹⁰³ *Id.* at 909-10.

¹⁰⁴ 2A SCOTT & FRATCHER, *supra* note 89, § 170.

¹⁰⁵ *Id.* § 174.

¹⁰⁶ *Id.* § 176.

¹⁰⁷ *Id.* § 179.1 & 179.3.

¹⁰⁸ *Id.* § 181.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* § 172.

¹¹¹ *Id.* § 183.

¹¹² See J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* 116-21, 174 (1981) (discussing differences and similarities between contractual and fiduciary relationships); 2A SCOTT & FRATCHER, *supra* note 89, § 170.25 (noting rigorous standard of conduct trustees are held to when acting on behalf of beneficiaries).

¹¹³ Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1051-53 (1991).

¹¹⁴ See SHEPHERD, *supra* note 112, at 126-30 (discussing procedural devices used to discover breach of fiduciary duty). The burden of proof shifts because of the difficulty in proving a breach of loyalty, thus if the beneficiary had the burden of proving the unfairness, the dishonest fiduciary would be more likely to avoid detection and consequences of disloyalty. See Cooter & Freedman, *supra* note 113, at 1053-56 (discussing how legal rules that presume misappropriation increase enforcement probability).

B. TRADITIONAL CATEGORIES OF FIDUCIARIES AND THEIR VARYING DUTIES

The specific circumstances of a fiduciary relationship, which may include which traditional category is applicable, refine the fiduciary's general duties.¹¹⁵ As one commentator has stated:

The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty. Thus, a trustee is under a stricter duty of loyalty than is an agent upon whom limited authority is conferred or a corporate director who can act only as a member of the board of directors or a promoter acting for investors in a new corporation.¹¹⁶

There are numerous examples of variations of authority and duties in the traditional categories. The trustee will generally have the greatest degree of independent authority.¹¹⁷ It holds legal title to fiduciary property and acts independently of direction except from the trust document,¹¹⁸ although the trust beneficiaries have the opportunity to observe the trustee and complain about breaches of duty.¹¹⁹ A guardian is relatively free of supervision from the ward because the ward is, by definition, incapacitated, but that supervisory function is undertaken by the court and by state statutes restricting the guardian's discretion.¹²⁰ The guardian's discretion is therefore held to a narrower range than a trustee's.¹²¹ For example, guardians must obtain court approval for the sale of guardianship property,¹²² whereas trustees have the power to sell by statute,

¹¹⁵ See SHEPHERD, *supra* note 112, at 109 ("The point here is that it is by analysing the powers of a fiduciary that we determine the nature of the duty of loyalty he is under.").

¹¹⁶ Scott, *supra* note 92, at 541.

¹¹⁷ *Id.*

¹¹⁸ 1 SCOTT & FRATCHER, *supra* note 89, § 8.

¹¹⁹ *Id.*

¹²⁰ *Id.* § 7.

¹²¹ *Id.*

¹²² *E.g.*, UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 2-109, 8 U.L.A. 476, 476-77 (1998) (stating powers subject to court approval); WASH. REV. CODE ANN. § 11.92.090 (West 1998) (enumerating conditions in which guardianship property may be sold, exchanged, leased, or mortgaged).

unless limited by the trust agreement.¹²³ The trustee's duty to act prudently in exercising the power of sale would therefore be more extensive than the guardian acting pursuant to court order.

An agent is presumed to be supervised by the principal, who retains the ability to revoke the agency at any time. An agent therefore has a duty to obey the instructions of the principal.¹²⁴ This duty contrasts with the duty of a trustee to carry out the terms of the trust in the best interests of the beneficiaries, rather than obeying the beneficiaries' instructions.¹²⁵ Thus, a trustee must exercise independent judgment regarding investment of trust assets (unless otherwise constrained by the trust agreement), but an agent is under a duty to follow the principal's desires regarding investment of assets given to the agent to protect.¹²⁶ Because of the principal's supervision of an agent, the agent owes a somewhat less rigorous duty of loyalty than a trustee.¹²⁷ By contrast, an agent's actions may bind the principal, whereas a trustee's actions can only bind the trust assets and would not create personal liability for the beneficiaries.¹²⁸

Another distinction surrounds the duty to act. A trustee has a duty to act to protect the trust property, invest it prudently and

¹²³ *E.g.*, UNIF. TRUSTEES' POWERS ACT § 3, 7C U.L.A. 401, 401-03 (2000) (enumerating specific powers commonly conferred upon trustees); WASH. REV. CODE § 11.98.070 (West 1998) (stating trustee powers).

¹²⁴ 1 MECHEM, *supra* note 14, § 1244, at 911.

¹²⁵ 1 SCOTT & FRATCHER, *supra* note 89, § 8.

¹²⁶ HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 16, at 44 (2d ed. 1990).

¹²⁷ The trustee is always held to a duty of fairness when self-dealing, even when he acts with the consent of the beneficiary, but the agent can freely deal with the principal's property with the principal's consent. Compare RESTATEMENT (SECOND) OF AGENCY § 390 cmt. c (1958) with RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. w (1959) (noting even when trustee has beneficiary's consent and transaction is reasonable, beneficiary can still have transaction set aside if certain factors are or are not present), and 2A SCOTT & FRATCHER, *supra* note 89, § 170 (explaining where trustee acts without beneficiary consent, transaction is always voidable; however, even with beneficiary consent, transaction may still be voidable if trustee failed to disclose material facts, used her position of influence inappropriately, or conducted transaction unfairly).

¹²⁸ RESTATEMENT (SECOND) OF AGENCY § 144 (1958) ("If the principal is not in a dependent position . . . and the agent fully performs his duties of disclosure, or transaction . . . is not voidable merely because the principal receives an inadequate price or pays too great a price."); 3A SCOTT & FRATCHER, *supra* note 89, §§ 277, 277.1.

make it productive.¹²⁹ An agent, on the other hand, has a duty to act only as directed by the principal.¹³⁰

Considering the duties of fiduciaries in the corporate setting further illustrates this variation. The modern rule regarding conflicts of interest of corporate directors is that a transaction in which a corporate director had a conflicting interest cannot be set aside by a shareholder if the transaction is fair to the corporation.¹³¹ That rule is more generous than the requirement of voidability of a trustee's self-interested transaction regardless of its fairness.¹³² In business relationships, such as majority shareholder to minority shareholder, or partner to partner, the closer the fiduciary's own interests are to those of the beneficiary, the less stringent the duty of loyalty.¹³³

Therefore, even among the traditional categories, the specific duties required by fiduciary status vary depending on the nature of the relationship and the extent of the fiduciary's discretion and authority.

C. "SITUATIONAL FIDUCIARIES"

A court will often label a party as a fiduciary, even if the facts do not fit within one of the recognized categories, if the court finds that certain defining elements of the fiduciary are present. Generally,

¹²⁹ 2A SCOTT & FRATCHER, *supra* note 89, §§ 175, 176.

¹³⁰ RESTATEMENT (SECOND) OF AGENCY § 383 (1958).

¹³¹ DEL. CODE ANN. tit. 8 § 144 (1991); see Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 702 (1982) ("[M]anagers of a corporation are free to funnel business to another corporation in which they have an interest if the transaction is . . . 'fair' (advantageous) to the firm.")

¹³² 2A SCOTT & FRATCHER, *supra* note 89, § 170 (explaining without beneficiary consent, self-interested transactions by trustee are voidable despite good faith or fairness); see also Easterbrook & Fischel, *supra* note 131, at 702 n.13 (stating reason for difference in duty is that interests of principals are different). Note, however, if the trustee's act is classified as merely a conflict of interest, rather than self-dealing, the transaction would not be voidable if shown to be fair. See *In re Rothko*, 372 N.E.2d 291, 295-96 (N.Y. Ct. App. 1977) (holding executors who bought decedent artist's paintings at less than fair market value for their art galleries must pay appreciated value at time of trial to estate and new fiduciary could not reject return of paintings in alternative).

¹³³ See Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 432-34 (1993) (listing various fiduciary relationships and varying duties of each).

those elements are a close relationship, an entrusting and acceptance of power, and a superiority of position.¹³⁴ Some courts have defined the required element as "justifiable trust," in other words, where one party has justifiably put trust in another to watch out for the first party's interests.¹³⁵ A common theme in these cases is the relaxation of one party's self-interested vigilance or independent judgment in favor of the other party's protection, because the circumstances justify the belief that the other is acting in the first party's best interests.¹³⁶

The fiduciary principle's roots as an equitable doctrine explain why it may be applied in certain fact situations that fall outside the traditional roles.¹³⁷ The court's purpose of attaching such a label is remedial, intended to shift the burden of proof, characterize the party's conduct as a breach of duty, and increase the possibility and amount of liability.¹³⁸ There should be a prescriptive purpose as well: persons in relationships that are not clearly labeled as fiduciary are in particular need of direction since they are not forewarned of the need to serve the other's interests. When using the fiduciary principle remedially, however, the court will generally pick and choose among the fiduciary duties and impose only those necessary for protection of the vulnerable party in a situational

¹³⁴ See *Taegeer v. Catholic Family & Cmty. Servs.*, 995 P.2d 721, 726 (Ariz. Ct. App. 1999) (finding adoption agency owes fiduciary duty toward adoptive parents because of exclusive control of information about child's background and necessary trust placed in agency by parents) (quoting *Condos v. Felder*, 377 P.2d 305 (Ariz. 1962)).

¹³⁵ See *Cowee v. Cornell*, 75 N.Y. 91, 99-100 (1878) (finding "trust justifiably reposed" shifts burden to stronger party to prove no deception or undue influence was used); *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595 (Tex. 1992) (requiring special trust and confidence beyond "mere subjective trust alone") (quoting *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1976)); Gregory B. Westfall, Comment, "*But I Know It When I See It*": A Practical Framework for Analysis and Argument of Informal Fiduciary Relationships, 23 TEX. TECH L. REV. 835, 844 (1992) (requiring justifiable trust as explained in *Crim Truck*).

¹³⁶ See *Adickes v. Andreoli*, 600 S.W.2d 939, 945-46 (Tex. App. 1980) (holding amateur real estate investor liable for withholding material information because he induced close friend to join in real estate venture, knowing friend relied on his knowledge of real estate market); see also P.D. Finn, *The Fiduciary Principle*, in *EQUITIES, FIDUCIARIES AND TRUSTS* 1, 46 (T.G. Youdan ed. 1989) (explaining fiduciary relationship will be found in actual circumstances in which one party is entitled to expect other party to act in the former's best interests).

¹³⁷ *DeMott*, *supra* note 86, at 880 (giving brief history of equitable evolution of fiduciary doctrine).

¹³⁸ Finn, *supra* note 136, at 24.

fiduciary relationship, and only to the degree necessary for that protection.

Numerous examples illustrate the peculiar facts that may give rise to the situational fiduciary label. In *Adickes v. Andreoli*,¹³⁹ the court found a fiduciary relationship between Mr. Adickes and Mr. Andreoli, two professional artists who were close friends.¹⁴⁰ Mr. Adickes was impressed with Mr. Andreoli's success in real estate investing, and he became involved in a real estate project with Mr. Andreoli on Mr. Andreoli's advice.¹⁴¹ In holding Mr. Andreoli liable for withholding material information about his other interests in the project, the court held that a fiduciary relationship was established by the close personal relationship between the two and the fact that Mr. Andreoli knew that Mr. Adickes relied on his knowledge of the Houston real estate market.¹⁴²

In *Taeger v. Catholic Family and Community Services*,¹⁴³ the court found that an adoption agency was in a fiduciary relationship to adoptive parents with respect to information about the background of the child and the biological parents, because it had exclusive access to that information and the adoptive parents necessarily placed special trust in the agency to disclose pertinent information.¹⁴⁴ As a result of that fiduciary relationship, the burden shifted to the agency to prove it acted fairly, and the necessary standard of care was "the duty to use the utmost fairness and honesty in its dealings with adoptive parents and the children it places for adoption."¹⁴⁵ Accordingly, the appellate court remanded the case for trial on whether the agency could be held liable for constructive fraud based on breach of fiduciary duty for withholding information about a child's biological mother.¹⁴⁶ In this situation,

¹³⁹ 600 S.W.2d at 939.

