Law Reform Commission

REPORT 20 (1975) - POWERS OF ATTORNEY AND UNSOUNDNESS OF BODY OR MIND

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Preface

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:-

The Honourable Mr Justice C. L. D. Meares, Chairman.
Mr R. D. Conacher, Deputy Chairman.
His Honour Judge R. F. Loveday, Q.C.
Mr C. R. Allen.
Mr D. Gressier.
Professor K. C. T. Sutton.

The offices of the Commission are in the Goodsell Building, 8-12 Chifley Square, Sydney. Letters should be addressed to the Secretary.

This is the twentieth report of the Commission on a reference from the Attorney-General. Its short citation is L.R.C. 20.

REPORT 20 (1975) - POWERS OF ATTORNEY AND UNSOUNDNESS OF BODY OR MIND

Part 1 - Introduction

To the Honourable J. C. Maddison, B.A., LL.B., M.L.A.,
Attomey-General for New South Wales.

1.1 *Summary*. In this report we recommend changes to the law relating to powers of attorney under four heads-

(a) Initial unsoundness of mind. A donor of a power of attorney may be of unsound mind, or of questionable soundness of mind, when he gives the power of attorney. We recommend a clarification of the law and the adoption of a means whereby the impact of questionable initial unsoundness of mind on a particular power of attorney may be ascertained.

(b) Supervening unsoundness of mind. A power of attorney may become ineffective through unsoundness of mind of the principal arising after the time when he gives the power of attorney. We recommend a clarification of the law and the adoption of a means whereby a person may give a power of attorney (a “protected power of attorney”) which will remain effective notwithstanding his supervening unsoundness of mind. We recommend consequential safeguards and controls.

(c) Mental Health Act, 1958. A man’s property and affairs may come under management by others pursuant to the Mental Health Act, as for instance if he becomes a patient or an incapable person within the meaning of that Act. It seems to be the law that if this happens a power of attorney previously given by him is ineffective at least for the duration of the management, and that a power of attorney given by him while the management continues is likewise ineffective. We recommend a clarification (and possibly some change) of the law and the adoption of measures for control by the Supreme Court.

(d) Physical handicap. A person who has given a power of attorney may suffer a physical handicap whereby he becomes unable to express his will or receive communications concerning his property or affairs. Coma or paralysis may have this effect. A person in this plight is, as regards his attorney, in a position similar to that of.a person of unsound mind who has given a protected power of attorney (subparagraph (b) above). We recommend similar safeguards and controls.

1.2 *Terms of reference*. We make this report under two references. They are-

To review the law relating to powers of attorney and incidental matters.

And

To review the law relating to the management of the property and affairs of persons in circumstances where the persons concerned do not or cannot manage their own property and affairs, including the cases of patients, protected persons and incapable persons within the meaning of the Mental Health Act, 1958, and the cases of persons who are absent or cannot be found and incidental matters.

1.3 *Reports on powers of attorney*. On the 28th of June, 1974, we made a report to you (L.R.C. 18) on powers of attorney generally. We now report separately on powers of attorney in cases where questions of unsoundness of mind or physical handicap arise. The recommendations in the two reports are independent in the sense that the substance of the recommendations in either report might be adopted whether or not the recommendations in the other report are adopted. As a matter of expression, the draft bill in appendix B assumes a state of the law in which our recommendations on powers of attorney

generally have been adopted. The main body of this report does not, however, make a like assumption. A copy of the draft legislation recommended in relation to powers of attorney generally appears in appendix A.

1.4 *Consultation*. We published a working paper on powers of attorney in April, 1973. Amongst other things we raised the question whether the law should enable a person to give a power of attorney not terminable by supervening unsoundness of mind. Of those who gave us their views on this question, all favoured the affirmative. We submitted a draft of this report to the Health Commission of New South Wales and it was favourably received.

1.5 *Mental Health Act*, 1958. We are not concerned in this report with a review of the Mental Health Act, 1958. That Act makes provision for, amongst other things, the management of people's property and affairs in a number of cases. This report is mainly concerned with cases to which, for a time at least, those provisions do not apply. The Mental Health Act is, however, together with other legislation and the common law, part of the background to our recommendations, and we recommend an amendment to that Act dealing with the effect on a power of attorney of the principal having, or ceasing to have, one of the statutes (patient, protected person, etc.) under the Mental Health Act.

1.6 *"Principal", "attorney"*. It will be convenient to use "Principal" and "attorney" in this report for persons who, on the face of the documents, stand in that relationship to one another, notwithstanding that, through unsoundness of mind of the principal, or through his having one of the statuses under the Mental Health Act, the relationship does not arise, or is suspended or terminated, or is less extensive than appears on the face of the documents.

1.7 *"Protected power of attorney"*. We shall speak of a power of attorney which is (or under proposed laws would be) saved by legislation from becoming inoperative through the supervening unsoundness of mind of the principal. We shall call such a power of attorney a "protected power of attorney".

1.8 *"Patient", "mentally ill"*. These expressions are defined in the Mental Health Act, 1958, and are used in this report in their defined senses. A patient is a person admitted to and detained in an admission centre, mental hospital or authorized hospital under the Act. [1] The provisions for admission and detention are too complex for useful statement here, but they are directed to (amongst other things) the object that a man will not be long so detained unless he is held to be "mentally ill". [2] A man is "mentally ill" for the purposes of the Act if, owing to mental illness he requires care, treatment or control for his own good or in the public interest, and is for the time being incapable of managing himself or his affairs. [3] The definition is deficient so far as concerns the management of property: it is both too narrow and too wide. It is too narrow in that a man may be of unsound mind and for that reason incapable of managing his affairs, yet not be "mentally ill" as defined because he does not require care and treatment for his own good or in the public interest. It is too wide in that a man may be of unsound mind and require such care and treatment, yet be quite capable of managing his affairs.

1.9 *"Protected person", "incapable person"*. When a man is mentally ill and incapable of managing his affairs the Court may make a declaration to that effect and may make orders for the management and application of his property and the care of his person. [4] A man in respect of whom such a declaration is in force is a "protected person" for the purposes of the Act. [5] Where a man is proved to the Court to be, through mental infirmity arising from disease or age, incapable of managing his affairs he is an "incapable person" for the purposes of the Act and the court may make orders for the management and application of his property. [6] Where a cases arises for the management of property under the Mental Health Act, and the owner is not a patient or a voluntary patient, he is usually made an "incapable person", not a "protected person". Since the only substantial difference in legal consequence between being a protected person and being an incapable person is that arrangements may be made for the guardianship of the person of a protected person [7] but not of an incapable person, and since that difference is not relevant to this report, we shall speak in this report of incapable persons and not of protected persons, but what we say of incapable persons will be applicable also to protected persons.

1.10 *"Surrogate management"*. The laws of most countries, New South Wales among them, provide for the management by others of the property and affairs of a person affected by unsoundness of mind.

There are two important cases in New South Wales. In the case of “patients” management is as a rule by the Protective Commissioner, but may be by a committee or manager appointed by the Supreme Court. In the case of “protected persons” and “incapable persons” management is as a rule by a committee or manager appointed by the Supreme Court but may be by the Protective Commissioner. We shall use “surrogate management” to denote management of this description.

1.11 *“Committee”*. We shall use “committee” to denote the person who is manager of the property of another pursuant to a surrogate management. Thus in relation to the laws of New South Wales “committee” may be used so as to embrace the Protective Commissioner in relation to a patient, a committee of the estate of a protected person and a manager of the property of an incapable person. In relation to the laws of other places “committee” may also be used so as to embrace a receiver, a guardian and a conservator.

1.12 *“Initial unsoundness of mind”*. Where a person is unable, through unsoundness of mind, to understand the general nature of some transaction, for example the grant of a lease, he has an incapacity to engage in that transaction, and he has a corresponding incapacity to authorize another person to engage in that transaction as his agent. In relation to a power of attorney, we shall use “initial unsoundness of mind” to denote an unsoundness of mind existing at the time when the power of attorney is given.

1.13 *“Supervening unsoundness of mind”*. Where a person of sound mind has given to another some authority to act as his agent, that authority fails if at the time of an act done by the agent the general nature of the act is, through unsoundness of mind of the principal, beyond the understanding of the principal. We shall use “supervening unsoundness of mind” to denote unsoundness of mind arising after the giving of a power of attorney.

1.14 *“Court”*. Where we speak in this report of the court, we mean the Supreme Court of New South Wales. It may be that some or all of the jurisdiction which we recommend could be given to the District Court as well as to the Supreme Court. But we think that at the outset the jurisdiction should be confined to the Supreme Court.

FOOTNOTES

1. Mental Health Act, 1958, s. 4.
2. Mental Health Act, 1958, pts 4, 5.
3. Mental Health Act, 1958, s. 4. “Mentally ill” is not defined. See Re an Alleged Incapable Person (1959) 76 W.N. 477, and 42 A.L.J 197, 207, 330.
4. Mental Health Act, 1958, s. 38. The use of “mentally ill” limits the utility of section 38: Re an Alleged Incapable Person (1959) 76 W.N. 477.
5. Mental Health Act, 1958, s. 4.
6. Mental Health Act, 1958, ss. 4, 39.
7. Mental Health Act, 1958, s. 38.

Part 2 - Property management during unsoundness of mind

2.1 *Several means of management*. There are at present several means of coping with the problems of property management which attend the unsoundness of mind of the owner. Some are anticipatory, to be taken if at all by the owner when of sound mind. Others may be taken after the owner has incurred unsoundness of mind. All have defects. We shall consider some of them before discussing in more detail the effect in law of unsoundness of mind on a power of attorney.

2.2 *Precautionary means: settlement of property*. On the face of it, an attractive way (to a lawyer at least) of dealing with the problems of future unsoundness of mind is for the owner of property to transfer it to the trustees of a settlement. He can thus provide for the management of his property and for the maintenance of himself and his dependents. He can make the settlement revocable. [1] But there are drawbacks. Since the settlement is voluntary, there are difficulties in bringing into the settlement property afterwards acquired by the settlor. [2] There will be substantial stamp duty and legal expenses are likely to be high. Death duty problems will arise. A settlement is not a familiar arrangement to many people and will be feared as a threat to independence. To sum up, the settlement may be useful in occasional cases, but not in most cases.

2.3 *Precautionary means: power of attorney*. Again on the face of it, the general power of attorney is an attractive way of dealing with the problem of future unsoundness of mind. The principal can choose his own attorney, can make arrangements about what is to be done with his property, and can revoke the power at any time while he retains his mental capacity. Common forms of general power of attorney are readily available at stationers, stamp duty is nominal, there are no death duty problems, and in the ordinary case there is no occasion for any judicial determination of mental capacity. But there is a major drawback in the rule of law that the power of attorney is inoperative as regards any act the nature of which is at the time of the act, through unsoundness of mind, beyond the understanding of the principal. If the attorney is willing to take risks, he can often manage the principal's property effectively and in conformity with the wishes of the principal expressed before the onset of unsoundness of mind or during lucid intervals. The attorney can do so because of the protection given to strangers by the common law and by statute. [3] The risks he takes are of two kinds. First, he may be called on to account by the principal (or by someone suing as his next friend), by a committee under the Mental Health Act, or by the legal representatives of the principal after his death. The account would be sought on the footing that he had acted without authority. Secondly, he faces, on paper at least, criminal liabilities for having given false declarations of non-revocation. [4] These risks are the more troublesome because they arise on any event, that is, the principal losing ability to understand the nature of some particular kind of act, which is difficult to establish and is in many cases a matter on which opinions will differ. Some use can be made of a power of attorney expressed to be irrevocable for a term, [5] but such a power of attorney protects a purchaser and not the attorney. In short, the power of attorney would be a good means of providing against future mental incapacity, were it not for its susceptibility to termination or suspension by the event in which it is intended to be used. The main recommendation of this report is that the law in this respect be changed.

2.4 *Other precautionary means*. A variety of other precautionary means may be adopted, more or less effective in particular cases. Sometimes adequate provision can be made by setting up a joint bank account. Sometimes property can be transferred outright, with an informal understanding about its management and application. Such means as these are not apt unless the affairs of the person concerned are simple, and they are risky for the person who undertakes the task of management.

2.5 *Arrangements during unsoundness of mind*. Two kinds of arrangement can be made after the onset of unsoundness of mind: informal arrangements and arrangements under the Mental Health Act.

