

DURABLE POWERS OF ATTORNEY AND THE DISABLED WHO'S WATCHING?

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This article will discuss the legal features of durable powers of attorney and then compare these features to their guardianship counterparts in an effort to help us identify areas in which we, as estate planning attorneys, must advise our clients.

Estate planning attorneys routinely recommend durable powers of attorney for healthcare and property as a means of avoiding guardianships for their clients. In most cases, this is appropriate. However, there are situations in which the absence of court supervision created by a durable power of attorney can put a disabled principal at risk, both personally and financially.

Durable powers of attorney are very commonly used, and for good reason. They grant broad powers to trusted individuals, giving clients peace of mind; they can be easily customized by expanding or limiting the scope and/or duration of the agent's powers as appropriate; they can save a great deal of time, expense and trouble in avoiding trusts or guardianships; they can be amended or revoked at any time during the principal's lifetime (assuming the principal is not under some form of mental disability); they are almost universally recognized and honored; they are easy to understand, find and/or prepare; and they are easy to execute.

Durable powers of attorney for both property and healthcare are governed by the Illinois Power of Attorney Act, found at 755 ILCS 45/1-1 et seq. (the "Act"). Durable powers are different from ordinary powers in that durable powers remain in force during the principal's mental disability, whereas ordinary powers do not.

Powers can take many forms, but the Act provides that an agency is durable unless it states otherwise. 755 ILCS 45/2-5. The Act also gives us statutory forms that may be used for durable powers for both healthcare and property. This article will focus on the most commonly created powers, which are the agencies created by the statutory short forms for durable powers of attorney for healthcare and property contained in the Act ("Agencies").

Generally, all acts of the Agent within the scope of the Agency during any period of the principal's disability bind the principal and his successors as if the principal were not disabled.¹ 755 ILCS 45/2-6(a). An Agent is acting within the scope of the Agency only if the type of action

¹ This assumes the creation of a valid Agency under the Power of Attorney Act. *Estate of Davis*, 260 Ill.App.3d 525, 632 N.E.2d 64 (1 Dist. 1994).

taken is specifically referenced in the Agency document. *Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc.*, 326 Ill.App.3d 126, 759 N.E.2d 174 (2 Dist. 2001).²

Property Agencies. Under the statutory short form, the powers of the Agent would appear to include all of the principal's rights, powers and discretions with respect to the types of property and transactions in relation to the following:³

- a. Real Estate Transactions;
- b. Financial Institution Transactions;
- c. Stock and Bond Transactions;
- d. Tangible Personal Property Transactions;
- e. Safe Deposit Box Transactions;
- f. Insurance and Annuity Transactions;
- g. Retirement Plan Transactions;
- h. Social Security, Employment and Military Service Benefits;
- i. Tax Matters;
- j. Claims and Litigation;
- k. Commodity and Option Transactions;
- l. Business Operations;
- m. Borrowing Transactions;
- n. Estate Transactions; and
- o. All Other Property Powers and Transactions.⁴

However, absent express inclusion, this broad grant of power excludes the power to make or alter *inter vivos* gifts, testamentary gifts, or personal guarantees.⁵

Compare to Guardianships of the Estate. Generally, a guardian has virtually the same powers as an Agent, but court approval must be obtained over all decisions.⁶ 755 ILCS 5/11a-18. See also Articles 19 and 20 of the Probate Act. There are extensive criteria set forth in the Probate Act governing a court's review of how each financial decision should be made (755 ILCS 5/11a-18), but generally the court is to act in the best interests of the ward. *In re Mabry*, 281 Ill.App.3d 76, 666 N.E.2d 16 (4 Dist. 1996). Failure to seek court approval prior to making certain investments of a ward's funds has been held to be an act of *devastavit* and the guardian held liable for any losses incurred. *Cox v. Rice*, 375 Ill. 357, 31 N.E.2d 786 (1940).

There are a few exceptions to this general rule. The Probate Act provides that a guardian must appear for and represent the ward in all legal proceedings unless another person is

² Thus, if you are asked to rely on an altered or customized Agency form, take special care that the Agency document specifically grants the Agent the proper authority. The risk that an Agent might exceed his authority is borne by the one relying on the Agency. *Estate of Mabry*, 281 Ill.App.3d 76, 666 N.E.2d 16 (4 Dist. 1996).