¹⁴⁰ *Id.* at 941-42.

¹⁴¹ *Id.*

¹⁴² *Id.* at 945-46 ("A confidential relationship may arise not only from the technical fiduciary relationships, but may also arise informally from moral, social, domestic, or purely personal relationships.")

¹⁴³ 995 P.2d 721 (Ariz. Ct. App. 1999).

¹⁴⁴ *Id.* at 727-28.

¹⁴⁵ *Id.* at 729.

¹⁴⁶ *Id.* at 730. The court defined constructive fraud as "a breach of a legal or equitable duty which, without regard to moral guilt or intent of the person charged, the law declares fraudulent because the breach tends to deceive others, violates public or private confidences,

the fiduciary duty of disclosure¹⁴⁷ was imposed because of the vertical position of the parties with respect to necessary information.

In *Taeger*, the fiduciary responsibility extended only to the duty to disclose because that was the only relevant duty in the circumstances.¹⁴⁸ Another way to accommodate the circumstances is to reduce the stringency of the duty. When the disparity of power between the parties is less than the truly vertical trustee-beneficiary arrangement, the duties will be more relative, less absolute.

A good example of this reduction in duty is the marital community. In a community property state, husband and wife have equal, independent management powers over community property, to varying degrees.¹⁴⁹ One spouse therefore has the power to manage property that is owned equally by that spouse and the nonacting spouse, and such power must carry with it some corresponding duty. However, the managing spouse could not be a full fiduciary, akin to a trustee, because the spouse is an equal owner and should not have to subvert her own interests to that of the nonacting spouse. For example, in *Somps v. Somps*,¹⁵⁰ the husband's use of separate funds for an investment opportunity that became available to him because

or injures public interests." *Id.* at 725 (internal citations omitted).

¹⁴⁷ See RESTATEMENT (SECOND) OF AGENCY § 381 (1958) (stating agent has duty to use reasonable efforts to provide his principal with relevant information if he has notice principal would desire to have this information); 2A SCOTT & FRATCHER, *supra* note 89, § 113 (indicating duty to provide information); see also *Roberts v. Sears, Roebuck & Co.*, 573 F.2d 976, 980 (7th Cir. 1978) (holding employer's superiority over its employee created confidential relationship and duty to inform employee of value of his proposed invention).

¹⁴⁸ See also *Buxcel v. First Fid. Bank*, 601 N.W.2d 593, 596-97 (S.D. 1999) (holding despite general rule of nondisclosure bank had duty to disclose distressed financial condition of grocery store to buyers due to "special circumstances" that bank had financial interest in sale and was financing sale for buyers). Another example of a court finding a fiduciary relationship limited to one duty is *Schneider v. Plymouth State Coll.*, 744 A.2d 101, 106 (N.H. 1999) (finding school breached fiduciary duty to student to "create an environment in which the plaintiff could pursue her education free from sexual harassment").

¹⁴⁹ *E.g.*, ARIZ. REV. STAT. ANN. § 25-214(B) (West 2000) ("The spouses have equal management, control and disposition rights over their community property and have equal power to bind the community."); CAL. FAM. CODE § 1100(a) (West 1994) ("[E]ither spouse has the management and control of the community personal property . . . with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse."); LA. CIV. CODE ANN. arts. 2345-46 (West 1985) ("Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law.")

¹⁵⁰ 58 Cal. Rptr. 304 (Ct. App. 1967).

of a business partially made up of community property was not a violation of the fiduciary duty he owed to the community,¹⁵¹ even though a full fiduciary would not be able to take a business opportunity connected with and available to the protected party (such as the trust, the principal or the corporation).¹⁵²

Some state statutes have defined the duty between spouses as the duty to act "in good faith,"¹⁵³ which seems no higher than the duty of contracting, nonfiduciary parties.¹⁵⁴ Other states and commentators have analogized to the fiduciary duties owed by partners.¹⁵⁵ The spousal relationship in a community property jurisdiction could be considered a status category of fiduciary, like the traditional categories, without the need for additional facts to support the characterization, as in a situational fiduciary case.¹⁵⁶ Confusion over the duty owed, however, illustrates both the recognition of lesser duties where the fiduciary has a necessary competing interest and the extent to which fiduciary status encompasses a broad spectrum of relationships with wide variations in the inequality of the parties' relative positions.

¹⁵¹ *Id.* at 310.

¹⁵² See *Miller v. Miller*, 222 N.W.2d 71, 78 (Minn. 1974) (explaining "one entrusted with the active management of a corporation . . . may not exploit his position as an 'insider' by appropriating to himself a business opportunity properly belonging to the corporation"); RESTATEMENT (SECOND) OF AGENCY § 388 cmt. c (1958) (explaining agent has duty to account for profits made through use of confidential information acquired during employment by principal); 2A SCOTT & FRATCHER, *supra* note 89, § 170.21 (stating it is improper for trustee to purchase property for himself when it is his duty to purchase that property for trust); 1 MECHEM, *supra* note 14, § 1191 (stating rule that agent "may not deal in the business of his agency for his own benefit").

¹⁵³ *E.g.*, WIS. STAT. ANN. § 766.15(1) (West 1993) ("Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse"); see also LA. CIV. CODE ANN. art. 2354 (West 1985) (stating spouse is liable for fraud or bad faith in management of community property).

¹⁵⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (stating one party's non-disclosure of fact is equivalent to assertion that fact does not exist if nondisclosure amounts to lack of good faith and fair dealing).

¹⁵⁵ See Alexandria Streich, *Spousal Fiduciaries in the Marital Partnership: Marriage Means Business But the Sharks Do Not Have a Code of Conduct*, 34 IDAHO L. REV. 367, 391 (1998) (suggesting spouses, like business partners, share authority and confidence in each other, necessitating imposition of fiduciary duty).

¹⁵⁶ The California statute expressly labels the husband-wife relationship as fiduciary and further provides that spouses have the same rights and duties as "nonmarital business partners." CAL. FAM. CODE § 721(b) (West 1994).

The line drawn by these cases between fiduciary and nonfiduciary is difficult to discern. Some cases describing breaches of fiduciary duty appear to be more accurately characterized as fraud perpetrated by a person who had some close, confidential relationship with the victim.¹⁵⁷ Courts may be reaching for the fiduciary characterization in order to access its remedies, without proper analysis of the limits of the fiduciary label. As pointed out by Professor P.D. Finn:

[I]f one cannot find a specific doctrine appropriate to the circumstances, but if one is committed to exacting a protective responsibility, the lure to fiduciary law becomes almost irresistible. . . . [I]f the remedy given by an available doctrine does not meet the perceived needs of justice in a given case, again the lure is there . . . to resort to fiduciary law's ample and flexible remedy system.¹⁵⁸

Professor Scott's distinction between fiduciary relationships and confidential relationships is helpful in identifying possible faux fiduciary cases:

A confidential relationship exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation may exist although there is no fiduciary relation; it is particularly likely to exist where there is a family relationship or such a relation of confidence as that which arises between physician and patient or priest and penitent. If one person is in a confidential, but not a fiduciary, relation to another, a transaction between them will not be set aside at the instance of one of them unless in fact he reposed confidence in the

¹⁵⁷ The cases involving sexual abuse by priests may be viewed this way. See *supra* note 4 (citing examples of fiduciary relationship between clergy and church members).

¹⁵⁸ Finn, *supra* note 136, at 24.

other, and the other, by fraud or undue influence or otherwise, abused the confidence placed in him. A fiduciary relation involves certain consequences as to transactions between the parties that flow automatically as a matter of law from the relation.¹⁵⁹

By contrast, there are breach of contract cases where the court declined to label the conduct as a breach of fiduciary duty but nevertheless imposed heightened duties for particular conduct.¹⁶⁰ Professor Finn has pointed out that the breach of duty cases run from selfish to selfless—from cases where a party is expected to be acting in his own interests, and bound only by unconscionability, to cases where the party is a full fiduciary and expected to be acting selflessly.¹⁶¹ Included in that spectrum is the good faith duty owed by contracting parties.¹⁶² What is not clear is the point on that spectrum where the duty shifts to the “fiduciary” label, with the attendant shift in the burden of proof and increased remedies. The existing cases show, however, that once the label is applied, the consequences of the label vary depending on the nature of the relationship and the discrepancy in power between the parties.

In summation, outside the traditional categories, the term fiduciary is used imprecisely, and the cases illustrate a certain confusion over the essence of fiduciary. Consideration of the facts of these cases, however, illustrate that the category of fiduciary relationships is a continuous spectrum where the scrutiny becomes more forgiving as the slant of the relationship flattens from the true vertical upper hand of the fiduciary.

D. DEBATE OVER THE NATURE OF THE FIDUCIARY PRINCIPLE

The precise nature of the fiduciary principle has never been pinned down,¹⁶³ although it has a long history with the

¹⁵⁹ 1 SCOTT & FRATCHER, *supra* note 89, § 2.5.

¹⁶⁰ See Scallen, *supra* note 100, at 929-70 (surveying “tortious breach of implied covenant of good faith and fair dealing” and “bad faith breach of contract” cases).

¹⁶¹ Finn, *supra* note 136, at 3-4.

¹⁶² *Id.* at 10-24.

¹⁶³ SHEPHERD, *supra* note 112, at 3-12; Finn, *supra* note 136, at 24 (“It is striking that a

courts,¹⁶⁴ and scholars have long debated the issue.¹⁶⁵ Courts have not added much consistency or precision to the definition, perhaps because of the context in which courts consider the fiduciary principle. Generally, when a court is faced with a wrong, the fiduciary principle is a method by which the court can impose a higher duty on the wrongdoer. Commentators have used a variety of methods to devise an overarching principle: analysis of the various cases as a source of a unifying common thread, philosophical consideration of the necessary underlying policy, with ensuing testing of the theory against the case law, and increasingly, a discussion of what the fiduciary principle should be, to provide guidance to courts that are struggling without a unifying principle.¹⁶⁶ A unifying theory is elusive, however, in part because so many different relationships are characterized as fiduciary, ranging from trustee-beneficiary to partner-partner and attorney-client, to relationships that have no formal characterization.¹⁶⁷ One commentator has called the role "atomistic."¹⁶⁸ The quest for a unifying theory has as its purpose a method whereby courts can find a fairly uniform basis upon which to impose the higher burdens of proof and stiffer penalties that are attached to the fiduciary label. The theories are primarily attempts at identifying the crucial characteristic that courts should look for before labeling someone a fiduciary.

Professor J.C. Shepherd has summarized various theories of the essence of fiduciary duty, identifying seven basic formulations: unjust enrichment, commercial utility, reliance, unequal relationship, property, power and discretion, and undertaking.¹⁶⁹ Initially,

principle so long standing and so widely accepted should be the subject of the uncertainty that now prevails.").

¹⁶⁴ See L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L. J. 69, 69-71 (describing eighteenth- and nineteenth-century cases discussing "trust" or "confidence" as precursors to fiduciary relationships).

¹⁶⁵ SHEPHERD, *supra* note 112, at 3-5.

¹⁶⁶ See J.C. Shepherd, *Toward a Unified Concept of Fiduciary Relationships*, 97 LAW Q. REV. 51, 52-53 (1981) [hereinafter Shepherd, *Toward a Unified Concept*] (describing method for developing unifying principle).

¹⁶⁷ See Easterbrook & Fischel, *supra* note 133, at 432-34 (defining duties imposed in several listed relationships).

¹⁶⁸ DeMott, *supra* note 86, at 915.

¹⁶⁹ SHEPHERD, *supra* note 112, at 51.

he lists the unjust enrichment theory, which defines a fiduciary relationship as one where a person holds property or another advantage which "justice requires should belong to another person."¹⁷⁰ This theory has been criticized as circular,¹⁷¹ and essentially justifies the enhanced remedies without giving guidance as to the line between what is just and unjust. Professor Shepherd points out, however, that it brings to the discussion a notion of morality as the core of fiduciary duty, as well as a notion of flexibility in application, necessary in light of the broad range of relationships to be defined under the doctrine.¹⁷²

The commercial utility theory would find a fiduciary relationship if protection of a commercial enterprise required a certain class of persons to be held to a higher standard of good faith.¹⁷³ This standard brings in a consideration of the economic utility of fiduciary concept but, again, is too vague (and perhaps too narrow) to be useful.