2.6 *Informal arrangements*. Sometimes where a person with property to be managed loses capacity to do so, another person, say a member of his family, can do so to a large extent without legal authority. The self-appointed manager may be able to get the incapable person's signature to documents and thus create to strangers an appearance that there is no question of incapacity. Or strangers may turn a blind eye to what they know to be, or think may be, the true state of affairs, or may be content with an express or implied indemnity or warranty of authority from the self-appointed manager. Probably informal managements of this description are common, but they are risky to the manager, to strangers dealing with him, and to the interests of the incapable person.

2.7 *Patients*. If a person becomes a patient his property and affairs come under the management of the Protective Commissioner, and may do so if he becomes a voluntary patient. But this management is a consequence of a need for institutional care or control of the person. It has no relevance to cases where that care or control is not required, and it does not apply unless the care or control takes place in an admission centre, mental hospital or authorized hospital within the meaning of the Mental Health Act. [6]

2.8 *Incapable persons*. If a person of unsound mind is made an incapable person by the court under the Mental Health Act, arrangements can be made for the management of his property. But such a management has, in the eyes of many, drawbacks which limit the utility of the legislation. These drawbacks may be considered under the headings of stigma, expense, delay and rigidity.

2.9 *Stigma*. A judicial finding of unsoundness of mind, and the presentation of evidence on the subject, is likely to be repellent to the person concerned and his family. Relatives in blood may fear an inference, however ill-founded, of hereditary mental defect. The case is heard in private, but word gets around, and the manager must expressly act as such in his dealings with strangers. Many people see in these proceedings a stigma of lunacy and therefore will avoid them if they possibly can.

2.10 *Expense*. Proceedings for the appointment of a manager will involve expense of at least some hundreds of dollars. The proceedings tend to be troublesome and time-consuming to lawyers because they are not often encountered and this tends to enlarge the expense. Sometimes a manager will act without charge, but commonly a professional man must be appointed at a fee. Court fees and the costs of applications to the court all enlarge the burden of expense.

2.11 *Delay*. Although the court and its officers can and do act quickly when occasion requires, there is an inevitable lapse of time while applications to the court are being prepared and dealt with.

2.12 *Rigidity*. Those administering the Mental Health Act are rightly concerned to see that the property of an incapable person is managed without unnecessary nsk to the property and with a view to its protection and, if possible, enhancement and to its proper application for the maintenance and so on of the incapable person and his family. But differences of opinion can arise on the best way of pursuing these objectives and it must happen that sometimes leave will be refused to carry out some transaction which commends itself to one or more of the manager, the family of the incapable person, and possibly the incapable person himself. This prospect is one which will lead the family of the incapable person and their advisers to look elsewhere for a means of management of his property.

2.13 *Mental Health Act reform*. We have as a larger project a review, in consultation with the Health Commission, of the provisions of the Mental Health Act relating to the management of property. We hope that this review will lead to some improvement in the present arrangements. However, whatever is done in this direction, we think that there will still be room for the legislation which we recommend in the present report.

2.14 *A vacuum in our law*. [7] What is needed is a means whereby a man, foreseeing the possibility of mental incapacity, might make his own arrangements for the management of his property in that event, and for its application for such purposes (for example the maintenance of himself and his family) as he thinks fit. Just as a man may provide by will for the management and application of his property in case of his death, so he ought to be able to provide for the management and application of his property in case he loses his mental capacity. The appropriate means is a power of attorney which will survive

subsequent unsoundness of mind, that is, what we call a “protected power of attorney”. The present law does not allow the creation of a power of attorney having this character: the law ought to be changed. We shall first discuss the present law and then go on to proposals for change.

FOOTNOTES

1. A power of revocation itself calls for capacity at the time of its exercise.
2. Jacobs on Trusts (1967) pp. 151-157.
3. See paragraph 3.6 below.
4. Conveyancing Act, 1919, s. 160 (3), (3A), (4).
5. Conveyancing Act, 1919, s. 162.
6. See the definition of “Patient’s in the Mental Health Act, 1958, s. 4.
7. Part of the title of a paper on the present subject read before the Section of Real Property, Probate and Trust Law of the American Bar Association by James O. Wynn in 1956. 1956 Proceedings of the Section, pt. 1, 27; Trusts and Estates (1956) p.879.

Part 3 - The present law

3.1 *Scanty authority*. There are few reported cases and little legislation on problems of the law of agency arising out of the unsoundness of mind of the principal. The account of the law in this part is therefore offered with an awareness that it is based on slender authority.

3.2 *Initial general incapacity*. A paper apparently a power of attorney duly executed may altogether fail of effect through unsoundness of mind of the principal because his signature to it is made without any awareness that it is a document which would, if duly executed by him, affect his legal position: it is like an act done by a sleepwalker. Again, a paper apparently a power of attorney duly executed may altogether fail of effect through unsoundness of mind of the principal because he, although understanding that he is signing a legal paper and intending to do so, is unable to understand the general nature of a power of attorney. The facts of these types of case shade into one another but there is a difference in legal thinking. In the first case the instrument is not well executed. In the second the instrument is well executed, but the principal's want of understanding invokes a policy of the law which denies effect to the instrument. The consequence in any of these cases is that the instrument is void: the attorney or a stranger dealing with the attorney cannot rely on the power of attorney, however innocent he may be of notice of the unsoundness of mind of the principal. These cases are not far removed from the cases where the common law doctrine of non est factum comes into play. [1]

3.3 *Initial particular incapacity*. A power of attorney may escape failure for the reasons mentioned in paragraph 3.2, yet still be not operative for its full apparent scope, or be altogether inoperative, through unsoundness of mind of the principal. A power of attorney does not confer on the attorney authority to act for the principal in a transaction the nature of which is, through unsoundness of mind of the principal at the time when the power is given, beyond his understanding. [2] It is implicit in this that if, of the transactions within the scope of the power, some are of a nature within the understanding of the principal and some are not, initial unsoundness of mind Will make the power of attorney void as to the latter, but not as to the former. [3]

3.4 *Supervening unsoundness of mind*. A power of attorney does not authorize the attorney to do an act the nature of which is, through unsoundness of mind of the principal, beyond the understanding of the principal at the time of the act. [4] The authorities do not deal with the effect on a power of attorney of a period of unsoundness of mind followed by a recovery. Suppose that the principal is of sound mind when he gives the power of attorney, that he afterwards becomes of unsound mind so that, under the rule just discussed, the power of attorney is ineffective as regards some kind of transaction, and that he recovers so that the nature of that kind of transaction is again within his understanding. Is the power of attorney good as regards a transaction of that kind, engaged in by the attorney after the recovery of the principals Reason would, we think, call for an affirmative answer, but there is no authority on the point, and some of the judgments and text books use language which suggests a negative answer. [5] Thus it is common to speak of supervening unsoundness of mind "revoking" or "bringing to an end" or "terminating" a power of attorney or other authority of an agent. [6] As a matter of language once a power of attorney or other authority of an agent is revoked or terminated that is the end of it: recovery by the principal would enable him to give a new power of attorney but would not reinstate the old. And people sometimes speak of agency as a "continuing" relationship: [7] again as a matter of language, a continuing relationship is something different from an intermittent one, and seems to exclude the concept of an authority exercisable from time to time according to whether the nature of the transaction in question is for the time being within the understanding of the principal. But this langauge was not used in reference to the present question and ought not to be pressed for an answer. It would, we think, be a reasonable state of the law, and one consistent with the views of the High Court in *Gibbons v. Wright*, [8] that a power of attorney, not relevantly affected by initial incapacity, should support an act done by the

attorney if the nature of that act is within the understanding of the principal at the time when the attorney does the act: it should not matter that at some intermediate time he lacked that understanding. [9]

3.5 *Surrogate management: effect on power of attorney*. In New South Wales at least, a man's property and affairs may come under surrogate management, may so remain, and may cease to be under surrogate management, whether or not he is capable of managing them himself. [10] And so far as the law of surrogate management is concerned with a man's ability to manage his own property and affairs, it is concerned with his ability in general, not with his ability to understand the nature of particular kinds of transaction. [11] The events which may bring a man's property and affairs under surrogate management are thus different from the events by reference to which the law determines the validity and effect of his power of attorney. It is, however, a consequence of the commencement of a surrogate management that the person concerned becomes incompetent to dispose of his property. [12] This consequence has been seen as involving the further consequence that, if the property of a person comes under surrogate management, a power of attorney previously given by him is revoked and a power of attorney given by him during the management is void. [13] But we know of no case which so decides, [14] and such a state of the law is not required for the purpose of supporting the control of the principal's property and affairs which the law gives to the committee. It is sufficient for that purpose that the power of attorney should not be exercisable while the principal's property and affairs are under surrogate management. It is foreign to that purpose that the power of attorney should be terminated or void so as to fail as an authority for acts not inconsistent with the surrogate management. Amongst acts not thus inconsistent are acts done after the surrogate management has come to an end. It seems to us to be the better view of the present law that a power of attorney given before the commencement of a surrogate management of the property and affairs of the principal is not terminated by that commencement. It seems to us likewise that under the present law a power of attorney given during the surrogate management of the property and affairs of the principal is not for that reason void. In each case, however, the power of attorney will not give to the attorney authority to act in any way in competition with the committee. [15]

3.6 *Persons without notice of unsoundness of mind*. Where a power of attorney is void, wholly or in part, because of initial unsoundness of mind of the principal, it does not avail a person relying on the power of attorney, for example the attorney or a stranger dealing with the attorney, that he did not have notice of the unsoundness of mind. [16] But the consequence of supervening unsoundness of mind is different: the power of attorney is a continuing assertion by the principal that the attorney is authorized to act for him, and a person dealing with the attorney, without notice of the supervening unsoundness of mind, may rely on the power of attorney as if the unsoundness of mind had not happened. [17] The attorney has a statutory protection against liability for things done after unsoundness of mind of the principal has taken away his authority but without notice of the unsoundness of mind. [18] There is no authority on the effect at common law on a power of attorney of a supervening surrogate management as regards the attorney or a third person acting in reliance on the power of attorney without notice of the surrogate management. The general statutory protections [19] would apply.

FOOTNOTES

1. See generally on this paragraph Gibbons v. Wright (1954) 91 C.L.R. 423. For the common law doctrine of non, est factum see Gallie v. Lee [1971] A.C. 1004.
2. Gibbons v. Wright (1954) 91 C.L.R. 421, 445; American Restatement (l,qecond) Agency (1958), s. 20.
3. This would clearly be so if each transaction were authorized by a separate instrument. It can hardly matter that numerous authorities are given by a single instrument and not by numerous instruments. It may, of course, appear as a matter of intention that the power of attorney either is to be effective for the whole of its apparent scope or is not to be effective at all.
4. "Where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him": Drew v. Nunn (1879) 4 Q.B.D. 661, 666-"The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such