³ See 755 ILCS 45/3-4; *Hoopingarner v. Stenzel*, 329 Ill.App.3d 271, 768 N.E.2d 772 (3 Dist. 2002).

⁴ It should be noted, however, that broad "catch-all" phrases such as this have been found not to expand the Agent's authority under the Agency without some other express evidence to support the expansion. *Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc.*, 326 Ill.App.3d 126, 759 N.E.2d 174 (2 Dist. 2001).

⁵ *Estate of Romanowski*, 329 Ill.App.3d 769, 771 N.E.2d 966 (1 Dist. 2002); *Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc.*, 326 Ill.App.3d 126, 759 N.E.2d 174 (2 Dist. 2001).

⁶ Either in advance or after the fact.

appointed for that purpose. 755 ILCS 5/11a-18(c). However, this language has been interpreted to include only those actions that effect the ward's assets or estate. *In re Kutchins*, 136 Ill.App.3d 45, 482 N.E.2d 1005 (2 Dist. 1985).

A guardian may continue an action for dissolution of marriage, 755 ILCS 5/11a-17(a-5), but has no power to initiate an action for dissolution of the ward's marriage even with a court order. *In re Drews*, 115 Ill.2d 201, 503 N.E.2d 339 (1986).

A guardian cannot waive legal rights of a ward with or without court approval and orders entered purporting to do so have been vacated by the appellate court. *Jeanblanc v. Mellott*, 152 Ill.App.3d 801, 504 N.E.2d 990 (2 Dist. 1987). Nonetheless, the courts have held that a guardian can enter into a settlement with court approval.⁷ *In re Mabry*, 281 Ill.App.3d 76, 666 N.E.2d 16 (4 Dist. 1996). Regardless of the nature of the proceeding, a guardian should not participate in any legal action without prior court approval.

So, it would seem that the powers of an Agent are very similar to those of a guardian, except that the guardian must ask the court's permission before taking action. Because of the time and expense ordinarily required to get court permission, an Agent's relative autonomy is ordinarily seen by estate planning attorneys as desirable.

However, the property Agency's greatest strength is also its greatest weakness. Since the Agent need neither consult with, nor report to, any person when exercising his power, there is a heightened risk that the Agent will be tempted to do something inappropriate.⁸

Healthcare Agencies. Under the statutory short form, the powers of the Agent include any and all health care decisions on behalf of the principal that the principal could make if present and under no disability, to be exercised in such manner as the agent deems consistent with the intent and desires of the principal, including the following:⁹

- a. Power to consent to or to refuse any medical or life-sustaining treatment;
- b. To place and visit the principal in any healthcare or residential facility;
- c. To bind the principal financially on healthcare contracts and authority to provide payment from the principal's funds;
- d. Access to all medical records; and
- e. Power to direct the disposition of remains, including autopsies and anatomical gifts.

⁷ Thus, the law appears to be in conflict because settlement agreements ordinarily contain certain waivers of rights. Compare to *In re Drews*, 115 Ill.2d 201, 503 N.E.3d 339 (1986).

⁸ Of course, an Agent may be required to account for his actions later, but that may not protect the principal if the money has already been spent when the accounting occurs.

⁹ See 755 ILCS 45/4-10.

Compare to Guardianships of the Person. As with a guardian of the estate, the powers of a guardian of the person to act unilaterally are dramatically limited compared to those of an Agent.

A guardian of the person should not consent to, or refuse, major medical treatments and cannot refuse life-sustaining treatment without specific court approval. *Murphy v. Gelman*, 137 Ill.2d 1, 558 N.E.2d 1194 (1980). A guardian may refuse artificial sustenance on behalf of the ward, but only with a court order and only when the patient has been diagnosed with a terminal condition and is irreversibly comatose or in a persistent vegetative state, *Estate of Longeway*, 133 Ill.2d 33, 549 N.E.2d 292 (1990), unless the guardian is acting pursuant to a healthcare Agency or under the Health Care Surrogate Act for a ward with a “Qualifying Condition.”¹⁰ 755 ILCS 5/11a-17(d); 755 ILCS 40/25.