The reliance theory finds a fiduciary relationship whenever one person has placed his or her trust in another person.¹⁷⁴ This is the most common definition of a fiduciary,¹⁷⁵ and is one of the definitions in *Black's Law Dictionary*.¹⁷⁶ It looks primarily to the intent of the person seeking protection, and is both under- and over-inclusive, because in some cases the person's placing of trust is unwarranted, defeating the finding of a fiduciary relationship, and in some cases a fiduciary relationship can be found even where there has been no explicit reliance. It has also been criticized as being circular¹⁷⁷ and as being descriptive only, rather than analytic.¹⁷⁸

Under the unequal relationship theory, a fiduciary relationship exists if the parties have unequal power, either by virtue of their

¹⁷⁰ Shepherd, *Toward a Unified Concept*, *supra* note 166, at 53.

¹⁷¹ Easterbrook & Fischel, *supra* note 133, at 435.

¹⁷² Shepherd, *Toward a Unified Concept*, *supra* note 166, at 56.

¹⁷³ *Id.* at 56-57; see generally Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975) (explaining how development of fiduciary obligation doctrine affects decision-makers in marketplace).

¹⁷⁴ Shepherd, *Toward a Unified Concept*, *supra* note 166, at 58.

¹⁷⁵ *Id.* at 59.

¹⁷⁶ See *supra* note 90 and accompanying text (discussing how fiduciary relationship is defined).

¹⁷⁷ Easterbrook & Fischel, *supra* note 133, at 435.

¹⁷⁸ Shepherd, *Toward a Unified Concept*, *supra* note 166, at 59.

legal relationship, such as trustee-beneficiary, or as a result of circumstantial dominance of one of the parties.¹⁷⁹ Consequently, unlike most contractual relationships, a fiduciary relationship is vertical, rather than horizontal.¹⁸⁰ A difficulty with this theory is defining the necessary extent of the dominance, since in most situations one party will be stronger than the other; rarely is the playing field exactly level. At what degree of tilt will the variation in strength create fiduciary responsibilities?

Other theories identified by Professor Shepherd include the property theory, which bases fiduciary duty in property owned beneficially by one party and controlled by another,¹⁸¹ the power and discretion theory, which focuses on the existence of one person's power over another,¹⁸² and the undertaking theory, which finds a fiduciary relationship based on a person's voluntary undertaking to act for another.¹⁸³

As noted by Professor Shepherd, some scholars have concluded that no single approach covers the field and have instead argued that a comprehensive fiduciary principle would include two or more of these concepts.¹⁸⁴ He objects to this approach, however, on the grounds that a list approach is not sufficiently flexible and dilutes the notion that "fiduciary" is an integrated whole.¹⁸⁵ Professor Shepherd concludes that a formulation of the fiduciary principle he calls "the transfer of encumbered power" would be more accurate and comprehensive than the other approaches.¹⁸⁶ That formulation describes a fiduciary relationship as follows: "A fiduciary relationship exists whenever any person acquires a power of any type on condition that he also receive with it a duty to utilize that power in the best interests of another, and the recipient of the power uses

¹⁷⁹ *Id.* at 61.

¹⁸⁰ See Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 775-76 (2000) (describing vertical characterization of fiduciary relationships and consequences of that characterization).

¹⁸¹ Shepherd, *Toward a Unified Concept*, *supra* note 166, at 63.

¹⁸² *Id.* at 68.

¹⁸³ *Id.* at 64.

¹⁸⁴ SHEPHERD, *supra* note 112, at 88-89; see also BLACK'S LAW DICTIONARY 640 (7th ed. 1999) (providing "list" definition of fiduciary).

¹⁸⁵ SHEPHERD, *supra* note 112, at 90-91.

¹⁸⁶ *Id.* at 102-08.

that power."¹⁸⁷ Again, these various definitions are all attempts at identifying the critical characteristic of a fiduciary, so that some consistency could be achieved in imposing the higher remedies.

One theory that has recently been advanced states that fiduciary duty is really not a separate principle, but a set of contractual principles called into play when the contractual duties in question are difficult to specify and monitor.¹⁸⁸ In other words, fiduciary duties are merely implied contractual terms—default rules—that are present in certain contracts, and that may be waived by express terms of the contract.¹⁸⁹ Fiduciary duty is not a separate species of duty under this theory but rather is just one end of the spectrum that begins with contractual good faith.¹⁹⁰ The remedy for a fiduciary's breach of loyalty—disgorgement of the fiduciary's profit—is on its face difficult to reconcile with the contractual theory because contractual damages generally focus on the wronged party's loss, thus allowing for economically feasible breach.¹⁹¹ Some contractarians argue that disgorgement is consistent with a contract theory. Even for fiduciaries, disgorgement is a limited remedy applicable only to breach of loyalty, and the difficulty in detecting breaches of loyalty (such as misappropriation) requires high penalties, exceeding the potential profit, in order to provide

¹⁸⁷ *Id.* at 96. Interestingly, Professor Shepherd notes that this description could include contractual duties that currently are not treated as fiduciary, which may argue against his formulation. In particular, the doctrine of efficient breach is inconsistent with the fiduciary remedy of disgorgement, indicating that a proper fiduciary concept could not include contractual relationships that allow efficient breach. He argues that rather than disproving his theory as overbroad the acceptability of efficient breach is an "anomalous exception" to his theory. *Id.* at 119-23.

¹⁸⁸ Easterbrook & Fischel, *supra* note 133, at 427.

¹⁸⁹ See Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1231-42 (1995) (describing characteristics and boundaries of fiduciary rules as default rules and describing required process for waiver of fiduciary duties); see also Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 448-50 (1998) (determining what separate function trust law serves, apart from contract and agency law, and concluding fiduciary duties could be included as part of contract and therefore add no independent value to separate set of trust rules).

¹⁹⁰ Easterbrook & Fischel, *supra* note 133, at 438; see Finn, *supra* note 136, at 4 (identifying spectrum of behaviors from selfish to selfless, and standards progressing from prohibiting unconscionability to those requiring good faith and then full fiduciary duty).

¹⁹¹ *Supra* notes 112-13 and accompanying text.

deterrence.¹⁹² The measure of such a remedy is what the parties would have contracted for in a transaction-cost-free environment.¹⁹³

Two related discussions focus on the contractarian nature of separate areas of law that include fiduciary principles. The first of these discussions is whether trust law is a branch of contract or property law. This discussion overlaps but is not concurrent with the fiduciary principle discussion, since trust law includes fiduciary principles but also encompasses the broad range of formation and administration issues.¹⁹⁴ Professor John Langbein has urged a contractarian view of trust law, in large part because of practical, normative concerns. His concern is that trust law as applied by the courts lacks the flexibility of contractual principles and limits the ability of the parties to a trust to carry out their intentions.¹⁹⁵ Professor Langbein distinguishes trust law from agency law, which expressly acknowledges its contract basis.¹⁹⁶ Although his concerns are broader, he specifically addresses the fiduciary aspect of trusts and concludes that it, too, is contractarian, as a set of default principles that can be altered by the parties' agreement.¹⁹⁷ He bemoans the moralistic rhetoric used by courts because the sermonizing cuts off the analysis, which muddles definitions of who is a

¹⁹² Cooter & Freedman, *supra* note 113, at 1051-53. While disgorgement only equals the wrongdoing fiduciary's profit, rather than exceeding it, the shift of burden to the fiduciary to prove lack of wrongdoing sufficiently increases penalty to make breach unattractive. *Id.*

¹⁹³ Easterbrook & Fischel, *supra* note 133, at 441.

¹⁹⁴ Professors Hansmann and Mattei conclude that trust law has a unique advantage over contract principles in that it creates new rules for liability to third parties, but that with respect to fiduciary principles, those rules could be part of any contractual arrangement and seem "a relatively unimportant reason for maintaining a separate law of trusts." Hansmann & Mattei, *supra* note 189, at 438.

¹⁹⁵ Langbein, *supra* note 99, at 663-67 ("The contractarian premise is that the law should strive to implement the trust deal, the deal between settlor and trustee."). He gives as an example of the failure of trust law in this regard, the situation where a child who is also a beneficiary is named as trustee by a parent-settlor. *Id.* at 663-64. The intention of the parties would presumably be more tolerant of conflicts of interest than the situation where a bank was named as trustee, but in the absence of specific language in the trust, the two types of trustees are treated the same. *Id.* at 667.

¹⁹⁶ *Id.* at 649. Professor Langbein explains the difference from an historical perspective: trust law arose from equity, and Professor Scott defined trust law as separate from contract law in part to maintain equitable jurisdiction. Agency law, on the other hand, developed in the common law. *Id.* at 647-49.

¹⁹⁷ *Id.* at 655-59.

fiduciary and confuses any detailed descriptions of the particular duties owed in the situation under consideration.¹⁹⁸

There is a similar debate about the nature of corporate law and whether its parameters are bound by contract law or extend beyond contracts to include overriding principles. This complex debate encompasses broad issues, such as the characteristics of the various relationships in the corporate form and whether such relationships (such as shareholder to management) can be defined as contractual.¹⁹⁹ As part of this debate, the contractarians argue that the fiduciary relationships inherent in the corporate structure²⁰⁰ are a part of the corporate contract and therefore negotiable.²⁰¹

The scholars that object to the characterization of fiduciary duties as default contract terms generally distinguish the fiduciary relationship as vertical, as opposed to the assumed horizontal nature of contractual relationships. In other words, the fiduciary relationship is defined by the power held by the fiduciary over the protected person, as opposed to the equal power in contracting parties.²⁰² In this view, fiduciary duties are more than gap-filling terms imbedded in a certain type of contract, because under general contract law, judges must fill contractual gaps conservatively, rather than expansively.²⁰³ Fiduciary duties, on the other hand, are anything but restrictive.²⁰⁴

¹⁹⁸ *Id.* at 658-59.

¹⁹⁹ See, e.g., Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 3 (1990) ("Contractarians view the corporation as a set of private contractual relationships among providers of capital and services. Anti-contractarians argue that the corporation is either not a contract at all, or at least is subject to more intrusive government regulation than other contracts.").

²⁰⁰ See WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* §§ 1-7, 1-13 (6th ed. 1998) (explaining fiduciary relationships of director/shareholder and majority/minority shareholder).

²⁰¹ Butler & Ribstein, *supra* note 199, at 28-32; Easterbrook & Fischel, *supra* note 133, at 427.

²⁰² See DeMott, *supra* note 86, at 903-05 (contrasting contractual duties of good faith and fiduciary duty). The difference in the relationship leads to fundamentally different duties. "The picture that emerges from the case law is that in contractual relationships the duty is 'don't screw the other side,' but with regard to fiduciary relationships the demand to the fiduciary is 'protect your beneficiary, not yourself.'" Alexander, *supra* note 180, at 776.

²⁰³ See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989) (criticizing general contract law in favor of penalty defaults).

²⁰⁴ See Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV.

In addition, contractual analysis, which views fiduciary duty as what the parties would have negotiated for if they had addressed the issue, fails to accommodate the instances where fiduciary duty is imposed in spite of contract terms and the expressed intentions of the parties.²⁰⁵ For example, in *Arnott v. American Oil Co.*,²⁰⁶ the court imposed fiduciary duties on a franchisor not to terminate the franchise even though the agreement would have allowed the franchisor to terminate under the existing circumstances.²⁰⁷ Additional objections to the contractarian theory treat it as descriptive and point out that the moral overtones of the judicial discourse indicate that something more than breach of contract is at stake.²⁰⁸ Also, the variance of fiduciary punitive remedies, such as disgorgement, from contract remedies, which focus on restitution rather than punishment, can be seen as placing fiduciary breach as a category separate from contractual breach.²⁰⁹

Professor Scott FitzGibbon attacks the potential normative intent of the contractarians, arguing that fiduciary duty as a principle separate from contract reflects "the precepts of social morality and practice"²¹⁰ and serves social purposes that could not be contemplated using the self-interest bias of contract law.²¹¹ Professor Joan Scallen proposed a "new fiduciary principle" as an explanation for tort damages awarded in contract cases: that there is a difference between a promise broken and a promise betrayed.²¹² A betrayed promise results in psychological and emotional damage as well as economic damage, justifying and explaining the contract cases that impose damages beyond contractual principles.²¹³

The purpose of the debate extends beyond labels, and is intended to inform courts when analyzing particular cases as to the extent of

303, 334-35 (1999) (referring to fiduciary doctrines as "aggressive and sweeping").