soundness of mind as to be capable of understanding the general nature of what he is doing by his participation": Gibbons v. Wright (1954) 91 C.L.R. 423, 427. See also Kerr v. Town of Petrolia (1921) 64 D.L.R. 689, 697, 698.
5. Compare Halsbury's Laws of England 4th edn, vol. 1 (1973), para. 706, which supports the affirmative answer: "a person suffering from mental disorder of such severity as to affect his understanding . . . may be held liable on contracts made by an agent ... during a lucid interval." Cf. para. 882.
6. In re Coleman (1929) 24 Tas. L.R. 77; Drew v. Nunn (1879) 4 Q.B.D. 666 (Brett L.J.), 669 (Bramwell L.J.); Halsbury's Laws of England, 4th edn, vol. 1 (1973) para. 882. Halsbury's Laws of England 3rd edn, vol. 29 (1960), p. 409; Theobald (1924), p. 227; Powell (1061), pp. 297, 298, 389, 390; Fridman (1971), pp. 304, 314; Allan, Ferster & Weihofen (1968), p. 156; American Restatement (Second) (1958) Agency s. 122.
7. Powell (1961) pp. 390, 391; Allen, Ferster & Weihofen (1968) pp. 155, 156.
8. (1954) 91 C.L.R. 423.
9. "So, if a principal should become insane, that would or might operate as a suspension or revocation of the authority of his agent during the continuance of the insanity; for the party himself, during his insanity, could not personally do a valid act; and his agent cannot, in virtue of a derivative authority, do any act for and in the name of his principal, which he could not lawfully do for himself': Story (1869), s. 481.
10. Under the definition of "mentally ill" in the Mental Health Act, 1958, s. 4 a man may become a patient whether or not he is able to manage his property or affairs: see paragraph 1.8 above.
11. See for example, the Mental Health Act, 1958, ss. 38, 39.
12. *Gibbons v. Wright* (1954) 91 C.L.R. 423, 439, 440. The decision of Owen C.J. in Eq. in Re King (1887) (9 N.S.W. L.R. Eq. 1) is contrary to what was said by th'e High Court in Gibbons v. Wright. Seciion 72 of the Mental Health Act, 1958, the original of which appears to have been enacted to meet that decision, may perhaps found an argument that the proposition in the text is not the law in New South Wales so far as concerns a "patient".
13. Powell (1961) p. 390.
14. Daily Telegraph Newspaper Co. Ltd v. McLaughlin [1904] A.C. 776 may be read as an authority against Powell's view. There the Privy Council, on a mistaken view of the facts in Elliot v. Ince (1857) (7 De G.M. & G. 475; 44 E.R. 186), seems to have thought that the validity of a power of attorney given by a lunatic so found depended on the mental condition of the principal at the time when the power was given: the question was not concluded by the fact that the control of the principal's property had passed to the Crown. The mistake on the facts of Elliot v. Ince was that, as appears from the report of Elliot v. Ince, the principal gave a power of attorney and was afterwards found by inquisition to be a lunatic (as from a date before the date of the power of attorney), yet the Privy Council regarded Elliot v. Ince as a case of a power of attorney given by a lunatic so found.
15. But see paragraph 8.10 below.
16. McLaughlin v. Daily Telegraph Newspaper Co. Ltd (1904) 1 C.L.R. 243; Gibbons v. Wright (1954) 91 C.L.R. 423, 444, 445.
17. Drew v. Nunn (1879) 4 Q.B.D. 661, 666, 667; Yonge v. Toynbee [1910] 1 K.B. 215 should not be regarded as authority to the contrary: it was not in contest there that insanity had determined the authority of the agent for all purposes (Crowther v. Crowther [1951] A.C. 723, 732), and it does not appear that the principal had held out the agent as having authority to act for him. See also the Conveyancing Act, 1919, ss. 160, 161, 162. In In re Coleman (1929) (24 Tas. L.R. 77) the question was between the representatives of the principal on the one hand and this agent on the other: it was not suggested that the agent acted without notice of the mental illness of the principal.
18. Conveyancing Act, 1919, s. 160. He may also be protected at common law: Drew v. Nunn (1879) 4 Q.B.D. 661, 667 "the agency expired upon his becoming to her knowledge insane".
19. Conveyancing Act, 1919, s. 160.

Part 4 - Initial unsoundness of mind

4.1 *Introductory*. Although the major recommendations of this report are concerned with a change in the law whereby a power of attorney may be made to survive supervening unsoundness of mind, we are also faced with problems arising out of the unsoundness of mind of the principal at the time when he gives a power of attorney. We call unsoundness of mind present at that time "initial unsoundness of mind" and it will be convenient to deal with these problems before going to the subject of supervening unsoundness of mind.

4.2 *The risks generally*. There are risks of two kinds if a principal is not of sound mind when he gives a power of attorney. First, there is the risk of imposition. The power of attorney may have been procured to promote, not the interests of the principal, but some sinister pursuit, such as the cupidity of the attorney. Second, there is the risk of invalidity. The attorney and those relying on his acts will be at risk if the power is defective for want of initial capacity in the principal. These risks are an incident of the giving of a power of attorney, whether a protected power of attorney or not. But the problems will be more pressing in the case of a protected power of attorney where the attorney proposes to act under the power while the principal is of unsound mind. This will be so because in the case of an ordinary power of attorney, but not in the case of a protected one, the unsoundness of mind of the principal at the time when the attorney proposes to act under it will as a rule render the power ineffective, so that it will be unnecessary to consider whether the principal was of sound mind when he gave it.

4.3 *The risks of imposition*. The risks of imposition can be dealt with by the principal or by others acting in his interests. The principal can deal with a power of attorney unwisely given by revoking it, assuming of course that he is no longer under the influence under which the power was procured and he is sufficiently of sound mind to grasp the situation and act appropriately. Others acting in the interests of the principal might sue in the name of the principal for orders restraining the attorney from acting under the power and delivery of the instrument for cancellation, or they might apply for a surrogate management of the property of the principal.

4.4 *The risk of invalidity*. The law does not provide effectively against the risk to an attorney and to persons relying on his acts of a power of attorney being invalid for initial unsoundness of mind. The statutory protections of the attorney and those relying on his acts [1] do not relieve against initial unsoundness of mind and we think that this is as it should be. It would be open to a person having a legal interest in some act of the attorney to get a judicial determination of the extent if any to which the act was invalid through initial unsoundness of mind of the principal. That, however, would be a slow and expensive business and would not be effective to enable the attorney to manage the affairs of the principal.

4.5 *Laws and proposals abroad*. In other countries, laws and proposals for laws permitting powers of attorney to survive supervening unsoundness of mind (that is, protected powers of attorney) have given some consideration to the problems of initial unsoundness of mind. The United States Model Act (1964) appears to be primarily directed to saving a protected power of attorney from the effect of supervening unsoundness of mind, [2] but judicial approval of the power of attorney is required, [3] and the judge must be satisfied, amongst other things, that the principal "reasonably understands the nature and purpose of the power". [4] It does not appear that judicial approval is intended to settle for all persons and for all purposes the question of initial capacity, but perhaps a third person dealing with the attorney is protected from the consequences of initial unsoundness of mind. [5] Amongst the proposals of the Law Society in England to the Law Commission in relation to protected powers of attorney was one that a medical practitioner should make a statutory declaration affirming initial soundness of mind,6 but this declaration appears to have been seen as a safeguard in fact, rather than as a determination of initial capacity on which the attorney and third parties might rely. The Ontario Law Reform Commission

considered and rejected a suggestion similar to that of the Law Society in England: it would introduce unnecessary complexity, and it was sufficient to rely on the ordinary onus of proof bome by a person attacking the power. [7] The Manitoba Law Reform Commission recommended that there should be a requirement that two people, one to be a lawyer or a medical man, should make a declaration affirming, amongst other things, the initial soundness of mind of the principal: [8] again, this declaration appears to be a safeguard in fact rather than a determination that can be relied on by the attorney and by third parties dealing with the attorney.

4.6 *Mandatory safeguards*. We do not think that the law should require any safeguards against initial unsoundness of mind as a condition of the validity of a protected power of attorney. As we have said, the present law affords means whereby the principal or those interested in his affairs can put stop, or move the court to put a stop, to the activities of an attorney under power given by a principal while of unsound mind. Further, we think that judicial approval, or a certification by medical men, while a trouble and expense in every case, would be useful in some cases only. Again, a certification by medical men could not be more than a safeguard in fact against imposition: it would be wrong to make such a certification conclusive for or against the validity in law of the power of attorney. On the whole, we concur with the National Conference of Commissioners on Uniform State Laws in the United States, [9], and with the Ontario Law Reform Commission [10] and the Law Reform Commission of British Columbia [11] that there should not be any mandatory measures for'seeiiig that a principal is of sound mind when. he gives a protected power of attorney.

4.7 *Determination of initial capacity*. Although we are against a mandatory requirement of an examination for initial soundness of mind, we think that there is room for a provision whereby the existence of initial capacity might be established on application by a person interested. The question of initial capacity is one which may anse in relation to any power of attorney, not only in relation to a protected power of attorney. We have in mind that it should be open to the principal or a next friend on his behalf to get in the Supreme Court an order confirming a power of attorney. The Court should be empowered to make such an order in relation to all or any of the things which are within the scope of the power. The cases for making such an order would be that the principal had sufficient capacity at the time when he gave the power, or that, at some later time including the time of the hearing of the application, the principal, having sufficient capacity at that later time, affirmed the power or that, where the power is a protected power, the confirmation is for the benefit of the principal. [12] The effect of an order of confirmation would be that the power would not be invalid for want of initial capacity, so far as concerns an act done by the attorney after the order of confirmation takes effect.

4.8 *Present declaratory jurisdiction insufficient*. The Supreme Court does not already have sufficient jurisdiction for this purpose under its general power to make binding declarations of right. [13] In the first place, while the general power would easily enough embrace a declaration that a particular act done by an attorney was not vitiated by initial incapacity, it would strain the principles on which the court exercises its discretion to make a declaratory order to make such an order in relation to the whole scope of a general power of attorney. In the second place, the utility of the proposed scheme is that an order of confirmation would operate in favour of all persons afterwards dealing with the attorney, not merely the parties to the court proceedings.

FOOTNOTES

1. Conveyancing Act, 1919, ss. 160-162A.
2. "The power is not invalidated by reason of any subsequent change in the mental ... condition of the principal . . . ": s. (1) (a).
3. s.1 (a).
4. s.1 (3).
5. s.6 (c).
6. Law Society Memorandum (c. 1967), paragraph 16 (a).
7. Ontario Report on Powers of Attorney (1972), p. 25.
8. Manitoba Report (1974) p.11.

9. As collected from the Uniform Probate Code (1969), s. 5-501.
10. Ontario Report on Powers of Attorney (1972), p. 25.
11. British Columbia Working Paper (1974) pp. 31-35.
12. See paragraphs 8.5 and 8.6 below.
13. Supreme Court Act, 1970, s. 75.

Part 5 - Protected powers of attorney: laws and proposals abroad

5.1 *General*. In recent years there have been laws and proposals for laws in the United States, in England and in Canada whereby a man may arrange for the management of his affairs in the event of unsoundness of mind by giving a protected power of attorney.

5.2 *United States of America: Virginia*. In the early 1950's an enactment on the subject was passed in Virginia. [1] The scheme is simple. Briefly, where the instrument creating a power of attorney shows an intention that, the power shall not terminate on unsoundness of mind of the principal that intention is effective. If a committee for the principal is appointed, the attorney is accountable to him, and the committee has the authority to revoke the power of attorney which the principal would have had if not under disability.

5.3 *American Bar Association*, 1956. The possibility of legislation whereby a man might provide for the management of his property and affairs in case of supervening unsoundness of mind was raised in 1956 in a paper read to the Section of Real Property, Probate and Trust Law of the American Bar Association. [2] The suggestion was made without any reference to the Virginia legislation of 1954. [3]

5.4 *National Conference of Commissioners on Uniform State Laws*. In 1957, following the reading of the above paper, the Commissioners took up the question with a view to recommending a Model Act. In 1961 a statute was passed in North Carolina probably based on an early draft Model Act. [4] In 1964 the Commissioners adopted a model Act, the "Special Power of Attorney for Small Property Interests Act". [5] The Model Act was adopted in Arkansas in 1965 with some alterations, [6] and has been adopted in three other States. [7]

5.5 *United States Model Act: "small property interests"*. As its title indicates, the Model Act is intended to be limited to small property interests. It contemplates a limitation to cases where the power of attorney is limited to property of not more than a specified value or income of not more than specified yearly amount. [8] The purpose of the Act "is primarily to provide 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 . . . It is not contemplated that a power of attorney executed under this Act will be used for the general handling of sizeable commercial property interests". [9] "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. An attempt to draft the Act so as to be applicable to unlimited amounts of property and income gave rise to demands for extensive safeguards and more detailed and complicated procedures with attendant increased expenses, which largely destroyed the value of the Act for the purposes originally intended." [10] The Model Act as adopted in Arkansas has a property limit of $3,000 (with some exceptions) and an income limit of $2,400, [11] but, as adopted in North Carolina, has no limit. [12]

5.6 *United States Model Act: initial safeguards*. Under the Model Act, the instrument creating the power of attorney must be expressed to be executed under the Act, [13] must be approved by a judge, [14] must be executed in his presence, [15] and must be filed in a court office. [16] A certified copy of the instrument must be filed or recorded in specified public offices. [17]

5.7 *United States Model Act: judicial approval*. Judicial approval is not to be given unless the judge is satisfied that (amongst other things) the principal understands the nature and purpose of the power and requests approval, [18] the attorney is a suitable person and consents to serve, [19] and the property and income covered by the power of attorney are within the statutory limits. [20] The requirement of judicial approval has been criticized as likely substantially to impair the practical use of the device and as reflecting a reluctance to depart too far from the values of the familiar. One of these values is the inclination to protect against the susceptibility to undue influence of persons who are barely competent, or possibly not competent at all. Execution before a judge would, it is said, provide an informal preliminary determination of competency and an inquiry into the suitability of this solution for the particular individual. "There is some irony in the fact that in a statute motivated by dissatisfaction with guardianship proceedings. [21] the Commissioners' response should be a further extension of the judicial role." [22]