A guardian of the person cannot place a ward in a residential facility without specific court order.¹¹ 755 ILCS 5/11a-14.1. A guardian of the person or estate cannot bind the ward on major medical contracts without specific court approval, 755 ILCS 5/11a-18(a), and does not have direct access to the ward’s funds without a court order 755 ILCS 11a-17(a). A guardian does have access to the ward’s medical records, but may have to get a court order under the new HIPA rules.

A guardian has the power to direct the disposition of remains under the Disposition of Remains Act, but only if that guardian is the Public Guardian and there is no other family member to make the decision. 755 ILCS 65/5. There is no statutory authority allowing a guardian to order an autopsy, unless the guardian is also a family member and invokes his right under the Autopsy Act. 410 ILCS 505/2. A guardian has the authority to make anatomical gifts pursuant to the Uniform Anatomical Gift Act if allowed to do so by the ward’s family. 755 ILCS 50/3(b).

Thus, the powers of a guardian of the person are not only limited to those that are actually authorized by the court in each particular case, but ironically they are also somewhat limited in absolute terms when compared to those of a healthcare Agent. This result is desirable if the Agent is acting appropriately. However, at the same time, it is highly undesirable if the Agent is acting inappropriately. As a result, the healthcare Agency’s main strength might also be seen as its weakness.

Third Party Responsibility and Liability. Third parties are charged with the duty to use reasonable diligence and prudence to verify both the fact and the extent of the Agent’s authority. *Johnson v. Edwardsville National Bank and Trust Company*, 229 Ill.App.3d 835, 594 N.E.2d 342 (5 Dist. 1992). Once that verification has been confirmed, third parties are protected from following an Agent’s directives as long as they act in good faith and unless they have actual knowledge that the Agency is invalid.¹² 755 ILCS 45/2-8. Even if the third party has a suspicion

¹⁰ A qualifying condition is a “terminal condition,” “permanent unconsciousness,” or an “incurable or irreversible condition.” 755 ILCS 40/10.

¹¹ Unless the guardian is the County or State Public Guardian. 755 ILCS 5/11a-14.1.

¹² The third party’s initial verification and extent of the Agency is very important. For example, a third party is not protected when the Agency was forged because in order to have the protection, a valid agency must first have been

of invalidity, this suspicion does not rise to the level of actual knowledge and thus, the protection is not removed. *Johnson v. Edwardsville National Bank and Trust Company*, 229 Ill.App.3d 835, 594 N.E.2d 342 (5 Dist. 1992). Except in cases where the fact and extent of the Agent's authority cannot be verified, third parties almost always have a duty to comply with Agent's directions; failure to comply with most directions without reasonable cause shall be subject to civil liability for any damages resulting from noncompliance.¹³ 755 ILCS 45/2-8.

Conditional Nature of an Agent's Duties. An Agent has no duty to act, and an Agency may go unused even when a principal has passed into a state of mental disability. It is only when and to the extent that, an Agent, in her discretion, elects to exercise one or more of the powers granted to the Agent under the Agency that any duties or liabilities actually apply to her. 755 ILCS 45/2-7.

Compare to Guardianships. A guardian's duties are mandatory and must be exercised. 755 ILCS 5/11a-17; 755 ILCS 5/11a-18. The guardian has an immediate duty to take control of the ward's health, residential placement and financial affairs. 755 ILCS 5/11a-17; 755 ILCS 5/11a-18. A guardian's failure to exercise these duties could result in removal or civil damages. 755 ILCS 5/23-2; *Mucci v. Stobbs*, 281 Ill.App.3d 22, 666 N.E.2d 50 (5 Dist.); *In Re Estate of Halas*, 209 Ill.App.3d 33, 568 N.E.2d 170 (1 Dist. 1991); *Northern Trust Co. v. Heuer*, 202 Ill.App.3d 1066, 560 N.E.2d 961 (1 Dist. 1990).

Private Nature of an Agent's Duties. Despite the broad powers potentially granted to an Agent under property and healthcare Agencies, there is no requirement that the Agent report to any individual or to any court concerning the fiduciary actions taken by the Agent.

