

*Insert at page 703 after Note 3 to Fidelity Bank v. Gorson:*

4. Section 3.13(1) of the Restatement Third continues the rule that powers given as security cannot be terminated by either a voluntary act of the principal or the principal's death. Instead,

[a] power given as security ... is terminated by an event that

(a) discharges the obligation secured by the power or terminates the interest secured or supported by the proxy,

(b) makes its execution illegal or impossible, or

(c) constitutes an effective surrender of the power or proxy by the person for whose benefit it was created or conferred.

Restatement Third § 3.13(1) (T.D. 2 2001).

5. Under the Restatement Third, the holder of a power given as security is *not* the agent of the principal:

A power given as security is a power to affect the legal relations of its creator that is created *in the form of* a manifestation of actual authority and *held for the benefit of the holder or a third person*. This power is given to protect a legal or equitable title, or to secure the performance of a duty apart from any duties owed the holder of the power by its creator that are incident to a relationship of agency under § 1.01. It is given upon the creation of the duty or title or for consideration. *It is distinct from actual authority that the holder may exercise if the holder is an agent of the creator of the power.*

Restatement Third § 3.12(1) (T.D. 2 2001) (emphasis added). If the holder of a power given as security is not an agent, then the holder is not a fiduciary of the person who gave the power:

A power given as security does not create a relationship of agency as defined in § 1.01 because it is neither given for, nor exercised for, the benefit of the person who creates it. *The holder is not subject to the creator's control and the holder does not owe fiduciary duties to the creator.*

Restatement Third § 3.12 cmt. b (T.D. 2 2001) (emphasis added).