5.8 *United States Model Act: effect of special power of attorney*. A power of attorney given under the Act is not invalidated by subsequent change in the mental or physical [23] condition of the principal, including but not restricted to incompetency. [24]

5.9 *United States Model Act: judicial supervision after grant*. A court may, it seems, remove an attorney for cause [25] and may in effect remove an attorney by appointing a substitute in the cases to be mentioned presently. [26] In case an attorney ceases to act, refuses or is unable to serve, resigns, or fails to maintain or replace a bond, a court may appoint a substitute. [27] A court may also appoint a substitute where an attorney dies or is removed by a court for cause. [28] It seems that a court may terminate a power of attorney for cause. [29] A court may also terminate a power of attorney on the appointment of a guardian, conservator or committee for the principal. [30]

5.10 *United States Uniform Probate Code*. In 1969 the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved a Uniform Probate Code. Section 5-501 of the Code, headed "When Power of Attorney Not Affected by Disability", is as follows:

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

The section is based in part on the provision of the Virginia code noticed above. [31] It seems that the Uniform Probate Code is not intended to supersede the United States Model Act (1964). [32] The Uniform Probate Code has been adopted in some States [33] and, in addition, New Jersey has substantially adopted section 5-501. [34]

5.11 *Developments in England*. The problem has been discussed in England, but without reference to the developments in the United States of America. In 1967 the Law Commission said in a working paper - "There is little doubt that it would be highly convenient if it were possible to grant a power of attorney under which the donee would be entitled to continue to handle the affairs of the donor, notwithstanding the latter's incapacity, resulting, for example, from mental illness . . . It is f elt, however, that it would go too far to provide for this facility since it would drive a coach and horses through the safeguards

provided by the Court of Protection." [35] In comment on the working paper a committee of the Law Society suggested the introduction of a special type of power of attorney which would survive supervening unsoundness of mind, subject to safeguards and limitations which were discussed. [36] The Holborn Law Society also suggested provision for a power of attorney which would survive supervening unsoundness of mind. [37] In its report on powers of attorney the Law Commission adverted to the question again, but took the view that it "was not a matter which could properly be dealt with in isolation from a complete review of the present procedure for dealing with the property of persons of unsound mind". [38] So far as we know such a review has not been undertaken.

5.12 Proposed safeguards in England. In its comments on the Law Commission's working paper, the Law Society proposed the following safeguards: [39]

> (a) For th e sake of seeing that the principal is of sound mind when he gives the power, the execution of the instrument creating the power, should be witnessed by a medical man and he should make a statutory declaration that the principal was then of sound mind.
>
> (b) For the sake of seeing that the power is given deliberately, the instrument should express an intention that the power should survive later mental incapacity.
>
> (c) For the sake of promoting honesty and competence, there should be not less than two attornies, to act jointly, at least one being outside the family of the principal and at least one being a member of a prescribed class, e.g., a trust corporation or a practising solicitor.
>
> (d) In case circumstances change after the power is given, the power should terminate no later than 5 years after its creation.

5.13 *Developments in Canada*. The problem has been considered by the Royal Commission Inquiry into Civil Rights in Ontario, by the Ontario Law Reform Commission, by the Manitoba Law Reform Commission, and by the Law Reform Commission of British Columbia. The Royal Commission did not advert to the developments in the United States; its work preceded that of the Law Commission in England. The Law Reform Commissions adverted to the work of the Law Commission in England and the submissions !made to it, but not to the developments in the United States of America.

5.14 *Ontario: Royal Commission Inquiry into Civil Rights*. In 1968 the Royal. Commission Inquiry into Civil Rights, after criticizing an enactment which avoided a power of attorney upon the Public Trustee becoming committee of the principal's estate under the Mental Health Act, 1967, went on-

> The section is a negative approach and does nothing to solve a very real problem. A form of power of attorney should be authorized by statute which would in proper circumstances enable the donee to continue to act for a person who has become incompetent. Simple machinery could be devised, whereby on consent of the parties likely to be interested in the estate of one who has become incompetent, a person could be authorized to act as attorney for the incompetent without setting up the elaborate machinery of a legal committee. It is not the function of this Commission to work out a procedure in detail, but steps should be taken to give legal authority to a useful practice that is now carried on on a very wide scale, but with questionable legality.

The Royal Commission made a recommendation that-

> A form of power of attorney should be recognized by statute which would authorize the attorney - with the approval of the guardian of the mentally incompetent, or, in proper cases, the county or district court judge to continue to act as attorney for the donor after he has become incompetent, so that small and limited transactions such as the banking and paying of small bills may be carried out by the attorney. [40]

5.15. *Ontario Law Reform Commission*. In a report on powers of attorney made in 1970 the Ontario Law Reform Commission recommended legislation allowing a person giving a power of attorney to provide for the power to survive his supervening unsoundness of mind, subject to certain conditions. [41]

5.16. *Ontario report on powers of attorney: initial safeguards*. The instrument creating the power of attorney must be expressed to be exercisable during subsequent legal incapacity of the principal, [42] and must be executed before a witness who is neither the attorney nor his spouse. [43]

5.17 *Ontario report on powers of attorney: filing and notice*. The attorney may, after legal incapacity of the principal, file the instrument creating the power of attorney by lodging a copy in a surrogate court office [44] and the registrar of the surrogate court is to give notice of the ffling to the Registrar of the Supreme Court. [45] The attorney must file the instrument in this way within 15 days after he learns of the incapacity, [46] otherwise the power of attorney ceases to be valid, [47] but a judge may extend the time, [48] and there is a protection for strangers dealing with the attorney without notice of the incapacity. [49]

5.18 *Ontario report on powers of attorney: accounts*. After incapacity of the principal, a court may order the attorney to pass his accounts in the court in relation to transactions after incapacity of the principal. [50] A court may so order on application by the Public Trustee [51] or by "any person having a material interest, directly or indirectly, in the estate" of the principal. [52] The report does not identify the persons having such an interest: presumably creditors would be included and perhaps also persons with claims for maintenance and persons with expectations of taking property on the death of the donor, by his will or on intestacy. [53]

5.19 *Ontario report on powers of attorney: change of attorney*. The Court may by order substitute a new attorney for the original attorney. [54] This power is intended to be exercisable, not only where the original attorney still has authority under the power of attorney, but also where his authority has ceased, as for instance by his death, incapacity or renunciation. [55] Application for substitution may be made by a person interested in the estate, [56] by the attorney [57] or by the Public Trustee. [58] The substitution of a new attorney for the original attorney is to have the like effect as the substitution of another person for a trustee under the Trustee Act: [59] presumably the effect of this is that the substitution does not discharge the original attorney from liability for his acts or omissions before the substitution, [60] and that the new attorney has the same powers and so on as if originally appointed an attorney by the instrument creating the power of attorney. [61]

5.20 *Ontario report on powers of attorney: effect of surrogate management*. The power of attorney becomes invalid and of no effect where an order is made declaring the. donor a mentally incompetent person and upon the appointment of a committee. [62] By the law of Ontario, the Public Trustee may become committee of the estate of a patient in a psychiatric facility [63] and thereupon a power of attorney given by the patient is void. [64]

5.21 *Ontario: legislative action*. A Bill substantially in the form recommended by the Ontario Law Reform Commission was introduced by the Attomey-General, in March, 1973, but had not been enacted by the end of 1973. [65]

5.22 *Manitoba Law Reform Commission*. The Manitoba Law Reform Commission made a "Report on Special Enduring Powers of Attorney" early in 1974. It recommended legislation modelled on the Ontario Draft Bill (1972), but with a number of alterations.

5.23 *Manitoba: Initial safeguards*. The instrument creating the power must express the intention of the principal that the power should survive the supervening unsoundness of mind of the principal. [66] The instrument must deal with questions of initial filing of the power of attorney, accounting by the attorney, and the fees (if any) payable to the attorney. [67] The execution of the instrument by the principal is to be witnessed by persons of specified descriptions. [68] The witnesses must make an affidavit showing that they are qualified to be witnesses and, amongst other things, saying that the rincipal appeared to be of sound mind and to understand the instrument. [69] The instrument must bear an acceptance of office by the attorney. [70]

5.24 *Manitoba: filing of the instrument*. The instrument must be filed with a court and with the Public Trustee within 15 days after acceptance by the attorney. [71] A court may extend time and, if the instrument is filed within the extended time, the power is good as to acts done by the attorney subsequent to the mental incapacity of, the principal. [72] Subject to that, if the instrument is not filed within the first 15 days, the power is of no effect. [73]

5.25 *Manitoba: accounts*. The attorney must file accounts annually with the Public Trustee, if so directed by the principal in the instrument. [74] Even though there is no such direction, the Public Trustee may, on complaint by an interested party, require the attorney to file accounts with him. [75] The attorney must also file accounts on the death of the principal. [76] The Public Tnistee may investigate accounts filed with him and take action to protect the estate of the principal. [77]

5.26 *Manitoba: fees of the attorney*. The instrument must state whether the attorney is to be entitled to charge fees, but a court may permit the attorney to charge fees notwithstanding contrary provision in the instrument. [78] Where the attorney is allowed to charge fees, the amount of fees is in the discretion of the Public Trustee, subject to appeal to a court. [79]

5.27 *Manitoba: renunciation by attorney*. A court may, on application by an attorney, order that he be relieved of his duties as attorney, with the by consequence that the power of attorney terminates. [80] Presumably it follows that the attorney is not to be at liberty to renounce at will.

5.28 *Manitoba: new attorney*. On application:by an interested party, [81] or by the Public Trustee, a court may appoint a new attorney on the death or incapacity of the original attorney or in case of default by the original attorney. [82]

5.29 *Manitoba: effect of surrogate management*. A special power of attorney should cease on the commencement of a surrogate management. [83]

5.30 *Manitoba: preservation of ordinary power of attorney*. So far we have dealt with the recommendations of the Manitoba Law Reform Commission in relation to a power of attorney intended by the principal to survive his supervening mental incapacity. The Commission adds a recommendation whereby a power of attorney not so intended might be made so to survive by court order. The idea is that a man may shrink from facing the prospect of mental incapacity, and be deterred by the formalities envisaged for the giving of a protected power of attorney, yet may have given, or may give, an ordinary general power of attorney. If a court were authorized to convert such a power of attorney into a protected power of attorney, the principal's arrangements would be to some extent promoted, in that an attorney of his choice, rather than a manager under the Mental Health Act, would have the care of the principal's affairs. In addition to having power to convert an ordinary power of attorney into a protected one, the Court would have power to require the attorney to give security, to make arrangements about fees, and to impose conditions. [84]

5.31 *Law Reform Commission of British Columbia*. In 1974 the Law Reform Commission of British Columbia published a working paper (No. 12) on Powers of Attorney and Mental Incapacity. The Commission proposed (amongst other things) the enactment of legislation to provide for the creation of a special agency, to be known as an "enduring power of attorney" which would not terminate upon a subsequent legal incapacity relating to the mental condition of the principal. [85]

5.32 *British Columbia: initial safeguards*. The power of attorney should be created by a written document signed by the principal. [86] The document should show an intention of the principal that the power should endure notwithstanding supervening unsoundness of mind. [87] These two safeguards would be mandatory: other safeguards would not be mandatory, but would be encouraged by the proposed legislation. The first of these further safe-guards is that the signature of the principal be witnessed. [88] The second is that the principal should acknowledge the creation of the power before a person competent to take affidavits, and that the latter should complete an acknowledgement form referring to

the apparent mental competence and his understanding of the document. [89] The third of these further safeguards is that the document be executed under seat. [90]

5.33 *British Columbia: effect of surrogate management*. An enduring power of attorney should terminate on the appointment of a committee to manage the affairs of the principal. [91]

5.34 *British Columbia: fiduciary relation*. The legislation should provide that a fiduciary relationship exists between principal and enduring attorney. [92] The background to this is that by the rules of equity the question whether an agent is in a fiduciary relation to his principal depends on the facts of the case, not merely on the relationship of agency. An enduring attorney should always be in a fiduciary relation, so that the principal and those claiming under him will always have the advantages of that relation, such as the presumption of ownership of mixed funds and the right to trace. [93]

5.35 *British Columbia: no waiver*. A principal ought not to be able to waive any special statutory provisions, relating to the creation and use of enduring powers of attorney, which are aimed at his protection. [94] As we understand the scheme, this would apply only to the provision just noticed about the fiduciary position of the enduring attorney: the remaining legislative proposals are facultative and do not raise a case of possible waiver.