Compare to Guardianships. Ordinarily, the guardian has the duty to report to the Probate Court on an annual basis concerning the ward's health, residence and medical treatments. 755 ILCS 5/11a-17(b). A guardian always has the duty to account to the court and interested persons. 755 ILCS 5/24-1; 755 ILCS 5/24-2. A guardian's failure to carry through with her duties to make these reports can be grounds for a citation or removal. 755 ILCS 5/23-2.

General Duties of Agents. Whenever a power is exercised, the Agent shall use due care to act for the benefit of the principal in accordance with the terms of the Agency and, in the case of a healthcare Agency, as the Agent deems consistent with the intent and desires of the principal. In all cases, the Agent shall be liable for negligent exercise. 755 ILCS 45/2-7; 755 ILCS 45/4-10.

Compare to Guardianships. All exercises of a guardian's power must be made on the basis of what the ward would have wanted. If the ward's wishes cannot be ascertained the guardian must act in the best interests of the ward. 755 ILCS 5/11a-17(e). Both an Agency and a guardianship create a fiduciary relationship between the Agent and the principal as a matter of

established. *Estate of Davis*, 260 Ill.App.3d 525, 632 N.E.2d 64 (1 Dist. 1994); *Johnson v. Edwardsville National Bank and Trust Company*, 229 Ill.App.3d 835, 594 N.E.2d 342 (5 Dist. 1992).

¹³ However, healthcare providers are not required to follow an Agent's decision concerning healthcare services for the principal, in which case the healthcare provider must cooperate in transferring the patient to another facility. 755 ILCS 45/4-7.

law. *Zachary v. Mills*, 277 Ill.App.3d 601, 660 N.E.2d 1301 (4 Dist. 1996). As a fiduciary, the Agent or guardian owes the principal the traditional fiduciary duties of loyalty, impartiality, and care. *Mucci v. Stobbs*, 281 Ill.App.3d 22, 666 N.E.2d 50 (5 Dist.); *In Re Estate of Halas*, 209 Ill.App.3d 33, 568 N.E.2d 170 (1 Dist. 1991); *Northern Trust Co. v. Heuer*, 202 Ill.App.3d 1066, 560 N.E.2d 961 (1 Dist. 1990).

Here are some specific areas in which the rules concerning Agencies and guardianships differ.

Accounting. The Agent shall keep a record of all receipts, disbursements, and significant actions taken under the Agency, but has no affirmative duty to prepare or to publish accountings of any kind. 755 ILCS 45/2-7. The only statutory exception is that an Agent is required to reveal such financial and healthcare information as may be requested from time to time by governmental agencies investigating suspicions of elder abuse. 755 ILCS 45/2-7.5.

Compare to Guardianships. A guardian has an affirmative duty to account to the court and to all interested persons. 755 ILCS 5/24-1; 755 ILCS 5/24-2. There are specific requirements as to what that accounting must contain. 755 ILCS 5/24-1. A guardian of the ward's person is an interested person for purposes of fee petitions and accountings. *Estate of Gustafson*, 268 Ill.App.3d 404, 644 N.E.2d 813 (2 Dist. 1994).

Following the Principal's Existing Estate Plan. The Agent shall take the principal's estate plan into account (at least any estate plan that the Agent knows about) and shall attempt to preserve the plan. The Agent shall not be liable to any beneficiary of the estate plan unless the Agent acts in bad faith. 755 ILCS 45/2-9. Also, the Agent shall have access to and the right to copy (but not to hold) the principal's will, trusts and other personal papers and records to the extent the Agent deems appropriate to maintaining consistency with it. 755 ILCS 45/2-9.

Compare to Guardianships. A guardian has no authority to take any action that would alter a ward's estate plan without court order. 755 ILCS 5/11a-18(a-5). The guardian has the right and duty to maintain custody of the ward's estate planning documents.

Amending or Creating a Principal's Estate Plan. An Agent may not create, revoke or amend the principal's trust or require the trustee of any trust to pay income or principal to the Agent without specific authority and specific reference to the trust in the Agency. 755 ILCS 45/2-9. An Agent does not have the authority to create a will for the principal.

Compare with Guardianships. A guardian may create or amend a ward's estate planning documents, but only with court approval. 755 ILCS 5/11a-18(a-5).