²⁰⁵ DeMott, *supra* note 86, at 887.

²⁰⁶ 609 F.2d 873 (8th Cir. 1979).

²⁰⁷ *Id.* at 877-79, 882-84; *cf.* *Bain v. Champlin Petroleum Co.*, 692 F.2d 43, 48 (8th Cir. 1982) (criticizing *Arnott* court's use of term "fiduciary.>").

²⁰⁸ Scallen, *supra* note 100, at 921.

²⁰⁹ *Id.*

²¹⁰ FitzGibbon, *supra* note 204, at 338.

²¹¹ *Id.* at 346-53.

²¹² Scallen, *supra* note 100, at 979.

²¹³ *Id.* at 978.

the duty and the appropriate remedies. Characterization of the principle should give courts a road map, a template in determining whether a particular relationship is fiduciary.

The characterization of a fiduciary duty as contractual has a further normative purpose; however, its focus is to remove the moralistic rhetoric and redirect the court's attention to intent of the parties. As described by Professor Gregory Alexander, a fiduciary analysis is "top-down"—guided by hindsight and what the court thinks the fiduciary should have done; whereas, contract analysis is "bottom-up"—drawing conclusions from an analysis of the underlying facts.²¹⁴ In other words, the fiduciary label creates a bias that may restrict the court's analysis of the actual circumstances.

In sum, the scholars grapple with two essential questions. First, what circumstances justify the imposition of superseding duties and selflessness on one party to a relationship, in spite of the parties' agreement? Do those duties arise from some moral obligation or external need, or are they merely an assumption of what the parties would have wanted had they fully detailed their relationship—playing a role similar to intestacy laws that approximate a decedent's intent where the decedent failed to leave a will? The answer to this question colors both the methodology used to identify when higher duties are called for, and the formulation of those duties when they are found to exist.

The second question concerns the identification of a fiduciary. What are the defining characteristics of a relationship that must be present in order to justify the imposition of these higher duties? In order to answer that question, the underlying purpose of fiduciary rules must be weighed.

IV. THE DURABLE POWER OF ATTORNEY'S ROLE IN DEFINING THE FIDUCIARY PRINCIPLE

In the discussions on the nature of the fiduciary principle, prototype fiduciary relationships such as those found in the trust, corporate and commercial context have been used to test the various theories. Durable powers of attorney have maintained a low profile

²¹⁴ Alexander, *supra* note 180, at 768.

in this debate, probably because they have such a short history and have received so little scholarly and judicial attention. However, their peculiar undefined nature, coupled with the one certainty that attorneys-in-fact are fiduciaries, create the potential for insights that inform the general fiduciary debate.

Initially one must question the purpose of the debate and the purpose of fiduciary principles in general. The commentators have not done much more than speculate on the question of whether the characterization of fiduciary duty is contractual or something separate.²¹⁵ Professor Langbein indicates that a contractual viewpoint would move judicial analysis away from the "top-down" moralizing to a "bottom-up" consideration of the evidence before drawing conclusions and would give more weight to the intention of the parties.²¹⁶ On the other end of the discussion, Professor Scallen's proposal of a "new" fiduciary principle is intended to expand the fiduciary category to relationships in those commercial situations where a promise has been betrayed rather than broken, thus warranting the imposition of the harsher fiduciary standards of conduct and damages.²¹⁷ The crux seems to be whether there is a moral overtone to judgment of the wrongdoer.

Consider this question in the context of durable powers of attorney. The typical arrangement is a family member who has agreed to handle the finances for an elderly relative, usually for no compensation. Recall that the original intent of the durable power of attorney was to address a specific social problem: the need for an economical method of assisting mentally frail adults with their financial and personal business matters. The context is therefore far from commercial.²¹⁸ One would have to strain to fit the power of

²¹⁵ See DeMott, *supra* note 86, at 888 (describing different remedies available under either contract basis or under fiduciary duty basis); FitzGibbon, *supra* note 204, at 337-38 (describing social morality basis for fiduciary relationships outside of contract law).

²¹⁶ Langbein, *supra* note 99, at 650-65.

²¹⁷ Scallen, *supra* note 100, at 901-02.

²¹⁸ In some settings, the power of attorney could create a commercial relationship. For example, one business partner who will be unavailable to execute documents at the closing of a transaction may give a limited power of attorney to a business associate, authorizing the attorney-in-fact to sign the documents for the principal. This discussion, however, considers only the durable power of attorney used for disability planning, *i.e.*, it assumes an attorney-in-fact acting under a general durable power of attorney for an incompetent principal.

attorney into a contract mode, since even though strictly speaking the attorney-in-fact can be said to have entered into an agency contract, there is little or no benefit in the arrangement for the attorney-in-fact. Indeed, we would be uncomfortable with an attorney-in-fact that has taken on the role for personal profit because of his unfettered, unsupervised control over the principal's assets and affairs.

So what is the motivation for individuals who have agreed to take on this role? It is telling that corporate fiduciaries are generally unwilling to serve as attorneys-in-fact. A younger family member acting as attorney-in-fact for an older relative is most likely motivated by a mixture of factors. He may be motivated by familial duty, genuine concern for the well-being of the older family member, or by a somewhat self-interested desire to handle the older family member's affairs in a cost-effective and private manner, thus preserving the older family member's estate and protecting her assets from waste or misappropriation by another, perhaps increasing the younger family member's future inheritance and avoiding the possibility that the younger family member would have to take on the financial burden of caring for the older family member when her own funds were exhausted. In sum, the attorney-in-fact's family connections with the principal create an interest in protecting the principal's best interests. Any self-interest beyond that begins to appear improper and renders the attorney-in-fact suspect. In fact, there is no role for self-interest in the attorney-in-fact's actions, and serving self-interest in this context crosses into criminal activity very quickly. Our image of the ideal attorney-in-fact who is not part of the close family group would be someone genuinely altruistic who takes on the role reluctantly and only in circumstances where the principal genuinely needs their assistance, and where there is no alternative.

This exercise of visualizing the ideal attorney-in-fact, and exploring our zone of comfort in the motives of an attorney-in-fact, results, interestingly enough, in a description of the duty of loyalty. By contrast, parties to a contract are expected to have self-interests that will be served by the contract, and the overarching duties of good faith are meant to prevent overzealous pursuit of those self-

interests in an unfair manner.²¹⁹ Such superimposed duties protect the viability of freedom to contract and to pursue our self-interests, generally. Even in the context of trustees and corporate directors, who are clearly fiduciaries, there is an expectation of self-interest. The trustee may charge fees, and a professional trustee provides those services as a means of profit. Corporate managers have also entered into those relationships for the self-interested purpose of personal profit. So, although commentators have, on the basis of these traditional fiduciaries, pronounced that fiduciaries are not expected to be entirely selfless,²²⁰ the attorney-in-fact for an incapacitated principal perhaps comes the closest to that expectation. This fiduciary role therefore illustrates better than any other that the characterization of fiduciary indicates a qualitative difference from other relationships, where altruism, or at least a concern broader than one's own self-interest, should be the guiding motivation. Fiduciary principles recognize that we cannot legislate motivation and morality; instead, we demand the external manifestations of the proper motivation by dictating standards and imposing harsh penalties for violating those standards that focus on the behavior of the wrongdoer rather than the damages of the victim.²²¹

Professor FitzGibbon objects to the contractarian view of fiduciary duty believing it to be too narrow.²²² He takes the position that efficiency is not the only goal of the law, that the fiduciary principle "reflect[s] the precepts of social morality and practice"²²³ and serves to promote virtue.²²⁴ The durable power of attorney seems to support this conclusion, since the purpose of the duties it imposes is to superimpose virtue in place of supervision on the role of the attorney-in-fact, in order to provide care for vulnerable

²¹⁹ See Alexander, *supra* note 180, at 775-76 (comparing weaker "good faith obligation" in contract setting to fiduciary duty higher duty of loyalty).

²²⁰ See Scallen, *supra* note 100, at 908-09 (explaining role of self-interest in fiduciary relationships).

²²¹ See Cooter & Freedman, *supra* note 113, at 1069 (explaining how punishing wrongdoer is sometimes necessary to create adequate incentives for compliance with fiduciary duties).

²²² See *infra* notes 223-24 and accompanying text (discussing how new fiduciary principles promote social morality and virtue).

²²³ FitzGibbon, *supra* note 204, at 338.

²²⁴ *Id.* at 346-48.

persons. The recent legislative activity indicates that our state legislators, who presumably act in accordance with popular opinion, view the durable power of attorney as more than a contract. The extreme penalties, involved including forfeiture of inheritance and jail time, implies a moral judgment far beyond a breach of contract.²²⁵

But does the moral tone hinder the analysis, as Professor Langbein indicates?²²⁶ At what point along Professor Finn's continuum from selfishness to selflessness is there a change in the quality of the role?²²⁷ Surely those of us unfamiliar with automobile repair are at the mercy of the auto mechanic, but at what point does that unilateral power in the relationship change to a moral duty? Professor Finn concludes that too often courts resort to fiduciary language because of the enticing flexibility of the remedies, and that if a breach of ordinary "good faith" had similar flexibility in remedy that the moralizing would be unnecessary.²²⁸

Perhaps the answer is that both the contractarians and their opponents are near the mark. The contractarians are right that there is no breaking point in the continuum of duty of fair dealing in relationships, that there is no separate, discrete category of fiduciary that is qualitatively distinctive from other relationships,²²⁹ and that fiduciary duties are, to a large extent, necessary gap-fillers for the express terms of the relationships that people create. It is also true that the moralizing tone, the "you're the oldest, you should know better" mentality shown by both courts and legislatures in this context can exaggerate and inflate the remedies without a proper tailoring of those remedies to the actual situation.

However, the anti-contractarians are also correct in asserting that the purpose of fiduciary rules extends beyond an approximation

²²⁵ See *supra* notes 74-82 and accompanying text (describing statutory penalties for abuse of power of attorney).

²²⁶ See Langbein, *supra* note 99, at 643-46 (probing objections to contractarian analysis of modern trusts).

²²⁷ Finn, *supra* note 136, at 4.

²²⁸ *Id.* at 56.

²²⁹ Professor Shepherd agrees but would extend fiduciary lower on the spectrum rather than eliminate it. See Shepherd, *Toward a Unified Concept*, *supra* note 166, at 76 (arguing to extend fiduciary duties lower on spectrum of duty of fair dealing in relationships rather than eliminate it).

of what the parties would have agreed upon if asked. There is an overriding purpose at work. The particular relationship (such as principal/attorney-in-fact) has been deemed to play a useful role, but left to their own devices the parties would fail to give it sufficient structure to be workable. The legal system could intervene and provide the necessary supervision. For example, with powers of attorney, fiduciary duties would be less necessary if the attorney-in-fact was subject to strict court supervision. However, that supervision would dilute the usefulness of the arrangement and would be inefficient overall. Therefore, the legal system instead superimposes a structure, an exoskeleton of duties, to hold up the relationship.

Rather than enforcing a moral duty, perhaps the fiduciary principle seeks to enforce and sustain what the communitarians consider a major sector, along with government and market: the community.²³⁰ Under this philosophy, community motivates individuals to act for the greater good, not out of altruism, but because of the mutual benefits to be derived. Neither the government nor market forces can comprehensively foster and fill roles classified as fiduciary, such as the attorney-in-fact. The law acknowledges the societal need for this relationship, leaves it in the realm of community rather than over-regulating and over-supervising it, but provides the necessary remedy where the community good is violated. This approach to finding a place for the fiduciary principle is based on mutualism rather than altruism, and may ease the moralistic tone.