5.36 *British Columbia: other points*. An enduring power of attorney should terminate on the commencement of a surrogate management. [95] This is a sufficient safeguard against abuse by the attorney and makes it unnecessary to provide for the removal and replacement of attorneys and to provide for accounting by the attorney. [96] There is no need for a requirement that an enduring power of attorney be filed. [97] There should not be a statutory limit to the duration of an enduring power of attorney, but the principal would be able to fix a limit. [98] The law should not define any classes of persons as competent, or incompetent, to act as attorney under an enduring power. [99]

FOOTNOTES

1. 1954 c. 486. But the first enactment may have been in 1950: Uniform Probate Code (1969) Official Text with Comments, comment at p. 242. See now Va. Code Ann. sec. 11-9.1. The text appears in Allen, Ferster & Weihofen (1968) p. 178, note 113.
2. Wynn (1956). See also McAvinchey (1956).
3. See paragraph 5.2 above.
4. 2A N.C. Gen. Stat., 1965 Supp., sec. 47-115. I. See Allen, Ferster & Weihofen (1968) p. 178 note 113.
5. United States Uniform Law Handbook (1964), pp. 275-281, where the text of the Model Act is set out with a prefatory note and comments.
6. 5 Ark. Stat. Ann., 1965 Supp. sec. 58-501 and following. See Allen, Ferster & Weihofen (1968) p. 178 note 113.
7. North Dakota, Oklahoma and Wyoming: United States Uniform Law Handbook (1972) p. 349. We are unable to say with what (if any) alterations the Model Act was adopted in these States.
8. United States Model Act, s. 4.
9. Uniform Law Commissionere Prefatory note, p. 274.
10. Uniform Law Commissionere comment on section 4, p. 277.
11. Ark. sec. 58-504.
12. Allen, Ferster & Weihofen (1968) p. 179. The authors criticize the Uniform Law Commissioners for undue conservatism.
13. United States Model Act, s.2 (a) (1).
14. United States Model Act, s.1 (a). See paragraph 5.7 below.
15 United States Model Act, s.1 (a). The Arkansas Act allows, as alternatives to execution before a judge, execution before two, witnesses or before a notary public, but court approval is still required: Ark. sec. 58-501 (2), (3).
16. United States Model Act, s.3 (b).

17. United States Model Act, s.3 (b).
18. United States Model Act, s.1 (b) (1), (3).
19. United States Model Act, s.1 (b) (2), (3).
20. United States Model Act, s. 4.
21. Generally comparable with proceedings under the Mental Health Act, ss. 38, 39.
22. Allen, Ferster & Weihofen (1968) p. 179.
23. We have not found a reason for legislating against invalidity by subsequent change in physical, as distinct from mental, condition. Under the law of New South Wales a physical change does not invalidate a power of attorney.
24. United States Model Act s.1 (a). "Incompetency" commonly connotes mental disability, or something like it. Probably in the Model Act the word describes some mental condition in fact rather than the status pursuant to which a person is deprived by law of the management of his property and affairs and that management is put in the hands of some other person. See generally on the concept of "incompetency" in the United States, Allen, Ferster & Weihofen (1968) pp.2-45.
25. United States Model Act ss. 5, 6 (b). "For cause" seems to involve that removal is not to be arbitrary but for some tangible reason, for example misconduct of the attorney: Black's Law Dictionary (1968) p. 279. Cf. Companies Act, 1961, s. 266 (removal of liquidator "on cause shown").
26. United States Model Act, s. 5.
27. United States Model Act, s. 5.
28. United States Model Act, s. 5.
29. United States Model Act, s. 6 (b). We say "it seems" because it is not clear to us: no doubt it is clear one way or the other to those more familiar with the legal context of the Model Act.
30. United States Model Act, s. 6 (a) (3).
31. See paragraph 5.2 above, the Uniform Probate Code (1969) Official Text with Comments, p.242, and Word (1970) p. 236.
32. United States Uniform Law Handbook (1972) pp. 405-408.
33. United States Uniform Law Handbook (1972) p. 433 (Alaska and Idaho). The table at p. 349 adds Arizona, Colorado and North Dakota.
34. Uniform Laws Annotated, Master edition, vol. 8 (1972), 1974 pocket part p. 43.
35. Law Commission, Working Paper on Powers of Attorney (1967), paragraph 21.
36. Law Society Memorandum (c. 1967), paragraphs 11-22. These paragraphs were set out again in an appendix to a Memorandum of the Council of the Law Society on the Court of Protection, March, 1970.
37. Holbom Law Society's Comments (c. 1967), paragraphs 34, 35.
38. Law Commission Report on Powers of Attorney (1970), paragraphs 25-27.
39. Law Society Memorandum (c. 1967) pp. 11-13.
40. Ontario Report on Civil Rights (1968), vol. 3, pp. 1251, 1252, 1254.
41. Ontario Report on Powers of Attorney (1972).
42. Ontario Draft Bill (1972), s. 3.
43. Ontario Draft Bill (1972), s. 5.
44. Ontario Draft Bill (1972), s. 6 (1).
45. Ontario Draft Bill (1972), s. 6 (2).
46. Ontario Draft Bill (1972), s. 6 (1).
47. Ontario Draft Bill (1972), s. 6 (3).
48. Ontario Draft Bill (1972), s. 6 (4).
49. Ontario Draft Bill (1972), s. 6 (5).
50. Ontario Draft Bill (1972), s. 7 (1).
51. Ontario Draft Bill (1972), s. 7 (3).
52. Ontario Draft Bill (1972), s. 7 (1).
53. Compare the Manitoba Report (1974), p. 14. See note to paragraph 5.25 below.
54. Ontario Draft Bill, s. 8 (1).
55. Ontario Report on Powers of Attorney (1972), pp. 26, 27.
56. Ontario Draft Bill, s. 8 (1).
57. Ontario Draft Bill, s. 8 (4).
58. Ontario Draft Bill, s. 8 (3).
59. Ontario Draft Bill, s. 8 (2).
60. Trustee Act (R.S.O. 1970, c. 470), s. 5 (2). Cf. Trustee Act, 1925, s. 70 (6).
61. Trustee Act (R.S.O. 1970, c. 470), s. 7. Cf. Trustee Act, 1925, s. 70 (8). The draft s. 8 (2) may also attract provisions for vesting of property: see the Trustee Act (R.S.O. 1970, c. 470), ss.10, 13.

62. Ontario Draft Bill (1972), s. 9. The powers to make such an order and to appoint a committee are given by the Mental Incompetency Act (R.S.O. 1970, c. 271), ss. 7 (1), 12 (1) (a), (3). The powers are generally comparable to those under the Mental Health Act, 1958, ss. 38, 39.
63. Mental Health Act (R.S.O. 1970, c. 269), ss. 33 (1), 34. Cf. Mental Health Act, 19-58, s. 52(1).
64. Mental Health Act (R.S.O. 1970, c. 269), s. 44.
65. Manitoba Report (1974) p. 9.
66. Manitoba Report (1974) p. 11, sec. II (a).
67. Manitoba Report (1974) p. 11, sec. II (b), (c), (d).
68. Manitoba Report (1974) p. 11, sec. III.
69. Manitoba Report (1974) p.11, sec. III.
70. Manitoba Report (1974) p. 11, sec. II (c).
71. Manitoba Report (1974) p. 12, sec. IV (a), (b).
72. Manitoba Report (1974) p. 12, sec. IV (d).
73. Manitoba Report (1974) p. 12, sec. IV (c).
74. Manitoba Report (1974) pp. 11, 12, secs II (b), V (a).
75. Manitoba Report (1974) p. 12, sec. V (b). “Interested party” would include a member of the family of the principal, a person who provides board and lodging to the principal, and in some circumstances a creditor: Manitoba Report (1974) p. 14. Compare paragraph 5.18 above.
76. Manitoba Report (1974) p. 12, see. V (a).
77. Manitoba Report (1974) 12, sec. V (d).
78. Manitoba Report (1974) pp” 11, sec. II (d).
79. Manitoba Report (1974) p. 12, sec.V (c).
80. Manitoba Report (1974) p. 13, sees VI (d), VII, (a).
81. See note 15 to paragraph 5.25 above.
82. Manitoba Report (1974) pp. 13, 14, sec. VII (b).
83. Manitoba Report (1974) p. 13, sec. VI (b).
84. Manitoba Report (1974) pp. 15, 16.
85. British Columbia Working Paper (1974) p. 42.
86. British Columbia Working Paper (1974) pp. 31, 42.
87. British Columbia Working Paper (1974) pp. 29, 42.
88. British Columbia Working Paper (1974) pp. 33, 42.
89. British Columbia Working Paper (1974) pp. 33, 34, 42.
90. British Columbia Working Paper (1974) pp. 34, 42.
91. British Columbia Working Paper (1974) pp. 29, 30, 42.
92. British Columbia Working Paper (1974) pp. 41, 43.
93. British Columbia Working Paper (1974) p. 40. See Hatsbury’s Laws of England, 3rd edn, vol. 14 (1956) pp. 624-634.
94. British Columbia Working Paper (1974) pp. 41, 43.
95. British Columbia Working Paper (1974) pp. 29, 30, 42.
96. British Columbia Working Paper (1974) p. 30.
97. British Columbia Working Paper (1974) pp. 30, 31.
98. British Columbia Working Paper (1974) pp. 3 5, 3 6.
99. British Columbia Working Paper (1974) pp. 37-41.

Part 6 - Protected powers of attorney: recommendations

6.1 *General*. We recommend that the law should be changed so that a power of attorney will remain effective notwithstanding unsoundness of mind of the principal arising after the time of the giving of the power of attorney, if it appears from the instrument creating the power that the principal so intended. [1] There should not be a statutory limit on the property or income the subject of a protected power of attorney, nor on the duration of the power.

6.2 *Examination of the principal*. We recommend that there should not be any mandatory requirement for seeing that, at the time when the power of attorney is given, the principal is of sound mind or that he understands the nature and effect of the power of attorney. There should, however, be a jurisdiction to confirm a power of attorney where the Court is satisfied that the principal was sufficiently of sound mind when he gave it. [2]

6.3 *Registration*. We do not see the utility of a special requirement for the filing or registration of a protected power of attorney. We therefore recommend that there should not be such a requirement. A protected power of attorney would, however, be within the requirements for registration of powers of attorney generally. By these requirements, in general, a conveyance or other deed, including a dealing under the Real Property Act, 1900, executed under a power of attorney is invalid unless the power of attorney is registered. [3]

6.4 *Fiduciary relationship*. We have noticed the proposal of the Law Reform Commission of British Columbia that there should be a statutory provision that a fiduciary relationship exists between principal and an attorney under a protected power of attorney. [4] We do not adopt this proposal. We think that as a rule the attorney should be a fiduciary but there are cases where he should not be, or should not be for all purposes. For example, a mortgagee is not for all purposes in a fiduciary relation to his mortgagor. [5] A power of attorney given in aid of a mortgagee's power of sale should not necessarily import a full fiduciary relationship merely because it is expressed to be intended to survive the supervening unsoundness of mind of the principal-mortgagor. We think that the rules of equity are well fitted to impose a fiduciary relationship in proper cases.

6.5 *Judicial supervision*. We recommend that wide powers begiven to the Court to supervise, control or replace the attorney, and to vary or revoke the power of attorney. [6] A principal should, however, be free to restrict or exclude these supervisory powers, except that the judicial power of revocation should apply notwithstanding anything in the instrument creating the power. We see force in the view of the Law Reform Commission of British Columbia that the termination of a protected power of attorney on the commencement of a surrogate management is a safeguard against abuse by the attorney. [7] We think, however, that there will be many cases where a surrogate management will be too drastic a safeguard. Our view is, therefore, that, while a surrogate management should render a protected power of attorney liable to termination, there should be a means whereby those interested can apply to the Court for remedies which will maintain the protected power in useful operation, rather than destroy it.