Actual or Apparent Self-Dealing. An Agent who acts with due care for the benefit of the principal shall not be liable or limited because the Agent also benefits from the act, has a conflicting interest or acts in a different manner with respect to the Agency and the Agent's individual interests. 755 ILCS 45/2-7. However, this general protection is limited by a significant number of cases holding that transactions from which the Agent personally benefits to the detriment of the principal are presumed to be fraudulent and this presumption may only be

rebutted by clear and convincing evidence to the contrary. *Estate of Savage*, 259 Ill.App.3d 328, 631 N.E.2d 797 (4 Dist. 1994).

Compare with Guardianships. There is no specific statutory protection for a guardian when there is actual or apparent self-dealing, but a guardian may have an opportunity to protect herself by seeking court approval prior to any questionable action.

Since Agencies and guardianships are born under different statutory provisions, there is the possibility that they might exist concurrently. It is not always easy to handle situations where they do.

Generally, Agencies trump guardianships. A guardian has no power over an Agency or its subject matter. 755 ILCS 45/2-10; *Estate of Mabry*, 281 Ill.App.3d 76, 666 N.E.2d 16 (4 Dist. 1996). The Probate Act requires that the ward's Agents receive notice of any guardianship petition. 755 ILCS 5/11a-10(f); 755 ILCS 5/11a-8. Because Agencies would appear to have absolute priority over guardianships, some Probate Courts will categorically refuse to entertain a guardianship petition unless the petition contains allegations that the Agent has breached his duty to the principal.¹⁴ Although this position is somewhat consistent with the statutory limitations imposed upon the courts' power to revoke Agencies, this practice is also problematic. Without a court's assistance in requiring accountings or the disclosure of other information when proof of an Agent's negligence or malfeasance is not obvious, it may be difficult, if not impossible, to determine if the Agent is properly administering a disabled principal's estate until it is too late.

In those instances where an Agent is accused of some form of negligence or wrongdoing and the principal is disabled, a number of issues arise.

Standing. There is some question as to exactly who has standing to bring a suit on behalf of a disabled principal against an Agent for negligence or malfeasance and where that action should be brought.

Ordinarily, in order to have standing, a potential party must have a legally cognizable interest at stake in the action. *Landau, Omahana & Kopka, Ltd. v. Franciscan Sisters Health Care Corporation*, 323 Ill.App.3d 487, 752 N.E.2d 570 (1 Dist. 2001). Thus, unless a guardian is appointed for the principal, the only individual who would have standing to bring suit against the Agent for negligence or malfeasance as to the principal would be the principal himself absent some statutory addition to the standing rules.

Fortunately, it appears that the Act may have been drafted with this problem in mind since it specifically grants "interested persons" standing to bring a petition for relief on behalf of a principal. 755 ILCS 45/2-10. However this is still problematic. Although this terminology would appear to be consistent with that used in the Probate Act (see 755 ILCS 5/1-2.11), the term "interested persons" is not defined in the Act. Nor does the Act incorporate the meaning of "interested person" used in the Probate Act. As a result, any petition brought outside the guardianship context by someone other than the principal or his guardian could be subject to a motion to dismiss.

¹⁴ Most notably, Cook County.

The possibilities for what an “interested person” might be outside the guardianship context include the following:

- a. *The Principal.* If restored to competency, the principal would certainly have standing to bring suit against an Agent for negligence or malfeasance. However, if the principal has not been restored to competency, there would have to be an inquiry as to whether the principal has requisite mental capacity to sue. At least one case has held that an adjudication of incompetence in the Probate Court is not a determination that the ward lacks the requisite mental capacity to sue. *In re Kutchins*, 136 Ill.App.3d 45, 482 N.E.2d 1005 (2 Dist. 1985).
- b. *A Guardian.* If a guardian is appointed, the guardian should have standing to bring suit against an Agent for negligence or malfeasance in a different court. Ordinarily, however, an action by the guardian would be brought within the context of the guardianship estate.
- c. *A Successor Agent on the Agency.* It is unclear whether a successor agent under the Agency would be an “interested person” for purposes of 755 ILCS 45/2-10, and thus has standing to bring suit against an Agent for negligence or malfeasance. However, because an Agent often times has a right to compensation for his services, a successor agent could potentially have a direct financial stake in whether or not the problem Agent could be removed.¹⁵
- d. *A Beneficiary of the Principal’s Estate.* Although consistent with the definition of “interested person” under section 1-2.11 of the Probate Act, it is again unclear whether this consistency would or should be observed by the Courts. However, at least one court has recognized a former beneficiary of the Principal’s annuity as an interested person when the Agent attempted to revoke that annuity account. *Hoopingarner v. Stenzel*, 329 Ill.App.3d 271, 768 N.E.2d 772 (3 Dist. 2002).
- e. *“Next Friend.”* It also appears that a court could appoint a next friend or guardian ad litem for the principal for the purpose of initiating and prosecuting a claim against an Agent. *In re Rankin’s Estate*, 322 Ill.App.64, 53 N.E.2d 747 (3 Dist. 1944).