The durable power of attorney may also add to consideration of the second open question, the necessary elements of a fiduciary relationship. Both the extreme vulnerability of the principal and the tenuous nature of the attorney-in-fact's authority affect how we view the fiduciary duties in this context. The principal is the most vulnerable of fiduciary protectees because of the lack of any formal supervision, and that vulnerability creates the need for imposing corresponding duties on the attorney-in-fact. That vulnerability is

²³⁰ *The Responsive Communitarian Platform: Rights and Responsibilities*, <http://www.gwu.edu/~ccps/RCPlatform.html> (last visited Sept. 22, 2001); AMITAI ETZIONI, *NEXT: THE ROAD TO THE GOOD SOCIETY* 5-19 (2001).

insufficient by itself, however, to give rise to duty. The attorney-in-fact is also vulnerable as a result of the lack of structure.

The following is a typical scenario. A power of attorney is prepared by the principal's lawyer as part of the principal's estate plan. The power of attorney names a child of the principal as the attorney-in-fact, but since the power of attorney is effective only on disability, the child is not consulted about the arrangement. Years later, the principal has begun to lose capacity, and the child learns that she has been appointed attorney-in-fact. However, the child knows almost nothing about the principal's finances and is unsure whether the principal is sufficiently incapacitated to trigger the child's authority as attorney-in-fact. Because there is no formal appointment process, no earmarked property, and no delineated scope of responsibilities, fiduciary duties should be imposed only to the extent the attorney-in-fact knows of the role, is able to accept responsibility, and affirmatively accepts. Thus, a fiduciary relationship should be defined by both parties' positions.

The role of fiduciary duties in this context is to substitute for supervision. Supervision would defeat the purpose of the arrangement, but a complete lack of protection of the principal would also make the arrangement unworkable and undesirable.

Professor Frankel describes a fiduciary relationship as "a consensual arrangement covering special situations in which fiduciaries promise to perform services for entrustors and receive substantial power to effectuate the performance of the services, while entrustors cannot efficiently monitor the fiduciaries' performance."²³¹ This definition includes the elements of acceptance by the fiduciary, vulnerability of the entrustor and the need for fiduciary rules to substitute for monitoring—the elements of the durable power of attorney relationship that justify the higher duties.

Continued exploration of a defining fiduciary principle leads to analysis of its purpose, and in turn, the question of whether a particular relationship should be called fiduciary. Any definition should encompass a purpose—incentive to act selflessly for a community benefit in place of external monitoring. That purpose perhaps may tone down the moralistic undertone of fiduciary

²³¹ Frankel, *supra* note 189, at 1212.

analysis and refocus on whether a lack of monitoring needs remedy. The durable power of attorney illustrates both the purpose of fiduciary duties and the need for a consideration of both parties' viewpoints in any characterization.

V. THE APPLICATION OF FIDUCIARY PRINCIPLE TO
THE ATTORNEY-IN-FACT SERVING UNDER
A DURABLE POWER OF ATTORNEY

A. IDENTIFICATION OF OPEN ISSUES FOR THE ATTORNEY-IN-FACT

We now shift focus to the predicament of the attorney-in-fact, attempting to carry out her duties faithfully and without liability in the confusing climate of amorphous fiduciary principles and the even less-defined role of an attorney-in-fact. The role of an attorney-in-fact serving under a durable power of attorney has been described as "unscripted."²³² The unscripted nature of the attorney-in-fact's task is primarily a result of the durable power of attorney's evolution and its relatively brief history. The intent in creating the durable power of attorney was to address a specific problem—the need for an economical, efficient way to handle the financial affairs of elderly persons.²³³

The resulting instrument is indeed economical and efficient, but it is somewhat of a hybrid. The fiduciary duties of an agent were created under the traditional agency assumption that the agent was subject to the control of the principal. A durable power of attorney's major feature is that, unlike traditional powers of attorney that terminate automatically upon the principal's disability, the durable power continues in force during the principal's incapacity. The durability feature shifts the control from principal to agent upon the principal's incapacity, although the effect of that shift on the fiduciary role as agent is not clear. Does the agent's role change? Is the attorney-in-fact for an incapacitated principal more like an

²³² Dessin, *supra* note 67, at 574.

²³³ See *supra* notes 27-35 and accompanying text (describing history of durable power of attorney).

attorney-in-fact for a competent principal or a trustee?²³⁴ Or is the attorney-in-fact more like a guardian? The characterization of the role, necessary to define the precise duties of an attorney-in-fact and identify lapses in that duty, was left unaddressed, in part perhaps because safeguards and controls on the attorney-in-fact would interfere with the efficiency of its use.²³⁵ While there have been some limited attempts to fill the gaps, primarily the durable power of attorney creates a new breed of fiduciary whose precise duties have yet to be identified.²³⁶

A more specific script for the attorney-in-fact is clearly needed now, however. Powers of attorney are becoming increasingly common, placing ever-growing numbers of attorneys-in-fact in an uncertain, perhaps even dangerous, position. Abuse of the instrument is becoming a concern, as part of the overall concern over elder abuse.²³⁷ In response to those concerns, durable power of attorney reform has focused on provisions aimed at curbing such abuse.²³⁸ These provisions primarily involve added oversight of the attorney-in-fact's actions.²³⁹ In addition, however, and alarmingly for the honest attorney-in-fact, there is a trend toward enhanced criminal penalties and civil remedies for abuse of the power of attorney.²⁴⁰

²³⁴ CHARLES CAPLIN, *POWERS OF ATTORNEY* 8 (Oyez Practice Notes No. 7, 4th ed. rev. 1976) ("Although the law relating to powers of attorney is usually (and no doubt correctly) dealt with by textwriters as a branch of the general law of agency, it displays many special features, and may be said to stray, in particular respects, towards trust law."). This was written at time when only common law powers of attorney were available; predating the durable power of attorney.

²³⁵ See FEDERMAN & REED, *supra* note 63, at 19 ("making them easier to use often involves making them easier to abuse. At the current time, the conflict has been addressed in a manner that favors maximizing use while disfavoring prevention of potential abuse.").

²³⁶ Huff, *supra* note 24, at ¶ 308 (identifying duties of attorney-in-fact as follows: "[T]he agent must be aware of his duties to act only within his authority, to act solely for the principal's benefit, not to act after his authority is terminated, not to commingle his principal's property with his own or that of another, to keep records and accounts, and while his authority continues to act prudently.").

²³⁷ See Dessin, *Financial Abuse*, *supra* note 72, at 207-10 (describing financial abuse of elderly in context of fiduciary relationships).

²³⁸ FEDERMAN AND REED, *supra* note 63, at 44-45.

²³⁹ See *infra* notes 250-56 and accompanying text (describing oversight provisions in individual state statutes).

²⁴⁰ See *infra* notes 275-84 (describing California, Illinois and Arizona criminal penalty and civil remedy provisions).

The risks of falling short on one's duty are increasing but the definition of that duty remains vague.

The lack of monitoring of an attorney-in-fact also heightens the need for a more precise definition of the role. While the general nature of fiduciary responsibilities assumes that the fiduciary's role is open-ended and unspecified, thus requiring fiduciary duties to put limits on that discretion,²⁴¹ the attorney-in-fact with an incapacitated principal is uniquely directionless. Most fiduciary relationships have some monitoring mechanism. For example, the trustee is required to account to the beneficiaries who in turn can object to the trustee's performance of his duties by bringing a suit in equity.²⁴² The guardian is subject to court supervision²⁴³ and the executor of an estate is answerable both to the court supervising the probate and the beneficiaries of the estate.²⁴⁴ An attorney-in-fact is presumed to be supervised by her principal,²⁴⁵ which under common law is sufficient since the agency would terminate on the principal's incompetence.²⁴⁶ However, the durable power of attorney statutes, by extending the agency into the principal's incapacity, removed the supervision and for the most part did not provide any substitute. While the Model Act addressed that deficiency by limiting the dollar amount subject to a durable power of attorney²⁴⁷ and by allowing the

²⁴¹ See SHEPHERD, *supra* note 112, at 13-15 (describing how fiduciary duties arose in trust context as antidote to trustees' legal independence and how fiduciary status crept into agency because agents, although theoretically controlled by principal, could nevertheless act independently and disloyally).

²⁴² RESTATEMENT (SECOND) OF TRUSTS § 199 (1959); see Mark Lacter, *The Case of the Ungrateful Heirs*, FORBES Dec. 25, 2000, at 137 (describing lawsuit brought by beneficiaries of Hearst trust against trustees challenging trustees' plans to merge Hearst Corporation with another media company).

²⁴³ *E.g.*, N.H. REV. STAT. ANN. §§ 464-A:26, :27 (1992 & Supp. 2000) (requiring guardians to file annual accountings to probate courts); N.C. GEN. STAT. §§ 35A-1202, -1301 to -1369 (1999) (requiring approval by courts for some actions of guardians in regards to wards' estates); OKLA. STAT. ANN. tit. 30 §§ 1-101, 1-114 (West 1991 & Supp. 2001) (providing for exclusive court jurisdictions in appointing, removing and controlling financial actions of guardians); UTAH CODE ANN. §§ 75-5-301 to -417 (1993 & Supp. 2000) (providing for court appointment of guardians).

²⁴⁴ Such supervision may be minimal in some jurisdictions. *E.g.*, WASH. REV. CODE ANN. ch. 11.68 (West 1998) (providing that personal representatives of estates can petition courts for nonintervention powers).

²⁴⁵ RESTATEMENT (SECOND) OF AGENCY §§ 383, 385 (1958).

²⁴⁶ *Id.* § 122.

²⁴⁷ See *supra* note 40 and accompanying text.

court to order the attorney-in-fact to account to the principal's "legal representative,"²⁴⁸ the Uniform Probate Code abandoned those provisions, presumably to facilitate use of the power of attorney and thus promote its use.²⁴⁹

A few state statutes have addressed this lack of supervision. For example, the North Carolina statute requires that once the principal is incapacitated, the attorney-in-fact must record the power of attorney document,²⁵⁰ file inventories of the principal's property in the "hands" of the attorney-in-fact with the court, and file annual accountings with the court.²⁵¹ However, the power of attorney document can relieve the attorney-in-fact of this duty. Colorado,²⁵² Missouri,²⁵³ California,²⁵⁴ and New Hampshire²⁵⁵ allow a person interested in an incapacitated principal's well-being to petition the court for an accounting or other relief from an attorney-in-fact. Tennessee allows an incompetent principal's "next-of-kin" to petition the court to require the attorney-in-fact to post a bond.²⁵⁶

The North Carolina approach is to treat the durable power of attorney as a somewhat informal guardianship, whereas the other states' approaches allow persons close to the principal to take over the supervisory role once the principal becomes incapacitated. In statutes that follow the lead of the uniform act and contain no supervisory provisions, the only avenue in most situations for any interference with an attorney-in-fact is for an interested party to file a petition for guardianship or conservatorship once the principal is incapacitated. Also, many states have statutes that allow civil remedies for abuse of vulnerable adults.²⁵⁷ A civil action is available against various defendants.²⁵⁸ The court can consider the actions of

²⁴⁸ 1964 HANDBOOK, *supra* note 30, at 280.

²⁴⁹ FEDERMAN & REED, *supra* note 63, at 14.

²⁵⁰ N.C. GEN. STAT. § 32A-9 (1999).

²⁵¹ *Id.* § 32A-11.

²⁵² COLO. REV. STAT. ANN. § 15-14-609 (West 1997).

²⁵³ MO. ANN. STAT. § 404.727 (West 2001).

²⁵⁴ CAL. PROB. CODE § 4541 (West 1991 & Supp. 2001).

²⁵⁵ N.H. REV. STAT. ANN. § 506:7 (1997).

²⁵⁶ TENN. CODE ANN. § 34-6-106 (1996).

²⁵⁷ *See, e.g.*, WASH. REV. CODE ANN. § 74.34.200 (West 1986 & Supp. 2001) (noting remedies are available for abandonment, abuse, or financial exploitation).