6.6 *Draft Bill and notes*. The draft Bill in Appendix B expresses these recommendations in statutory form. [8] More detailed notes appear in Part 8 of this report. [9]

FOOTNOTES

1. Here we depart from the view put in our working paper on powers of attorney (paragraph 152), that a power of attorney should not be revoked by the supervening unsoundness of mind of the principal, even though the instrument creating the power is silent on the question. We are persuaded by the unanimous views of other law reform agencies who have considered the problems and by the possible risks of the survival of the power of attorney against a principal of unsound mind who has not, while of sound mind, adverted to the question.
2. See paragraphs 4.6, 4.7 above.
3. Conveyancing Act, 1919, s. 163.
4. Paragraph 5.34 above.
5. Hotel Terrigat Pty Ltd v. Latec Investments Ltd (No. 2) [1969] 1 N.S.W.R. 676.
6. See the draft section 163Gof the Conveyancing Act, 1919, in appendix B below.
7. See paragraph 8.24 below.
8. See the proposed new sections 163D, 163F, 163G for insertion in the Conveyancing Act, 1919.
9. See paragraphs 8.10-8.20 below.

Part 7 - Physical handicap

7.1 *The problem*. A man may suffer a physical handicap, for instance paralysis or coma, which renders him unable to express his will or unable to receive conununications and thus unable to manage his own property or affairs. The possibility of long periods of this kind of handicap grows with advances in medicine. Such a handicap may occur without unsoundness of mind, in the sense of ability to understand business transactions, but may make it impossible for others to form an opinion on his soundness of mind. The management of the property of such a person is at present not provided for by law and it is a problem which we expect to deal with in a later report. But the occurrence of such a handicap is a possibility for all men. Sometimes a man with property or affairs which require management gives someone a general power of attorney, to be used if occasion requires, and a possible occasion is the onset of such a handicap as we have described. The onset of such a handicap does not in law terminate the authority of the attorney: the situation is similar to that which would arise on a power of attorney surviving unsoundness of mind as recommended elsewhere in this report. There are the risks, that is to say, that the arrangements will break down because the attorney is unable or unwilling to act, and that the attorney will misuse his powers because no one has both the legal standing and the ability to control him or, if need be, to revoke the power of attorney.

7.2 *Recommendation*. We recommend that, where a person has given a power of attorney and afterwards suffers a handicap of the nature mentioned, the Court should have powers in relation to the power of attorney similar to those which we recommend in the case of a protected power of attorney.

Part 8 - Notes on the Draft Bill, 1975

8.1 *General*. Appendix B expresses our recommendations in the form of a draft Bill. The changes which we recommend should be made by amendments to the Conveyancing Act, 1919, and the Mental Health Act, 1958. The new provisions relating to initial unsoundness of mind, protected powers of attorney and physical handicap should go in the Conveyancing Act because they relate to the general law of powers of attorney, not to the statuses (of patient, incapable person and so on) which arise under the Mental Health Act. However, the new provisions relating to the effect on a power of attorney of the principal having or acquiring one of those statuses should go in the Mental Health Act, because those provisions modify what would otherwise be the effect of that Act.

8.2 *Amendment of the Conveyancing Act*. The Conveyancing Act would be amended by inserting a new division 2 in part 16, which deals generally with powers of attorney. The new division would apply only to powers of attorney given after the commencement of the new Act: [1] it is better to take no risk of upsetting existing arrangements. Consequential amendments would be made to division 1 of part 16: we deal with these later. [2]

8.3 *Initial unsoundness of mind: general*. The draft section on this subject (draft section 163E) is not concerned with cases where the instrument is void because, by reason of unsoundness of mind, the execution by the principal of the instrument creating the power is not accompanied by an intention to execute an instrument affecting his legal position, or he does not understand the nature of a power of attorney. The draft section is concerned with cases where the principal knows that he is executing an instrument creating a power of attorney and understands the nature of a power of attorney, but does not (or may not) understand, by reason of unsound mind, the nature of some or all of the acts within the scope of the power. In other words, the aim of the draft section is to provide a means for removing doubt about the effectiveness of a power of attorney which the principal intended to create and did create, not to give legal effect to an instrument which, by reason of initial unsoundness of mind, is merely an empty gesture. It is moreover a condition of the jurisdiction of the Court under draft section 163E (3) that there is a power of attorney. If a question arose whether the instrument was wholly void by reason of initial unsoundness of mind, the Court would have to determine the question. The determination would bind the parties to the proceedings as between themselves and would be persuasive for all purposes. By the terms of the draft subsection the principal. would be a necessary party. Who else would be parties would be a matter of court procedure, but probably the attorney would be a party.

8.4 *Initial unsoundness of mind: the present law*. Subsections (1) and (2) of the draft section 163E are intended to state the present law. [3] The subsections are there partly for the convenience of those concerned with applying the law, but mainly to provide a basis for subsections (3) and (4).

8.5 *Confirmation in aid of certainty*. Where the Court is satisfied on the facts that the nature of the acts within the scope of the power, or some of them, was initially within the understanding of the principal, or that, having mental capacity to do so, he has affirmed the power of attorney wholly or in part, the Court may confirm the power to an appropriate extent. Provision is made for affirmation by the principal because proof of capacity at the time of affirmation may be easier than proof of capacity at the time of the giving of the power of attorney.

8.6 *Confirmation: protected power of attorney*. In our scheme the protected power of attorney is saved from termination or suspension by reason of supervening unsoundness of mind, but it may yet be wholly or partly inoperative by reason of initial unsoundness of mind. Where the Court can see that a protected power of attorney is for the benefit of the principal, it should be able to cure defects or possible defects in the power by reason of initial unsoundness of mind. An occasion for the exercise of this paternal

jurisdiction would not arise unless the principal lacked capacity himself to confirm the power or the existence of that capacity were itself in doubt.

8.7 *Confirmation: incommunicate principal*. The state of being "incommunicate" is discussed later. [4] Where the principal is incommunicate he cannot himself affirm his power of attorney and examination for the purpose of assessing his capacity will be difficult or impossible. It is not likely to be common that a man will have the double misfortune of (a) being of questionable soundness of mind when giving a power of attorney and (b) afterwards becoming incommunicate. If he does, however, he will stand in as much need of this paternal jurisdiction to confirm his power of attorney as would a principal who has given a protected power of attorney and has afterwards come into a state of unsound mind.

8.8 *Effect of confirmation*. An order of confirmation would aid the validity of things done by the attorney after the order of confirmation takes effect but would not disturb the effect of things done before that time. Within this limit of time, the order would have effect as if the principal were of full capacity and himself confirmed the power. Questions of initial incapacity would thus be overcome.

8.9 *Exclusion of jurisdiction to confirm*. It may be that a principal will be unwilling to submit his affairs to the paternal jurisdiction which we recommend in cases where there is a protected power of attorney and where the principal is incommunicate. It is not for us nor, we suggest, for the legislature to attempt to foresee, and to weigh the sufficiency of, the wish of a principal to exclude this jurisdiction to confirm. ff the principal wants to do so, there is no reason why the law should hinder him. Our draft Bill has a subsection covering the point. By the general law, his exclusion of the power to confirm would fail if, by unsoundness of mind, he lacked understanding of the effect of the exclusion.

8.10 *Supervening unsoundness of mind: the present law*. Subsection (1) of the draft section 163F is intended to state what we think is the present law. Again, the subsection is put in partly for the convenience of those applying the law but mainly as a basis for substantive changes in draft sections 163F (2) and 163G. Draft section 165F (1) speaks affirmatively of the power of attorney being "effective" rather than negatively of the power of attorney being suspended: it does so in order to leave room for cases where, by the present law, an agency persists notwithstanding the unsoundness of mind of the principal. These cases are not fully explored by the reported decisions, but, as an example, it may be that the unsoundness of mind of one partner does not by itself affect the authority of another partner to bind him. [5]

8.11 *Protected power of attorney*. Draft section 163F (2) would give effect to the main recommendation of this report. A protected power of attorney is one which appears, by the instrument creating it, to be intended by the principal to continue notwithstanding that he afterwards incurs any loss of capacity through unsoundness of mind. [6] There are thus two requirements of form and two only. First, in accordance with the general legal concept of a power of attorney, the power must be created by an instrument. Second, there must be an expression in that instrument of the requisite intention.

8.12 *Protected power of attorney: the risks*. Draft section 163G provides for judicial control in two cases: where there is a protected power of attorney, and where a principal is incommunicate. We deal later with the case where the principal is incommunicate. [7] Giving a power of attorney always carries some risk. The attorney may turn out to be incompetent or inert or dishonest. Where the principal remains of sound mind he can keep the risk within bounds by getting accounts and other information from the attorney and, if he thinks fit, by revoking the power. These safeguards may be absent if the principal becomes of unsound mind. He may for that reason be unable to himself control the attorney and, unless he has made special. arrangements, there will be no one to do so on his behalf. There is thus a risk involved in the scheme for protected powers of attorney and the law should guard against that risk.

8.13 *Judicial Control*. Our recommendation is that the Supreme Court should be authorized to do some acts in relation to the power of attorney which the principal might do for himself if of sound mind. We shall deal later with the particular powers of the Court: we note for the present that the Court may remove an attorney from office, may appoint a new attorney, may make orders for accounts and information, and may revoke the power.

8.14 *Application for court orders*. Under the draft section 163G (2) the powers of the Court are exercisable only on application by the principal. Since the section is intended for use when the principal is of unsound mind we should discuss the intention behind this arrangement. The section enables the Court to do things which the principal might do if of sound mind. If, therefore, a principal applied for orders under the section, and it appeared to the Court that there was no question of soundness of mind, the Court would as a rule refuse his application because approach to the Court was not necessary. The real operation of the section in the case of the protected power of attorney is where the principal is of unsound mind or the soundness of his mind is in doubt. The section is designed to operate in the context of the procedure of the Supreme Court in proceedings where a party is, owing to the mental illness, incapable of managing his affairs in respect of the proceedings. He is then a mentally disable person for the purposes of the rules of court and an application to the Court may be made in his name by another person as his next friend or tutor. [8] To state the position in reference to the draft section 163G, an application under the draft section in the name of a principal could be made by any person as his tutor. [9] If the principal thought that he, the principal, was not a mentally disable person, he could seek a decision of the Court on that question and, if he succeeded, proceedings on the application under the draft section would be dismissed or stayed. [10] Apart from the case where the principal raises the question, there is no need for evidence of unsoundness of mind. If it was thought that the application was not for the benefit of the principal, any one could apply in his name for an order that the proceedings be stayed. [11] Even in the absence of an application for stay, the Court would not make an order under the draft section unless it appeared that the order would be for the benefit of the principal. [12]

8.15 *Avoidance of stigma*. The procedure just described is attractive because in the general run of cases there will be no inquiry into, nor any finding of, unsoundness of mind. There will thus be avoided the hurt to the feelings of the person concerned and his family and friends which is commonly caused by Court determinations of unsoundness of mind. This result is achieved at the price of expressing the legislation in a way which will not convey its full effect to those unfamiliar with court procedures. But the price is worth paying.

8.16 *Removal, appointment of new attorney, revocation*. Paragraphs (a), (b) and (e) of the draft section 163G (2) are, we think, straight-forward enough. They will enable the Court to get rid of a bad attorney, to fill vacancies, and to put an end to the power of attorney altogether if one of those courses appears to be for the benefit of the principal. The draft section has in it the implication that the power of attorney will not be altogether terminated by, say, the death of the attorney but will remain on foot so as to support an appointment of a new attorney by the Court. This is some departure from ordinary notions of the law of agency, but we see no harm in it.

8.17 *Accounts and information*. The power to make orders for the furnishing of accounts and information needs some explanation. If the principal were of unsound mind, proceedings for this purpose might be brought under the general law in his name by some person as his next friend or tutor. But in the ordinary course this would lead to the tutor having access to the accounts and information and he may seek that access for some purpose irrelevant to the benefit of, or inimical to, the principal. It may be that the powers of the Court under the general law are sufficient to guard against this abuse, but it seems as well to enact specifically that the Court may make orders for preventing unnecessary disclosure of the affairs of the principal.