Revocation by a Principal. A principal may revoke an Agency at any time, though there are different standards for revocation of property Agency than a healthcare Agency.

¹⁵ See *Freesman v. Smith*, 379 Ill. 79, 39 N.E.2d 367.

Every property Agency may be amended or revoked by the principal at any time and in any manner communicated to the Agent or to any other person related to the subject matter of the agency. 755 ILCS 45/2-5. Under this standard, it would appear that the Agency could be amended or revoked even if the principal would otherwise lack the mental capacity to bind himself legally.¹⁶ However, substantial confusion remains as to whether or not a principal can reach a point of incapacity where he is legally unable to revoke a power, and if so what that point is.

Healthcare Agencies appear to me more difficult to amend or revoke than property Agencies. Although the statute specifically allows for the revocation of a healthcare Agency regardless of the principal's mental condition, the agency must be amended in writing at the direction of the principal, and may only be revoked by one of the following methods:

- a. By destroying or defacing the document in a manner indicating intention to revoke;
- b. By a written revocation signed and dated by the principal or person acting at his direction; or
- c. By an oral or other expression of the intent to revoke in the presence of a person over 18 who signs and dates a writing confirming that expression. 755 ILCS 45/4-6.

Amendment or Revocation by a Guardian. When the Court appoints a guardian or if a guardian has already been appointed and an action is brought against the Agent within the context of the guardianship, the definition of "interested person" used in the Probate Act would appear to apply for purposes of determining who has standing to bring the issue before the court. If after the petition is filed the court determines that the principal lacks the requisite mental capacity to control or revoke the Agency and finds that the Agent is not acting for the benefit of the principal according to the Agency's terms, or through the Agent's actions or inactions threatens the principal's person or estate in a way not intended by the principal, the court may order the guardian to exercise any of the principal's powers under the agency, including revocation. 755 ILCS 45/2-10. In fact, the mere appointment of a guardian could be interpreted as a revocation of a power of attorney, depending on the circumstances. *Estate of Doyle*, 362 Ill.App.3d 293, 838 N.E.2d 355 (4 Dist. 2005). Absent such an order, the guardian has no authority to exercise any of the principal's powers as to the Agency. 755 ILCS 45/2-10; 755 ILCS 5/11a-17(c); 755 ILCS 5/11a-18(e).

Amendment or Revocation by Someone other than the Principal or Her Guardian. When there is no guardian and the principal is unable to amend or revoke the Agency herself, the issues concerning standing are most difficult as discussed above. However, even if the court finds that the petitioner has standing to bring the action, it is unclear whether the Act can allow amendment or revocation.

¹⁶ Section 2-7.5 of the Power of Attorney Act does offer a definition of "incapacitated," but it appears that the definition given is limited to that specific section and in any event, does not purport to limit a principal's authority to revoke a property Agency. 755 ILCS 45/2-7.5(a).

Under Section 2-10 of the Power of Attorney Act, a court does have the authority to “enter such other orders without appointment of a guardian as the court deems necessary to provide for the best interests of the principal.” 755 ILCS 45/2-10. However, this broad language may be limited by the provision that immediately follows it, which says, “if the court finds that the Agency requires interpretation, the court may construe the Agency and instruct the Agent, **but the court may not amend the Agency.**” 755 ILCS 45/2-10, emphasis added.

Alternatives to Amendment or Revocation of an Agency. Here are some potential alternatives to amending or revoking an Agency when the Agent has committed some malfeasance or negligence.