²⁵⁸ *Id.*

the attorney-in-fact in the course of appointment proceedings,²⁵⁹ or the guardian or conservator, once appointed, could demand accountings or remove the attorney-in-fact as the legal representative of the principal.²⁶⁰

Even in states with supervisory mechanisms, the attorney-in-fact can operate autonomously when there are no close friends or relatives available to monitor and question the attorney-in-fact's performance.²⁶¹ The North Carolina accounting requirement does not guarantee that breaches will be detected because that would depend on the thoroughness of the court monitoring process.²⁶² Other than the accounting, the attorney-in-fact is still free to act without any interference, unlike a guardian who needs court approval for most transactions.²⁶³

The lack of a monitoring mechanism can be considered a disadvantage but is also a primary advantage of a durable power of attorney, as it facilitates incredible efficiency and economy. To include a thorough monitoring process would essentially gut the usefulness of the power of attorney because the increased costs and intrusiveness would turn it into a de facto guardianship, which was deemed inadequate years ago.²⁶⁴ The lack of supervision and the peculiar position of the attorney-in-fact under a durable power of attorney heightens the need for a specific set of fiduciary duties.²⁶⁵ Such certainty would serve the dual purposes of giving additional guidance to the attorney-in-fact and increasing the potential for finding breach of duties, thereby serving both a deterrence and remedy function.

Some state statutes attempt to define the scope of the attorney-in-fact's fiduciary duty, further confusing whether an attorney-in-

²⁵⁹ *E.g.*, WASH. REV. CODE ANN. §§ 11.88.030(1)(i) (West 1998).

²⁶⁰ UNIF. PROBATE CODE § 5-503, 8 U.L.A. 421, 421 (1998).

²⁶¹ See Burnele V. Powell & Ronald C. Link, *The Sense of a Client: Confidentiality Issues in Representing the Elderly*, 62 FORDHAM L. REV. 1197, 1230 (1994) (attributing autonomy to court's failure to supervise).

²⁶² One respondent to the Albany survey stated that "mandating accounting solves nothing if the courts are too overwhelmed to do anything." FEDERMAN & REED, *supra* note 63, at 86.

²⁶³ Dessin, *supra* note 67, at 590.

²⁶⁴ See generally Engel, *supra* note 24; Fred Bayles & Scott McCartney, *Declared 'Legally Dead' Guardian System is Failing the Ailing Elderly*, THE RECORD (Northern, N.J.), Sept. 20, 1987, at A01, available at 1998 WL 4867722.

²⁶⁵ Dessin, *supra* note 67, at 617.

fact for an incapacitated principal can rely on the fiduciary duties identified for agents. Other statutory definitions only identify the fiduciary nature of the role. For example, South Carolina's statute provides that "the attorney in fact has a fiduciary relationship with the principal and is accountable and responsible as a fiduciary."²⁶⁶ The Indiana statute requires an attorney-in-fact to use "due care,"²⁶⁷ and the Missouri statute requires an attorney-in-fact to act "in the best interests of the principal," to avoid self-dealing and conflicts of interest as would a trustee,²⁶⁸ and to exercise the degree of care a prudent person would use in dealing with someone else's property.²⁶⁹

Illinois's statute provides that an attorney-in-fact "shall use due care to act for the benefit of the principal in accordance with the terms of the agency and shall be liable for negligent exercise"²⁷⁰ and further provides that the attorney-in-fact will not be liable for "error in judgment" or for conflicts of interest or self-dealing, if the attorney-in-fact otherwise has acted "with due care for the benefit of the principal."²⁷¹ This standard is clearly less than the standard of care that a trustee would be required to observe²⁷² and may even be less than the traditional duties of an agent.²⁷³

Florida's statute, on the other hand, states that the attorney-in-fact under a durable power of attorney has the same fiduciary duties as trustee.²⁷⁴ This high level of responsibility may be somewhat problematic; it would presumably include the duty to diversify, the duty to account, the duty to invest prudently—all duties that may

²⁶⁶ S.C. CODE ANN. § 62-5-501(a) (Law. Co-op. 1987 & Supp. 2000).

²⁶⁷ IND. CODE ANN. § 30-5-6-2 (Michie 2000). The Indiana statute also states that the attorney-in-fact shall exercise its powers "in a fiduciary capacity." *Id.* § 30-5-6-3.

²⁶⁸ A trustee is in fact prohibited from engaging in self-dealing or acts involving conflicts of interest, unless the beneficiaries consent. RESTATEMENT (SECOND) OF TRUSTS § 170(1) cmt. a (1959); DUKEMINIER & JOHANSON, *supra* note 25, at 904-05.

²⁶⁹ MO. ANN. STAT. § 404.714 (West 2001).

²⁷⁰ 755 ILL. COMP. STAT. ANN. § 45/2-7 (West 1992).

²⁷¹ *Id.*

²⁷² See RESTATEMENT (SECOND) OF TRUSTS § 170 (1959) (stating trustee must administer trust in beneficiary's interest only, treat beneficiary fairly, and communicate relevant material facts openly).

²⁷³ See RESTATEMENT (SECOND) OF AGENCY § 390 cmt. c (1958) (advising agent who is adverse to principal and who cannot or does not want to give impartial advice has duty to ensure such advice is given by unbiased third party).

²⁷⁴ FLA. STAT. ANN. § 709.08 (West 1998 & Supp. 2000).

be difficult to carry out during periods when the principal is still competent.

The variations among the states in defining the attorney-in-fact's duty and the inherent confusion as to the precise nature of this fiduciary are exacerbated by the fact that, in some states, abuse of a power of attorney where a vulnerable adult is the principal triggers criminal penalties and enhanced civil penalties. For example, an Illinois statute provides that financial exploitation of an elderly or disabled person is a felony;²⁷⁵ the elements of financial exploitation are found where the exploiter is in a position of confidence with the vulnerable person, and "knowingly and by deception or intimidation obtains control over the property" of the vulnerable person "with the intent to permanently deprive the . . . person . . . of the use, benefit, or possession of his or her property."²⁷⁶ This statute was cited by Judge Posner as authority for the statement that, "indeed, the breach of a fiduciary obligation to an elderly person is explicitly a crime in Illinois."²⁷⁷ A California statute provides that a person loses the right to inherit from a vulnerable adult if that person acted in bad faith and it can be proven by clear and convincing evidence that the person recklessly committed "fiduciary abuse" of the vulnerable adult.²⁷⁸

In Arizona, an attorney-in-fact "shall use the principal's money, property or other assets only in the principal's best interest and the agent shall not use the principal's money, property or other assets for the agent's benefit."²⁷⁹ That provision also states that an attorney-in-fact violating its requirements is subject to criminal prosecution.²⁸⁰ In addition, the attorney-in-fact who does not act for the benefit of the principal "to the same extent as a trustee" is liable for treble damages and attorneys fees, and forfeits the right to inherit from the principal, or claim a forced share, omitted spouse or child's share, homestead or other family support allowance.²⁸¹

²⁷⁵ 720 ILL. COMP. STAT. § 5/16-1.3 (West 1992 & Supp. 2001).

²⁷⁶ *Id.*

²⁷⁷ *Boyce v. Fernandes*, 77 F.3d 946, 950 (7th Cir. 1996).

²⁷⁸ CAL. PROB. CODE § 259(a)(1) (West 1991 & Supp. 2001). The statute also provides other grounds for disinheritance, such as physical abuse and neglect of the decedent. *Id.*

²⁷⁹ ARIZ. REV. STAT. § 14-5506(A) (1995).

²⁸⁰ *Id.*

²⁸¹ § 46-456(A), (D).

The criminal penalties appear to be imposed only when the person knowingly took control of the principal's assets through intimidation or deception with intent to deprive the principal of his or her property.²⁸² However, the statute applicable specifically to powers of attorney²⁸³ is broader, providing for potential criminal penalties any time an attorney-in-fact does not use the principal's property "in the principal's best interest."²⁸⁴

The Arizona bar has expressed concern over the vagueness of these provisions.²⁸⁵ In particular, there is concern over what it means to act in the best interest of the principal; the statute defines "best interest" as where "the agent acts solely for the principal's benefit."²⁸⁶ That definition is still imprecise and does not indicate whether negligence would be sufficient to trigger the enhanced penalties. Also, there is concern as to whether any benefit flowing to the attorney-in-fact, including nominal benefits such as reimbursement of expenses or compensation, would violate the statutory command to act solely in the principal's best interest.²⁸⁷ Attorneys-in-fact who are spouses or children have an additional difficulty because they would often be included among those benefiting from actions of the attorney-in-fact, such as gifting or other estate planning. Because of these concerns, and concerns that in disharmonious family situations, one family member could create serious problems for the family member acting as attorney-in-fact,²⁸⁸ many

²⁸² §§ 13-1802(B), 46-456(B).

²⁸³ § 14-5506.

²⁸⁴ *Id.* § 14-5506(A).

²⁸⁵ See Thomas J. Murphy, *Drafting Powers of Attorney to Comply with the New Legislative Changes*, ARIZ. ATTY, Dec. 1998, at 22, 22 (stating legislature does not define "benefit," causing different interpretations of that term).

²⁸⁶ ARIZ. REV. STAT. § 14-5506(F)(1) (1995).

²⁸⁷ Murphy, *supra* note 285, at 24. There is a statutory exception to the prohibition against benefit flowing to the attorney-in-fact; if the power of attorney authorizes the benefit, the benefit is specifically identified in detail *and* the authorization is initialed by the principal and a witness. ARIZ. REV. STAT. § 14-5506(B) (1995).

²⁸⁸ Murphy, *supra* note 285, at 23.

A grave concern is that the new legislation can create an ominous weapon in the hands of the children of a first marriage to use against the second spouse who is the agent of the children's parent. Likewise, a sibling who feels cheated or who carries a grudge can wreak havoc if the agent fails to follow the dictates of the new legislation.

Id.

Arizona attorneys were hesitant to continue recommending powers of attorney to their clients. Instead, Arizona practitioners began recommending revocable living trusts began,²⁸⁹ which were long ago deemed too costly and cumbersome to be generally useful by the original proponents of the durable power of attorney.²⁹⁰

The trends illustrated by the Illinois, Florida and Arizona statutes are fueled by increasing concern over elder abuse.²⁹¹ Nevertheless, as a result of such statutes a well-meaning attorney-in-fact risks disinheritance or worse when guessing as to what his duties are.

The attorney-in-fact for an incapacitated principal has unclear direction as to whether she must act consistent with the principal's wishes, which is the guide for agents,²⁹² or whether she must act in the principal's best interests. These two standards can be inconsistent. Where the principal is competent, the attorney-in-fact can, except in extreme circumstances, follow the principal's direction, since the principal's desires are the defining fiduciary purpose in agencies.²⁹³ By contrast, a trustee and a guardian do not take direction from the beneficiary or ward but are required to act in their best interests.²⁹⁴ Once the principal becomes incapacitated and is no longer able to direct the agent, the fiduciary purpose may be substantially affected. For example, the principal may have preferred extremely speculative, risky investments. The attorney-in-fact, managing those investments on the principal's behalf while the principal was competent, would have to maintain those investments as directed by the principal. Once the principal became

²⁸⁹ *Id.*

²⁹⁰ See *supra* note 25 and accompanying text (discussing limited utility of estate planning tools other than power of attorney).

²⁹¹ See generally Nina Santo, Comment, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 MCGEORGE L. REV. 801 (2000) (detailing elder abuse studies and state and federal legislative and programmatic responses to problem).

²⁹² RESTATEMENT (SECOND) OF AGENCY § 33 cmt. b (1958) ("An agent is a fiduciary under a duty to obey the will of the principal as he knows it or should know it."); see generally *id.* §§ 14, 385, 425 cmt. a; cf. *Erlich v. First Nat'l Bank*, 505 A.2d 220, 235-36 (N.J. 1984) (noting investment advisor must prioritize preservation of estate over wishes of principal).

²⁹³ RESTATEMENT (SECOND) OF AGENCY § 33 cmt. b (1958).