8.18 *Variation of powers and rights*. Paragraph (c) of section 163G (2) is not concerned with controlling the attorney or seeing that the intentions disclosed by the instrument creating the power are realized. Paragraph (c) is rather concerned with altering the scope of the power of attorney or the relationship between principal and attorney in cases where the Court can see that the alteration is for the benefit of - the principal. The principal may have given a power of attorney to an honest and capable attorney and, the principal having become of unsound mind, it may appear to be for his benefit that the attorney should carry out some transaction which is, or may be, beyond the scope of the power of attorney. For example, it may appear to be for the benefit of the principal to make a settlement of property, or to take part in a reorganisation of a company, to soften the impact of a change in the taxation laws. If the attorney and any other interested person consent, then the Court can make the alteration. “Interested person” here means a person with a legal interest, that is, one whose legal position is affected by the

alteration. Again, the power of the Court is to do something which the principal himself might do if of sound mind.

8.19 *Exclusion of the powers of the Court*. We think that the Court should have power to revoke a protected power of attorney no matter what is said by the instrument creating the power. There is too great a risk of things going wrong if an attorney is altogether uncontrollable. And the existence of a power to revoke may render unnecessary the more drastic methods of getting rid of a power of attorney, i.e., proceedings for management of property under the Mental Health Act. In the presence of this ultimate safeguard of a power to revoke, it appears to us to be safe to allow a principal, if he thinks fit, to limit the powers of the Court over his own power of attorney. Draft section 163G (5) is directed to these purposes.

8.20 *Effect of order*. Following further the concept that the Court stands in the place of the principal who, through unsoundness of mind, cannot act for himself, a removal, appointment, alteration or revocation by order of the Court has effect as if done by the principal. [13]

8.21 *Incommunicate principal: the problem*. A principal may incur some defect such as coma or paralysis which makes him unable to receive communications, or unable to express his will, respecting his property and affairs. Such a defect may or may not amount to unsoundness of mind, [14] but in the nature of things could not be shown to affect his ability to understand the nature of business transactions. The defect therefore would not affect his power of attorney, yet it would prevent him from supervising the attorney and it would prevent him from revoking his power of attorney. His affairs are thus placed in a state of risk resembling the risks which would arise if the law permitted the giving of a protected power of attorney without provision for control and supervision such as that which we have framed in the draft section 163G.

8.22 *Incommunicate principal: the solution*. Draft section 163Gwould apply to a power of attorney if the principal became incommunicate. The difficulty is that the defect which prevents him from controlling his attorney also prevents him from applying to the Court, yet does not, or at least may not, amount to mental illness so as to open the way for the commencement of proceedings in his name by some one else as his next friend or tutor. Our solution is the draft section 163H. This draft section would enable proceedings under the draft section 163G to be taken on behalf of an incommunicate principal, would give power to regulate such proceedings by rule of Court, and would provide that, subject to rules of Court, the procedure in the case of persons of unsound mind is to apply.

8.23 *Consequential amendments to the Conveyancing Act*. Some consequential amendments are merely formal and we say no more about them. [15] The protections of an attorney and third parties in case of transactions without notice of termination of a power of attorney are extended to cases of transactions without notice of suspension of a power of attorney. [16] This does no more than express the policy of the present legislation. Criminal liability is put on an attorney who acts notwithstanding knowledge of the suspension of the power of attorney. [17] Again, this does no more than express the policy of the present legislation.

8.24 Powers of attorney and the Mental Health Act. We have pointed out the obscurity of the law on the effect on a power of attorney of a management under the Mental Health Act. [18] We think that the law should be clarified. It remains to add that it may be found convenient to allow the power of attorney to have some operation while the property of the principal is subject to management under the Act, and it may seem right to terminate or restrict the power of attorney so that it will not come into operation, or fully into operation, on the property of the principal ceasing to be under management. The draft new section 110Aof the Mental Health Act has these objects in view. [19]

R. D. CONACHER, Deputy Chairman.
D. GRESSIER, Commissioner.

6th January, 1975.

FOOTNOTES

1. Draft section 163c of the Conveyancing Act.
2. Paragraph 8.23 below.
3. See paragraphs 3.2, 3.3 above.
4. Paragraph 8.21 below.
5. Lindley (1962) p. 590, note 72; Halsbury's Laws of England, 2nd edn. vol. 28 (1959), p. 567, note (o).
6. Draft section 163D.
7. Paragraphs 8.20, 8.21 below.
8. Supreme Court Rules, 1970, pt 1 r. 8 (1); pt 63 generally. Beall v. Smith (1873) L.R. 9 Ch. App. 85; Jones v. Lloyd (1874) L.R. 18 Eq. 265; Porter v. Porter (1888) 37 Ch.D. 420.
9. There are some exceptions to the proposition that the application might be made by any person, but the exceptions do not matter here. See Supreme Court Rules 1970 , pt 63 r. 4.
10. Palmer v. Walesby (1868) L.R. 3 Ch. App. 732; Pope (1890) p. 329.
11. Howell v. Lewis (1891) 61 L.J. Ch. 89; 65 L.T. 672; Didisheim v. London and Westminster Bank [1900] 2 Ch. 15, 43, 44; New York Security and Trust Co. v. Keyser [1901] 1 Ch. 666; Pope (1890) pp. 326, 327.
12. Draft section 163G (2). See also Jones v. Lloyd (1874) L.R. 18 Eq. 265, 272; Porter v. Porter (1888) 37 Ch. D. 420; Wilder v. Pigott (1882) 22 Ch. D. 263.
13. Draft section 163G (6).
14. In re Barber (1888) 39 Ch. D. 187; Kirby v. Leather [1965] 2 Q.B. 367, 387B, C.
15. Draft Bill s. 2 (a), (b).
16. See the amendments to the Conveyancing Act, ss. 158, 161, 162 by the draft Bill s. 2 (c), (d), (e).
17. See the amendments to the Conveyancing Act ss. 158, 162A by the draft bill s. 2 (c), (f).
18. See paragraph 3.5 above.
19. Compare the United States Model Act, s. 6 (a) (3). See paragraph 5.9 above.

Appendix A - Draft Conveyancing (Amendment) Bill, 1974

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

1. This Act may be cited as the "Conveyancing (Amendment) Act, 1974." — Short title.

2. This Act shall commence on 1st January, 1975. — Commencement.

3. The Conveyancing Act, 1919, is, in this Act, referred to as the Principal Act. — Principal Act.

4. The Principal Act is amended by omitting from section 2 in the matter relating to Part XVI the figures "163" and by inserting instead the figures "163B". — Amendment of Act No.6, 1919. Sec.2.

5. The Principal Act is further amended by omitting section 158 and by inserting instead the following section — Further amendment of Act No.6, 1919. Sec.158.

158. (1) In this Part- — Definition.

"attorney", in relation to a power of attorney, means an attorney under the power;

"power of attorney" or "power" includes an authorised substitution, delegation, or appointment of sub-attorney;

"principal", in relation to a power of attorney, means the person giving the power.

(2) This Part shall not enable an attorney irrevocably to appoint a substitute, delegate, or sub-attomey, unless expressly authorised so to do.

(3) This Part shall extend to powers of attorney authorising, whether expressly or in general terms, the execution of dealings under the Real Property Act, 1900.

6. The Principal Act is further amended by omitting section 159 and by inserting instead the following section : — Further amendment of Act No.6, 1919. Sec.159.

159. (1) An attorney under a power of attorney may- — Execution under power of attorney. cf.1971 c.27, s.7(1).

(a) execute any assurance or instrument with his own signature and, where sealing is required, with his own seal; and
(b) do any other thing in his own name; by the authority of the principal.

(2) An assurance or instrument executed or thing done in that manner shall be as effectual as if executed,or done by the attorney with the signature and seal, or, as the case may be, in the name,

of the principal.

7. The Principal Act is further amended by omitting section 160 and by inserting instead the following section-

Further amendment of Act No.6, 1919. Sec.160.

160. (1) Where a power of attorney is, in the instrument creating the power, expressed to be irrevocable and is given, or in the instrument creating the power is expressed to be given, for valuable consideration, then, subject to the terms of the instrument, the power is not revoked nor otherwise terminated by, and remains effective notwithstanding-

Irrrevocable powers.

(a) anything done by the principal without the concurrence of the attorney;
(b) bankruptcy of the principal;
(c) mental incapacity of the principal;
(d) the principal becoming a patient, a protected person or an incapable person within the meaning of the Mental Health Act, 1958, or any other event happening whereby the property or affairs of the principal become subject to care, management, collection, administration, charge or control under that Act;
(e) death of the principal;
(f) if the principal is a corporation dissolution of the corporation.

(2) Where the objects of a power of attorney to which this section applies have been carried out, or have become incapable of being carried out, or a power of attorney to which this section applies is otherwise exhausted, the Court may order that the power of attorney terminate and may order that the instrument creating the power be delivered up for cancellation.

(3) This section does not apply to a power of attorney created by an instrument executed before the commencement of the Conveyancing (Amendment) Act, 1974.

8. The Principal Act is further amended by omitting sections 161, 162 and 162A and by inserting instead the following sections :-

Further amendment of Act No.6, 1919. Secs. 161, 162, 162A.

161. (1) Where-

Termination: protection of attorney.

(a) an attorney under a power of attorney does an act within the scope of the power; and
(b) at that time the attorney does not have notice that the power had terminated;

he shall be entitled to rely onthe power, as against tjie principal and any other person, notwithstanding any termination of the power before the time of the act, in the swne manner and to the same extent as if the power had not terminated before the time of the act.

(2) This section applies only to an act done by an attorney after the commencement of the Conveyancing (Amendment) Act, 1974.

162. (1) Where-

Termination: protection of strangers.

(a) an attorney under a power of attorney does an act within the scope of the power, professing to act on behalf of another;
(b) at the time of the act of the attorney or afterwards, a third person-
(i) acts as a purchaser or incurs an obligation or otherwise acts to his detriment in a transaction (with the attorney or with any other person) which depends for its validity or effect on the power not having terminated at the time of the act of the attorney; or
(ii) acts in reliance on a right, title or interest which so depends; and
(c) at the time of the act of the third person he does not have notice that the power had terminated before the time of' the act of the attorney;

the third person and any person claiming under him shall be entitled, as against the principal and the attorney and any other person, to rely on the power, notwithstanding any termination of the power before the time of the act of the attorney, in the same manner and to the same extent as if the power had not terminated before the time of the act of the attorney.

(2) Subsection (1) shall not entitle an attorney to rely on a power m support of an act within the scope of the power done by him with notice of termination of the power.

(3) This section applies only to an act done by an attorney after the commencement of the Conveyancing (Amendment) Act, 1974.

Attorney acting with knowledge of termination of power.

162A. (1) Where a power of attorney has terminated and an attorney under the power, knowing of the termination, does any act or thing under or in pursuance of the power, he shall be guilty of a misdemeanour.

(2) This section applies only to acts or things done after the commencement of the Conveyancing (Amendment) Act, 1974, under a power of attorney whenever given.

Further amendment of Act No.6, 1919. Sec.163.

9. The Principal Act is further amendedby omitting from section 163 the words “donee of” wherever occurring and by inserting instead -the words “attorney under”.

Further amendment of Act No.6, 1919.

10. The Principal Act is further amended by inserting next after section 163 the following new sections-

Proof of powers of attorney.

163A. (1) Where it is certified in writing for the purposes of this section bythe principal orby a person of a prescribed class that a document is a true and complete copy of an instrument creating a power of attorney that document shall be evidence of-

(a) the execution and -the contents of the instrument, as against the principal; and of
(b) the contents of the instrument, as against any other person.

(2) Subsection (1) does not make a document better evidence than is the instrument of which it purports to be a copy.

(3) This section does not affect any other method of proving the contents of an instrument creating a power of attorney.

(4) A person (other than the principal under a power of attorney) who gives a certificate for the purposes of this section in respect of a document purporting to be a copy of a power of attorney and-

(a) is not a person of a class prescribed for the purposes of subsection (1) ; or
(b) is not authorised by the principal to give the certificate,

shall be guilty of a misdemeanour.

(5) A person who gives a certificate for the purposes of this section knowing the certificate to be false shall be guilty of a misdemeanour.

(6) This section applies only to a document certified under subsection (1) after the commencement of the Conveyancing (Amendment) Act, 1974.

General power of attorney.

163B. (1) Where the instrument creating a power of attorney is expressed to authorise an attorney under the power to do on behalf of the principal any thing ,that the principal may lawfully authorise an attorney to do (in this section called a general authority), whether or not subject to conditions or limitations expressed in the instrument, the instrument shall have effect in accordance with its

terms.