- a. Removal of Agent. As an alternative to amending or revoking an Agency, an “interested party” might try to initiate a removal action akin to an action for removal of a trustee based on the Agent’s breach of fiduciary duty. The theory here would have to be that removal for cause is somehow different than the need to amend or revoke a power of attorney. However, the removal of a fiduciary is said to be a rare, extraordinary remedy that is granted only for intentional or repeated breaches of fiduciary duty. *Chicago Title & Trust Co. v. Rogers Park Apartments*, 375 Ill. 599, 32 N.E.2d 137 (1941).
- b. Attacking the Validity of the Agency. As an alternative to removal, an interested person may have the ability to attack the validity of the Agency based on undue influence or incompetence in a fashion analogous to other contractual documents.
- c. Actions for Accounting. Ordinarily, actions for accounting are equitable in nature and thus, in order for the court to entertain an action for accounting there must be no adequate remedy at law. *Singer v. Brookman*, 217 Ill.App.3d 870, 578 N.E.2d 1 (1 Dist. 1991). However, a court will often exercise jurisdiction for the purpose of ordering an accounting without a showing of no adequate remedy at law when there is a fiduciary relationship, the need for discovery and complicated mutual accounts. *Metro-Goldwyn-Mayer, Inc. v. Antioch Theatre Co., Inc.*, 52 Ill.App.3d 122, 367 N.E.2d 247 (1 Dist. 1977); *Newton v. Aitken*, 260 Ill.App.3d 717, 633 N.E.2d 213 (2 Dist. 1994); but see *Mann v. Kemper Financial Companies, Inc.*, 247 Ill.App.3d 966, 618 N.E.2d 317 (1 Dist. 1992). Although often referred to as an “action for accounting,” the accounting is actually a remedy and not a cause of action which must be based upon some other action such as breach of fiduciary duty.

- d. Actions for Breach of Fiduciary Duty or “Surcharge.” There might be instances when a single act, course of action, transaction or set of transactions is the only complaint. Under those circumstances, it might not be appropriate to initiate an action for Accounting. Instead, one might seek to set aside one or more discrete transactions. Ordinarily, transactions from which the Agent personally benefits to the detriment of the principal are presumed to be fraudulent and this presumption may only be rebutted by clear and convincing evidence to the contrary. *Estate of Savage*, 259 Ill.App.3d 328, 631 N.E.2d 797 (4 Dist. 1994). Once the court has found that the Agent has breached her fiduciary duty to the principal, the principal must be made whole.¹⁷ *Eichhorst et al. v. Eichhorst*, 338 Ill. 185, 170 N.E. 269 (1930); *Dowie v. Driscoll*, 203 Ill. 480, 68 N.E. 56 (1903); and *Moehling v. W.E. O’Neil Construction Co.*, 20 Ill.2d 255, 170 N.E.2d 100 (1960). The most common remedy in these cases is surcharge. A surcharge is akin to a judgment for damages against the representative for which no reimbursement may be had from the trust or estate. *In Re Estate of Halas*, 159 Ill.App.3d 818, 512 N.E.2d 1276 (1st Dist. 1987); *Graham v. Graham*, 85 Ill.App. 460 (1st Dist. 1900).

In conclusion, there is no protective oversight for a principal who is approaching the point of mental disability. And, since Agents are typically granted a very broad range of powers over a principal’s person and estate but at the same time are not currently accountable to anyone other than the principal, after the principal reaches a state of mental disability, there is a serious risk that a dishonest or unorganized Agent could convert or waste the principal’s estate before any malfeasance or negligence is ever detected.

Does this risk mean that all durable powers are bad? No, of course not. In the vast majority of cases they are very good. But there are some considerations that we as estate planning attorneys must keep in mind when offering durable powers as estate planning options to our clients, particularly when that client is near the line of mental incapacity.

¹⁷ However, this general fiduciary liability could be limited in some way by section 2-7 of the Power of Attorney Act, which provides that an Agent who acts with due care for the benefit of the principal shall not be liable or limited because the Agent also benefits from the act, has a conflicting interest or acts in a different manner with respect to the Agency and the Agent’s individual interests. 755 ILCS 45/2-7.