²⁹⁴ *Id.* § 14B cmt. f; RESTATEMENT (SECOND) OF TRUSTS § 8 cmt. b (1959); see McGovern, *supra* note 11, at 23 ("To subject the trustee to the beneficiary's control would defeat the very purpose of the trust.").

incapacitated, would the attorney-in-fact have a fiduciary duty to reinvest in safer investments, or could the attorney-in-fact retain the risky investments on the assumption that such retention would be consistent with the principal's wishes? Some commentators have speculated that the principal's control ceases upon incapacity²⁹⁵ while others have presumed that the agent has a duty to "act in accordance with what [the attorney-in-fact] understood the principal's wishes would be if it were possible to ascertain those wishes."²⁹⁶

Some state statutes address this issue, albeit obliquely. For example, California and Missouri require the attorney-in-fact to stay in contact with the principal, if possible, and if not possible to communicate with the principal,²⁹⁷ to communicate as much as possible with those close to the principal who may know his or her intentions.²⁹⁸ Those provisions indicate that the attorney-in-fact must be governed by the principal's wishes.²⁹⁹ The Illinois statute requires an attorney-in-fact to take the principal's estate plan into account.³⁰⁰ This also implies that the principal's desires are paramount. By contrast, the Florida statute provides that an attorney-in-fact has the same fiduciary duties as a trustee,³⁰¹ which may imply that the attorney-in-fact must act in the principal's best interests as opposed to the principal's desires.

Another ambiguous area is the attorney-in-fact's duty to act. Unlike other traditional fiduciaries, such as trustee, guardian and

²⁸⁵ McGovern, *supra* note 16, at 28-29.

²⁸⁶ ELIAS S. COHEN, *DURABLE POWER OF ATTORNEY: AN IMPORTANT ALTERNATIVE TO GUARDIANSHIP, CONSERVATORSHIP, OR TRUSTEESHIP 4* (Technical Assistance Monograph, U.S. Dept of Health and Human Services, *reprinted with permission from the Mid-Atlantic Long Term Care Gerontology Center, Temple Univ. Inst. on Aging 1984*) ("in the case of an incapacitated individual, the attorney-in-fact would be bound to act in accordance with what he understood the principal's wishes would be if it were possible to ascertain those wishes"); *see also* Charles M. Hamann, *Durable Powers of Attorney, TR. & EST.*, Feb. 1983, at 28, 29 ("Translating this to a situation in which the principal is incapacitated, we might say that an agent must act in accordance with what he deems would be the principal's wishes if those wishes could be ascertained.")

²⁸⁷ CAL. PROB. CODE § 4234 (West 1991 & Supp. 2001); MO. ANN. STAT. § 404.714.2 (West 2001).

²⁸⁸ MO. ANN. STAT. § 404.714.2 (West 2001).

²⁸⁹ CAL. PROB. CODE § 4243 cmt. (West 1991 & Supp. 2001).

³⁰⁰ 755 ILL. COMP. STAT. ANN. § 45/2-9 (West 1992).

³⁰¹ FLA. STAT. ANN. § 709.08(8) (West 1998 & Supp. 2000).

executors, the attorney-in-fact's authority to act does not carry with it a corresponding *duty* to act.³⁰² Professor Carolyn Dessin agrees that courts and legislatures "must create a role for agents under durable powers of attorney that makes clear the agent's responsibilities."³⁰³ Her concern focuses primarily on the lack of an attorney-in-fact's duty to act, and she proposes that statutes impose liability on attorneys-in-fact for failure to act to protect the principal's property, once the principal has become incapacitated, and provided that the attorney-in-fact has accepted the role.³⁰⁴ The issue is certainly troublesome for the principal, especially in light of Professor Dessin's accurate observation that clients using a durable power of attorney for disability planning most likely do not fully understand that the attorney-in-fact has the power, but not the legal obligation, to handle the principal's affairs when the principal becomes incapacitated.³⁰⁵ Her approach would also be consistent with the definition of fiduciary discussed in Part III.B above, because the duty is triggered only if the principal needs the protection and if the attorney-in-fact has consented.

However, the issue can be as troublesome for the careful attorney-in-fact. It is often not clear at what point the principal has become incapacitated. Incapacity usually creeps in as a gradual process, and taking over responsibility for the principal's affairs can be a delicate matter. If the principal is having difficulty accepting his or her increasing need for assistance, then the attorney-in-fact will need to move slowly. The attorney-in-fact may make a determination that the principal is incapacitated and that the duty to act has been triggered, but the principal may not accept that conclusion. If the attorney-in-fact nevertheless takes over the affairs of the principal, the principal may resist, even to the point of revoking the power of attorney. It should be noted that execution of the power of attorney does not affect the authority of the principal to conduct his or her own affairs; the document supplements rather than supplants that authority. Since the principal is therefore free to continue to

³⁰² RESTATEMENT (SECOND) OF AGENCY §§ 377-78 (1958); Dessin, *supra* note 67, at 604-05.

³⁰³ Dessin, *supra* note 67, at 587.

³⁰⁴ *Id.* at 607.

³⁰⁵ *Id.* at 608.

manage his or her affairs, even past incapacity, the power of attorney only works as disability planning when the principal voluntarily invokes it.

The attorney-in-fact also may have difficulty ascertaining whether the principal needs assistance. Attorneys-in-fact are usually family members who have agreed to perform the role out of a sense of family obligation. Requiring such a pro-active duty as monitoring the principal's efficiency would make the role extremely undesirable, particularly where the attorney-in-fact is a child of the principal who is reluctant to challenge the principal's autonomy and capabilities. If no family member or friend is available to serve, professionals such as attorneys and accountants may agree to serve, and again, the role would be particularly unpalatable if the professional had the responsibility of monitoring the principal to know when to step in.

Several states have attempted to address this problem by taking an approach contrary to Professor Dessin's suggestion, expressly providing that the attorney-in-fact has no duty to act.³⁰⁶ California provides that there is no duty to act, with the exception that a duty to act arises if the attorney-in-fact has expressly accepted that duty in writing.³⁰⁷

Professor Dessin is correct that once a principal is clearly incapacitated, there should be a duty on the part of the attorney-in-fact to step in and handle the principal's affairs, assuming the attorney-in-fact has agreed to serve. The difficulty, however, is determining when that duty is triggered. As a practical matter, the duty to act can be imposed reasonably on an attorney-in-fact only where the attorney-in-fact has taken over all or parts of the management of the principal's affairs, so that the duty would be defined as a prohibition against later abandoning the assumed

³⁰⁶ *E.g.*, 755 ILL. COMP. STAT. ANN. § 45/2-7 (West 1992); IND. CODE ANN. § 30-5-6-1 (Michie 2000) ("The attorney-in-fact is not required to exercise the powers granted under the power of attorney or to assume control of or responsibility for any of the principal's property, care or affairs, regardless of the principal's physical or mental condition.").

³⁰⁷ CAL. PROB. CODE § 4230 (West 1991 & Supp. 2001).

responsibilities.³⁰⁸ Anything more would risk confrontation and mistrust in the relationship between principal and agent.

Another misalignment between general agency rules and the durable power of attorney is the ability of the agent to resign. An agent is required to give notice of resignation to the principal.³⁰⁹ If the principal is incapacitated, the attorney-in-fact will have no effective means of giving notice. This is particularly problematic because even if the agreement to act is gratuitous, the agent must continue to carry out her promise to act unless there are other means to carry out the purpose of the agency and the agent gives proper notice.³¹⁰ If the agent abandons the agency, she may be subject to liability.³¹¹ By contrast, a trustee, guardian or probate executor can obtain permission from the court or the beneficiaries to resign,³¹² and can obtain release from liability upon approval of the resignation.³¹³ Some state statutes contain provisions allowing an attorney-in-fact to petition the court for authority to resign.³¹⁴

Despite the lack of a clear fiduciary standard for attorneys-in-fact, refining the fiduciary duties of the attorney-in-fact receives

³⁰⁸ This duty exists under the general rules of agency. See RESTATEMENT (SECOND) OF AGENCY § 118 cmt. c (1958) (providing for liability of principal or agent, in absence of privilege or supervening circumstances, for revocation or renunciation of authority in breach of contract).

³⁰⁹ 1 MECHEM, *supra* note 14, § 649, at 461.

³¹⁰ RESTATEMENT (SECOND) OF AGENCY § 378 (1958); see A.L. Moses & Adele J. Pope, *Estate Planning, Disability, and the Durable Power of Attorney*, 30 S.C. L. REV. 511, 524 (1979) ("Because of the attorney-in-fact's fiduciary relationship to the principal, however, it is questionable whether the attorney-in-fact can resign after the onset of incompetency if the resignation would be a detriment to the incompetent principal.").

³¹¹ See RESTATEMENT (SECOND) OF AGENCY §§ 14B cmt. h (1958) (allowing termination of agency at will of principal or agent, subject to contractual liability for wrongful termination).

³¹² *E.g.*, CAL. PROB. CODE § 17200 (West 1991 & Supp. 2001) (indicating permission from court or beneficiaries can be obtained by trustee to resign); IOWA CODE ANN. § 633.4106 (West 1992 & Supp. 2001) (describing methods by which trustee may resign); MICH. COMP. LAWS ANN. § 555.25 (West 1988) (indicating court of chancery may accept resignation upon petition of any trustee of express trust).

³¹³ *E.g.*, 760 ILL. COMP. STAT. ANN. § 5/14 (West 1992); IOWA CODE ANN. § 633.6202 (West 1992 & Supp. 2001); MASS. GEN. LAWS ANN. ch. 203, § 14A (West 1990); WISC. STAT. ANN. § 701.18(1) (West 2001).

³¹⁴ *E.g.*, CAL. PROB. CODE § 4541(e) (West 1991 & Supp. 2001) (detailing procedure for court approval of resignation).

little attention in the current direction of reform.³¹⁵ The current reform proposals focus on abuse and include:

- enhanced penalties on those who abuse the authority granted under a power of attorney;
- creation of a central registry of attorneys-in-fact, or a central registry of those convicted of elder abuse;
- requiring recordation of the power of attorney;
- notification of a third party for significant transactions;
- waiting period between execution and use of the power of attorney;
- appointment of a third person to monitor the activities of the attorney-in-fact;
- requirement of annual accountings, to be filed with the court or with a third party; and
- requiring that the agent be bonded.³¹⁶

Most of these proposals are focused on providing oversight, which is probably the element most likely to prevent abuse. However, such oversight is not a silver bullet; abuse occurs even in guardianships where court supervision is extremely invasive.³¹⁷ The abuse problem cannot be solved with these statutory modifications, however. Generally, the abuse that the reformers are concerned about involves misappropriation of assets, where the thief assumes that he or she will not get caught. The focus of statutory changes should instead be on assisting the honest attorney-in-fact in knowing how to do a good job, on creating oversight that is not unduly burdensome, and on clarifying the role of the attorney-in-fact

³¹⁵ *But see* Schilling, *supra* note 2, at 250 (reporting 36 of 776 respondents to ACTEC survey urged instructing agents as to duties and responsibilities, including descriptions of possible abuse and penalties for abuse).

³¹⁶ FEDERMAN & REED, *supra* note 63, at 44-45; *see* Schilling, *supra* note 2, at 250 (survey of estate planning attorneys indicated abuse infrequent and outweighed by advantages of instrument).

³¹⁷ *See* English & Wolff, *supra* note 70, at 34 (“The survey responses indicate that guardian abuse is as serious, if not more serious, than [durable power of attorney] abuse.”).

so that the honest attorney-in-fact need not feel threatened by the enhanced penalties aimed at curtailing outright dishonesty.

B. SUGGESTED STATUTORY IMPROVEMENTS

It is certainly necessary that the details of an attorney-in-fact's role be clarified. The use of powers of attorney will only increase as the population ages, and a clear job description is needed to keep the device useful. Such a job description is necessary both for the principal's protection, because an informed attorney-in-fact will not breach duties out of ignorance, and for the attorney-in-fact's protection, because the current state of the law leaves the attorney-in-fact guessing as to what his duty actually is. Also, if states choose to impose heightened penalties for fiduciary abuse, what constitutes abuse has to be clarified in order to protect the well-meaning fiduciary. The place to do this is in the statutory scheme. Although the commentators speculated that courts would define the role,³¹⁸ that has not happened and is not likely to happen at an acceptable speed because litigation involving powers of attorney is too infrequent and too fact-specific. State legislatures should therefore respond with legislation that fleshes out the skeleton of this device, which was first constructed by the Virginia statute and the UPC. The elements of a comprehensive definition of fiduciary—vulnerability of the principal and the vertical distribution of power, consent by the fiduciary, and the need for fiduciary rules to replace monitoring function so that the arrangement can operate efficiently without government intrusion³¹⁹—need to be considered when determining how far the duties and liability extend over the action and nonaction of an attorney-in-fact.