(2) A general authority may be given by means of an instrument in or to the effect of the form set out in the Seventh Schedule.

11. The Principal Act is further amended by omitting Schedule VII and by inserting instead the following-

Further amendment of Act No.6, 1919. Schedule VII Sec.163B.

SCHEDULE VII.

General Power of Attorney

THIS GENERAL POWER OF ATTORNEY is made on the day _____ of _____, 19___ by AB of _____ in pursuance of section 163B of the Conveyancing Act, 1919.

1. I APPOINT CD of _____ to be my attorney.
2. I AUTHORISE my attorney, subject to clause 3, to do on my behalf any thing that I may lawfully authorise an attorney to do.
3. THE AUTHORITY of my attorney is subject to the following conditions or limitations:-

Saving.

IN WITNESS, etc.

12. The omission by this Act of sections 161, 162 and 162A of the Principal Act does not affect the operation of those sections in relation to a power of attorney created by an instrument executed before the commencement of this Act.

Appendix B - Draft Conveyancing and Mental Health (Amendment) Bill, 1975

NOTE.-This draft assumes the prior enactment of a Bill in the terms of Appendix A. *See* paragraph 1.3 above.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows .-

1. This Act may be cited as the "Conveyancing and Mental Health (Amendment) Act, 1975". — Short title.

2. The Conveyancing Act, 1919, is amended- — Amendment of Act No.6, 1919.

(a) by omitting from section 2,the matter "PART XVI. -POWERS OF ATTORNEY-SS. 158-163B." andby inserting instead the matter- — Sec.2. (Division of Act).

PART XVI.-POWERS OF ATTORNEY

DIVISION 1.-General provisions-ss. 158-163B.

DIVISION 2.-Unsoundness of mind and handicap-ss. 163c-163H. — Part XVI. (Powers of Attorney).

(b) by inserting in Part XVI after the heading "POWERS OF ATTORNEY" the following new matter-

DIVISION 1.-General provisions.;

(c) by inserting in section 158 after subsection (1) the following new subsection:- — Sec.158. (Definition).

(1A) In sections 161, 162 and 162A, "suspended", in relation to a power of attorney, means-

(a) suspended or restricted in operation by reason of unsoundness of mind of the principal occurring after the execution of the instrument creating the power; or
(b) suspended by section 110A (5) of the Mental Health Act, 1958;

(d) (i) by inserting in section 161 (1) after the words "had terminated", the words "or had been suspended"; — Sec.161. (Termination: protection of attorney).
(ii) by inserting in the same subsection, after the words "any termination", the words "or suspension";
(iii) by inserting in the same subsection, after the words "not terminated", the words "or had not been suspended";

(e) (i) by inserting in section 162 (1) after the words "having terminated", the words "and not being suspended"; — Sec.162. (Termination: protection of strangers).
(ii) by omitting paragraph (c) of the same subsection and by inserting instead the following paragraph"at the time of the act of the third person he does not have notice that, at the time of the act of the attomey, the power had terminated or was suspended so far as concerns the authority of

the attorney to do that act;";
(iii) by inserting in the same subsection, after the word "attorney" where secondly occurring in the matter following paragraph (c), the words "and notwithstanding any suspension of the power atthat time so far as concerns,authority to do that act";

(iv) by inserting at the end of the same subsection the words "and were not suspended at that time;
(v) by inserting at the end of section 162 (2) the words "or notice of suspension of the power so, far as concerns authority to do that act";
(f) by inserting in section 162A, after subsection (1), the following new subsection :-

Sec.162A. (Attorney acting with knowledge of termination of power).

(1A) Where a power of attorney is suspended so far as concerns authority to an attorney to do an act or thing of any nature and an attomey under the power, knowing of the suspension, does an act or thing of that nature under or in pursuance of the power, he shall be guilty of a misdemeanour.

(g) by inserting after section 163B the following new Division:-

New Division 2 of Part XVI.

DIVISION 2.-Unsoundness of mind and handicap.

163C. This Division applies only to a power of attorney given after the commencement of the Conveyancing and Mental Health (Amendment) Act, 1975.

Application.

163D. In this Division-

Interpretation.

"incommunicate" in relation to a person, means under such a handicap of body or mind, by way of coma, paralysis or otherwise, whether or not induced by any drug or by medical or other treatment, that he is unable to receive communications respecting his property or affairs, or to express his will respecting his property or affairs.

"protected power of attorney" means a power of attorney which is, inthe instrument creating the power, expressed to be given with the intention that it will continue to be effective notwithstanding that after the execution of the instrument the principal suffers loss of capacity through unsoundness of mind.

163E. (1) Subject to this section, a power of attorney is not ineffective by reason that any act within the scope of the power is of a nature which is, at the time when the power is given, beyond the understanding of the principal)through unsoundness of mind.

Initial unsoundness of mind.

(2) Subject to subsections (3) to (6), a power of attorney does not authorise an attorney under the power to do an act of a nature which is, at the time when the power is given, beyond the understanding of the principal through unsoundness of mind.

(3) Where, on application by the principal under a power of attorney, it appears to the Court that the nature of the acts, or of some one or more of the acts, within the scope of the power was not at the time when the power was given, beyond the understanding of the principal through unsoundness of mind, the Court may by order confirm the power wholly or in part as the case requires.

(4) Where, on application by the principal under a power of attorney, it appears to the Court that the principal has before or during the proceedings on the application, affirmed the power wholly or in part, the Court may by order confirm the power wholly or in part as the case requires, but only to the extent to which it appears to the Court that the principal is, at the time of the affirmation, sufficiently of sound mind so to affirm.

(5) Where, on application by the principal under a power of attorney, it appears to the Court that-

(a) the power of attorney is a protected power of attorney or the principal is incommunicate; and
(b) it is for the benefit of the principal that the power be confirmed wholly or in part-

the Court may:by order confirm the power wholly or in part as the case requires.

(6) Where the Court makes an order under,this section confirming a power of attorney wholly or in part, an act within the scope of the power to the extent so confirmed, done after the order takes effect by an attorney under the power, shall be as good for all purposes and between all persons as if at the time when the order takes effect the principal were of full capacity and in due form confirmed the power of attorney to the extent of the order of confirmation.

(7) Subsection (5) applies. only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.

Supervening unsoundness of mind.

163F. (1) A power of attorney is effective so far as concerns any act within its scope, being an act of a nature which is not, at the time of the act, beyond the understanding of the principal through unsoundness of mind.

(2) A protected power of attomey is effective so far as concerns any act within its scope, notwithstanding that the act is of a nature which is, at the time of the act, beyondthe understanding of the principal through unsoundness of mind.

(3) This section does not save a power of attorney from being or becoming ineffective by reason of any matter other than unsoundness of mind of the principal arising after the execution of the instrument creating the power.

(4) This section applies only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.

Protected power or incommunicate principal: judicial control.

163G. (1) This section applies to-

(a) a protected power of attorney; and
(b) a power of attorney the principal under which is for the time being incommunicate.

(2) Where, on application by .the principal under a power of attorney, it appears to the Court to be for his benefit, the Court may, on his behalf, by order-

(a) remove a person from office as attorney;
(b) appoint a person to fill a vacancy in the office of attorney;
(c) with the consent of the attorney and of any other interested person-
(i) alter the scope of the power;
(ii) otherwise alter the instrument creating the power; or
(iii) alter the rights and duties of the principal and the attorney between themselves;
(d) direct an attorney to fumish accounts and other information to the Court orto a person approved by the Court; or
(e) revoke the power.

(3) For the purposes of subsection (2) (b), a vacancy in the office of attorney occurs in any of the following events

(a) renunciation of the power by an attorney;
(b) removal of an attorney by the principal or with his authority, or by the Court under subsection (2);

(c) disability of an attorney;
(d) death of an attorney;
(e) where an attorney is a corporation, liquidation or dissolution of the corporation; or
(f) other event personal to an attorney whereby his authority is terminated.

(4) Where the Court makes an order directing an attorney to furnish accounts or other information under subsection (2) (d), the Court may make further orders for-

(a) preventing unnecessary disclosure of the affairs of the principal; and
(b) inquiry and report on the conduct of the attorney.

(5) The Court may revoke a power of attorney under subsection (2) (e) notwithstanding anything in the instrument creating the power, but otherwise subsections (2), (3) and (4) apply only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.

(6) A removal, appointment, alteration or revocation under subsection (2) (a), (b), (c) and (e) shall have effect as if done in due form by the principal, and as if he were of full capacity and were, so far as necessary, authorised to do the thing in question by the instrument creating the power.

(7) This section has effect subject to section 160.

163H. (1) Wherethe principal under a power of attorney is incommumcate- Incommunicate principal: procedure.

(a) proceedings under this Division by the principal-
(i) may be commenced and carried on as prescribed by rules of court; or
(ii) subject to rules of court, may be commenced and carried on as if the principal were of unsound mind; and
(b) subject to rules of court, all persons shall, in relation to the proceedings, be as nearly as may be in the like position in law as if the principal were of unsound mind.

(2) Subsection (1) does not limit the rule-making powers conferred by the Supreme Court Act, 1970.

3. The Mental Health Act, 1958, is amended by inserting after section 110 the following new section:- Amendment of Act No.45, 1958.

110A. (1) In this section “principal” means a person who has given a power of attorney. Powers of attorney.

(2) A power of attorney is not terminated by property of the principal becoming subject to management under this Act.

(3) Subsection (2) has effect subject to the terms of the instrument creating the power.

(4) A person may give a power of attorney notwithstanding that his property is subject to management under this Act.

(5) A power of attorney is suspended while property of the principal is subject to management under this Act -

(6) Notwithstanding subsection (5), where an attorney under a power of attorney does an act within the scope of the power while property of the principal is subject to management under this Act, the act of the attorney has no less validity and effect than the act of the attorney would have had if this section had not been enacted, but this subsection does not affect the operation of subsection (9).

(7) While a power of attorney is suspended by this section, the Court may restore the power of attorney to operation to such extent, and on such terms and conditions, as the Court thinks fit.

(8) The Court may restore a power of attorney to operation under subsection (7) as from any time whether before or after the order of restoration is made or takes effect.

(9) Where property of a principal is subject to management under this Act, the Court may-

(a) terminate the power of attorney; or
(b) order that the power of attorney be subject to such conditions and restrictions as the Court thinks fit.

(10) An attorney under a power of attorney and persons dealing with the attorney and all other persons shall have the like protections against any term or condition of any restoration of the power, and against any condition or restriction to which the power is subjected under this section as if the term, condition or restriction were effected by act of the principal.

(11) For the purposes of this secition-

(a) where a person becomes a patient, ‘his property thereupon becomes subject to management under this Act and remains so during his life or until his discharge or, if after his discharge the Protective Conu-nissioner continues to have the care, protection and management of any of his property, until the Protective Commissioner ceases to do so;
(b) where the Protective Commissioner takes charge of the estate of a voluntary patient under section 22, his property thereupon becomes subject to management under this Act and remains so during his life or until the Protective Commissioner gives up charge of the estate or until the discharge of the voluntary patient, whichever is the later, or if after his discharge the Protective Commissioner continues to have the care, protection and management of any of his property, until the Protective Commissioner ceases to do so;
(c) where a person be,comes a protected person or an incapable person, his property thereupon becomes subject to management under this Act and remains so duringhis life or until the Court makes a declaration in relation to him under section 40;
(d) where the Court directs a copy of an inquisition or finding in relation to a person to be filed of record in the Court under section 40, his property thereupon becomes subject to management under this Act and remains so during his life or until the Court declares that management of his estate under section 40 is not required; and
(e) where, in relation to a person, it is certified to the Protective Commissioner and the Protective Commissioner is authorised as mentioned in section 101 (1), the property of that person thereupon becomes subject to management under this Act and remains so during his life or until the Court declares that the exercise of the powers of the Protective Commissioner in relation to his property is not required.

(12) The Court may make a declaration for the purposes of paragraph (d) or (e) of subsection (11) on the application of the Protective Commissioner or of ,the person whose power of attorney is in question or of an attorney under the power of attorney.

(13) A declaration for -the purposes of paragraph (d) or (e) of subsection (11) shall not have any effect otherwise than for the purpose of the paragraph concerned.

(14) This section does not apply to a power of attorney given before the commencement of the Conveyancing and Mental Health (Amendment) Act, 1975.

(15) This section has effect subject to section 160 of the Conveyancing Act, 1919.

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