The fiduciary responsibilities of an attorney-in-fact for an incapacitated principal should be high, in light of the broad power wielded by the attorney-in-fact.³²⁰ The first issue to tackle is the

³¹⁸ *E.g.*, McGovern, *supra* note 16, at 23 (stating courts will make exception to general rules of agency when principal becomes incompetent).

³¹⁹ *See supra* notes 90-104 and accompanying text (describing traditional categories of fiduciaries and their varying duties).

³²⁰ If the strictness of the duty is keyed to the extent of risk of the entrustor, then an attorney-in-fact's duty would be at the highest level, because of the enormity of the power and

fiduciary purpose: whether the fiduciary must act in accordance with the principal's wishes or the principal's best interests.³²¹ The principal's wishes should be the starting point of the attorney-in-fact's decisions because those intentions are akin to the purposes set out in the trust agreement by the trustor or the testator in the will. The source of the agent's authority is the principal.³²² For example, the attorney-in-fact should not be faulted for maintaining the principal's home-living situation, even though a supervised facility would be more economical, if living at home was a strong desire of the principal and that arrangement is economically feasible and safe for the principal. On the other hand, the attorney-in-fact must be able to interject his or her own judgment when the principal's choices are potentially damaging. In that sense, the attorney-in-fact is more like a guardian than a trustee, particularly where the principal's judgment is impaired by the incapacity.

With respect to investments, the attorney-in-fact should be obligated to follow prudent investment strategies determined in light of the principal's age and financial situation.³²³ A trustee is usually allowed by statute to retain assets transferred to the trust without consideration of the duty to diversify.³²⁴ However, an attorney-in-fact has authority over all of the principal's affairs and allowing the attorney-in-fact to abdicate responsibility of investment decisions by leaving the principal's choices intact, no matter how ill-considered, would seem temptingly easy to the attorney-in-fact but would be dangerous to the principal.

the absence of monitoring. See Frankel, *supra* note 189, at 1226 ("[B]ecause entrustors' risks from the relationship may vary, fiduciary rules that address these risks vary . . .").

³²¹ One commentator, noting the gap between the traditional agency rule and the situation of the attorney-in-fact for an incompetent principal, speculated that "[p]resumably, courts will create an exception to the general rules of agency to cover such situations." McGovern, *supra* note 16, at 23. Such a court-devised exception has not yet materialized, however.

³²² See Mark Fowler, Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 1025-26 (1984) (contrasting authority of agent with that of guardian, whose authority comes from courts, which in turn have broad discretion to define guardian's role).

³²³ See Moses & Pope, *supra* note 310, at 521-22 (stating South Carolina statute classifies attorneys-in-fact as fiduciaries; therefore, attorneys-in-fact are subject to state's statutory prudent person investment rule).

³²⁴ See UNIF. TRUSTEES' POWERS ACT § 3(c)(1), 7C U.L.A. 401, 401 (2000).

The agent's duty to follow the wishes of the principal raises another problem. If the attorney-in-fact must be guided by the principal's wishes as best ascertained, except in circumstances where contrary actions would be in the principal's best interests, then the attorney-in-fact is limited by two considerations rather than one and must sometimes choose which controls. By contrast, a trustee is relatively free to disregard the wishes of a beneficiary if the trustee's actions are in the best interests of that beneficiary. For example, a beneficiary may object to the trustee's investment in companies the beneficiary does not consider socially responsible, but as long as the investment is financially sound and within the boundaries of the trust agreement, the trustee has not breached a duty by making such investments. By contrast, if the attorney-in-fact knows that the principal would disapprove of such investments, then the attorney-in-fact may be breaching fiduciary duty by making those investments.³²⁵ Another example of an attorney-in-fact's dilemma is the sale of real property to developers for significant profit, when the principal made clear while competent that she would never sell to developers. Again, a trustee may be free to act, while an attorney-in-fact may be constrained by the wishes of the principal.

It is difficult to pronounce a general rule for all attorneys-in-fact, even if limited to attorneys-in-fact for incapacitated principals, because the scope of the agent's authority may vary. The power of attorney may be a general grant of authority, giving the attorney-in-fact full authority to do everything that the principal could do with respect to his property, or it may be limited to certain purposes. For any limited purpose power of attorney, the specific duties of the agent would have to be defined by the particular situation. A statutory provision could therefore provide guidance by requiring an attorney-in-fact to act in the best interests of the principal, in light of the purpose of the agency relationship and consistent with the principal's intentions when possible.

³²⁵ Hamann, *supra* note 296, at 29 ("Thus, if the attorney knows or has reason to know that the principal would disapprove of a particular act, he may not perform that act, even though it is ostensibly within the reach of his power of attorney.")

Another concept in agency that creates some confusion when applied to durable powers is that the principal is liable for contracts of the agent.³²⁶ By contrast, the trust, but not the beneficiaries, is liable for the trustee's contracts.³²⁷ This feature of trusts is one of its advantages: because the beneficiary has little control over the trustee's actions (unlike a competent principal), the costs of the beneficiary's monitoring of the trustee are reduced by the limit on liability.³²⁸ There has been some speculation that, because of the similarities to trust beneficiaries, incompetent principals should in some circumstances be able to void transactions entered into by the attorney-in-fact on their behalf.³²⁹ However, the liability of the principal for acts of the agent is an essential part of the durable power of attorney scheme. If the transaction was subject to review any time the principal was incapacitated, third parties would have a strong disincentive to deal with attorneys-in-fact, and if third parties refuse to accept the power of attorney, it is useless as a planning tool.³³⁰ The principal's liability therefore plays a necessary role and should be retained.

State statutes should have some procedure for the resignation of an attorney-in-fact where the principal is incompetent. Without such a procedure, the attorney-in-fact who wishes to resign must either make substitute arrangements privately or, if there are no alternatives, petition the court for appointment of a guardian for the

³²⁶ RESTATEMENT (SECOND) OF AGENCY § 144 (1958).

³²⁷ RESTATEMENT (SECOND) OF TRUSTS § 275 (1959).

³²⁸ See Hansmann & Mattei, *supra* note 189, at 462-63 (noting trust beneficiary's lack of liability is "efficient" and "minimize[s] the total costs of credit" and is therefore one of most useful features of trusts).

³²⁹ See McGovern, *supra* note 16, at 25 (suggesting third parties should not be able to hold incompetent principal liable for unauthorized action of agent); Alexander M. Meiklejohn, *Incompetent Principals, Competent Third Parties, and the Law of Agency*, 61 IND. L.J. 115, 147-48 (1986) (analogizing to cases involving acts of attorneys-in-fact under traditional powers of attorney that were revoked upon principal's incapacity); see also Dessin, *supra* note 67, at 588-89 (noting transactional analysis of enforceability of attorney-in-fact's contracts does not adequately protect principal).

³³⁰ See McGovern, *supra* note 16, at 39-41 (describing current problem of third party acceptance of power of attorney); see also Sandra G. Krawitz, *The Florida Durable Power of Attorney Becomes a Document to Respect—1995 Changes*, 69 FLA. B.J. at 14 (Dec. 1995) (noting "banks and other financial institutions have often rejected the present form of durable power of attorney typically used in Florida, particularly where the attorney-in-fact is attempting to transfer assets to a party other than the principal or the principal's trust.").

principal. Even where there is an alternate attorney-in-fact named in the power of attorney who is willing to take over, the resigning attorney-in-fact generally has no means to have his actions reviewed and approved and could be answerable to the principal's executor or administrator when the principal dies. A resignation procedure, available to other fiduciaries,³³¹ would make the position more attractive to potential attorneys-in-fact.

Attorneys-in-fact should also be given some method of protecting themselves against allegations of breach of fiduciary duty. The lack of ongoing supervision means that an attorney-in-fact's actions may never be reviewed and therefore are open to scrutiny and challenge by the personal representative of the principal's estate. The attorney-in-fact role would be more attractive if the statute allowed the attorney-in-fact to petition the court for instructions or approval of any transaction the attorney-in-fact was unsure about.

Also, if there was some access to the courts, there could be a mechanism for approving self-dealing. For example, the principal's financial situation may require that nonincome-producing assets be sold, and a logical choice is recreational property, such as a vacation cabin, that has been in the family for years but is no longer used by the principal. The attorney-in-fact, child of the principal, is the only family member who is financially able to purchase the property and wants to purchase it to keep it in the family. The sale would be self-dealing, however. Self-dealing transactions are allowed for most fiduciaries if there is consent of interested parties or court approval,³³² but the attorney-in-fact cannot obtain the consent of an incapacitated principal. A procedure to obtain court approval, with notice to all other interested parties, would allow our attorney-in-fact to keep the cabin in the family without risking a later lawsuit by a disgruntled niece or nephew. The court access procedure could be included in the same provisions, allowing an attorney-in-fact to resign and allowing a third party to request an accounting from the

³³¹ For examples of procedures allowing trustees to withdraw, see CAL. PROB. CODE § 17200 (West 1991 & Supp. 2001); IOWA CODE ANN. § 633.4106 (West 1992 & Supp. 2001); MICH. COMP. LAWS ANN. § 555.25 (West 1988).

³³² See *DUKEMINIER & JOHANSON*, *supra* note 25, at 904-05.

attorney-in-fact or other oversight of the attorney-in-fact's activities.³³³

In summary, durable power of attorney reform needs to broaden its scope beyond abuse prevention and remedy. The vast majority of attorneys-in-fact carry out their duties faithfully,³³⁴ and those attorneys-in-fact deserve a safe harbor from the abuse penalties and from second guessing by other family members on how they resolve the too numerous ambiguities associated with the role. Without a corresponding clarification of the fiduciary duties, the pressure of the abuse reforms will make the power of attorney too unattractive to be useful,³³⁵ and we will return to the situation of the early 1960's where no legal device was available to deal efficiently with disability planning.

Legislatures can attack abuse by oversight provisions and enhanced penalties, if those provisions are mindful of retaining the efficient use of the document without turning it into a de facto guardianship and mindful of the well-meaning fiduciary. That well-meaning fiduciary should be sufficiently comfortable with understanding the scope of duties so that she need not fear inadvertently triggering the criminal penalties or loss of inheritance and other punitive civil damages. That can be accomplished by clarifying the scope of the attorney-in-fact's unique role and by clarifying that the penalties are triggered only by intentional violation of duties. The specific reforms should include some oversight mechanism, although they must be carefully tailored so that the usefulness is not undermined.

Duties of the attorney-in-fact that should be clarified start with resolution of the fiduciary purpose. The attorney-in-fact should be allowed to balance the principal's wishes with the principal's best interests and should be given discretion to resolve conflicts between the two. The attorney-in-fact's duty to act should be stated as a duty only to continue whatever management the attorney-in-fact has already undertaken, in other words, a duty not to abandon. The

³³³ See CAL. PROB. CODE § 4541 (West 1991 & Supp. 2001) (delineating purposes for which petition may be filed).

³³⁴ Schilling, *supra* note 2, at 250; English & Wolff, *supra* note 70, at 34.

³³⁵ See generally see Murphy, *supra* note 77 (describing Arizona's abuse reforms that have made use of durable power of attorney less attractive).

statutes should provide a resignation procedure so that an attorney-in-fact who wishes to resign can do so without fear of future liability.

VI. CONCLUSION

The need for the durable power of attorney, as identified over thirty years ago, is greater than ever. It is time to recognize the unique character of this fiduciary and construct guideposts to continue the instrument's viability. Reform aimed at curbing abuse of the document must be mindful of retaining its usefulness. In turning attention to the durable power of attorney, our understanding of the nature of a fiduciary can also be enhanced. The durable power of attorney illustrates that the fiduciary's needs and limitations on carrying out the fiduciary purpose must be considered when specifying the role. It also indicates a purpose of having a fiduciary category of relationships: certain relationships necessary to the community cannot be efficiently regulated by the self-interested marketplace or the government. Those relationships function best without monitoring from those sectors, and the fiduciary principle gives them a non-intrusive enforcement mechanism from the courts.