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Remedying Financial Abuse by Agents Under a Power of Attorney for Finances

Although financial elder abuse is often viewed as involving vulnerable victims, most victims are competent.

By Michele M. Hughes

Introduction

Financial exploitation of older persons, including the systematic depletion of bank accounts or other resources for the benefit of the abuser, has been tagged the "crime of the 90s."¹ The number of financial exploitation cases will only continue to rise with the arrival of the millennium, as the population continues to age. Despite the increase in financial abuse cases, law enforcement officials remain reluctant to pursue perpetrators of abuse, traditionally viewing the situation as a family matter best resolved by civil litigation. In turn, civil litigators may hesitate to take on a case in which they must plead complex and varied legal remedies. Because of concern with the financial abuse of older persons, it is beneficial to describe remedies an attorney could pursue to address this growing problem. While this article refers to many Wisconsin resources, the problem of financial abuse is recognized nationwide.

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Sadly, in more than eighty percent of cases, those abused by an agent under a durable power of attorney are victimized by relatives, most of whom are immediate family members.² Although financial elder abuse is often viewed as involving vulnerable victims, more often than not, the victims are competent. One national study of abuse patterns by agents under a durable power of attorney for finances revealed that 57 percent of the principals were competent when the abuse occurred. The agents in those cases misappropriated more than one half of the principals' assets in 70 percent of the cases.³ Whether or not the victim is competent, and whether or not the abuser is a family member, it is critical that abusers be vigorously pursued. Financial abuse is not only immoral; it is often criminal.

This article outlines various remedies an attorney may use in pursuing an agent under a power of attorney for finances who has misappropriated funds or other property from the unsuspecting principal. These legal actions include an action for breach of the agent's fiduciary duty, conversion, fraud, undue influence, tortious interference with an expected inheritance, eviction, and to void a contract based on lack of mental capacity to contract. Equitable remedies may be available to the principal, including an action to establish a constructive trust, and for an accounting. A statutory remedy to petition the probate court to review the agent's performance may be available. This article explains how the remedy of surcharging the abusing agent can defray the victim's legal fees in bringing a civil action against the agent.

In addition to the remedies outlined in this article, numerous other causes of action may occur to the creative lawyer.⁴ An attorney will need to plead multiple causes of action in most financial exploitation cases. Before discussing these various remedies,

the nature of the relationship between an agent and his or her principal under a durable power of attorney document and the general construction principles of power of attorney for finances documents will be discussed.

The Nature of the Relationship Between an Agent and His or Her Principal Under a Durable Power of Attorney

To pursue remedies for an agent's misappropriation or other financial abuse, it is useful to understand the nature of the agent/principal relationship created by a power of attorney for finances document. This relationship may be defined by statutory or common-law provisions or both. Some state statutes specifically define this relationship as an agency relationship, where the agent is required to act in a fiduciary capacity.⁵

Courts generally hold that an agent is a fiduciary with respect to the matters within the scope of his or her agency.⁶ The very relation implies that the principal has reposed some trust or confidence in the agent. Therefore, the agent is bound to exercise the utmost good faith and loyalty toward his or her principal.⁷ The agent's duty is to act solely for the benefit of the principal in all matters connected with his or her agency. It is the duty of the agent to further the principal's interests, even at the expense of the agent's own interests in matters connected with the agency.⁸

The fact that an individual's execution of a power of attorney for finances document creates an agency relationship with the agent is important in many respects in representing clients who have been financially exploited by those agents. As will be shown below, a practitioner may cite case law involving other types of agents with fiduciary obligations, such as trustees⁹ and real estate agents, in briefing issues. In addition, selections from the Restatement (Second) of Trusts and the Restatement (Second) of Agency will undoubtedly prove useful to support your arguments.

Construction of Power of Attorney Documents Generally and of Gifting Clauses

General Construction

It is widely held that power of attorney documents must be strictly construed.¹⁰ Thus, courts hold that the documents grant only those powers that are clearly delineated or specified¹¹ or, alternatively

stated, those powers that are contained in the "four corners of the document."¹² It has even been said that a power of attorney for finances document is construed more strictly than an ordinary contract, especially if the authorized agent is given broad authority over all or much of the principal's property.¹³ The strict construction principal is useful to an attorney whose client's assets have been stolen by his or her chosen agent.

Gifting

A practitioner representing a victim of financial exploitation by an agent under a power of attorney for finances will want to have a clear understanding of his or her state's common or statutory law defining an agent's authority to gift. Perpetrators unfailingly raise a defense that the document allows the agent to gift to himself, herself, or others. Courts have uniformly held that unless the power of attorney document contains a specific clause allowing the agent to gift the principal's money to the agent or contains a broad gifting power, the agent does not have authority to gift to himself or herself.¹⁴ Even where a document authorizes the agent to sell and convey property, the agent may not gift such property unless the document contains gifting provisions that are fairly specific.¹⁵

A majority of courts that have considered the issue have held that when a power of attorney for finances document does not expressly authorize the agent to make gifts to himself or herself, extrinsic evidence of the principal's intent to allow such gifts is not admissible; although at least one jurisdiction has held that this is not a bright-line rule and that the surrounding circumstances may be taken into consideration.¹⁶ Other courts have also considered extrinsic circumstances, such as a pattern of gifting prior to the execution of the document, in determining whether gifting is authorized under the document, at least where the document is ambiguous on this point.¹⁷

The Restatement (Second) of Agency Section 34 Comment h (1958) provides that formal instruments, including powers of attorney, "can be assumed to spell out the intent of the principal accurately with a high degree of particularity." It is assumed that the document represents the entire understanding of the parties. Dangerous powers, such as the power to borrow money, will not be inferred unless it is reasonably clear that this was intended.

Furthermore, even if a power of attorney for finances document contains a clause granting the agent broad gifting power, an agent nonetheless has a fiduciary duty of loyalty to the principal.¹⁸ Thus, an agent may not gift to himself or herself or others with impunity. The gifting must be consistent with the terms and conditions of the gifting clause. Where the gifting clause does not specify the nature and amount of the gifts allowed, the agent nonetheless has a fiduciary duty to act with the principal's utmost concern in mind, not the agent's.¹⁹ Finally, an argument could be made that an agent who believes he or she is authorized under the power of attorney for finances document to gift to himself or others has a duty to disclose those gifts and obtain consent from the principal.²⁰

Certainly, a principal may grant an agent broad gifting powers. Experienced elder law practitioners use power of attorney for finance documents to effectuate an overall estate plan for an individual or couple. The document may include provisions to allow the agent to divest the principal's assets prior to a medical assistance application. A substituted judgment standard clause allowing the agent to substitute his or her own judgment for the principal's, which even allows the agent to choose a new agent if he or she becomes available to serve, may also be included. However, elder law practitioners reserve use of such clauses for cases where a married couple are principal and agent, the couple has been happily married for many years, and they trust one another completely. These clauses must be drafted carefully in order to avoid a later challenge to the agent's gifting authority.

A Petition to Review the Agent's Performance

Some states provide a statutory cause of action that allows any interested person to petition the probate court to review whether the agent is performing his or her duties in accordance with the terms of the durable power of attorney. Typical remedies the court may impose include directing the agent to act in accordance with the power of attorney document, requiring the agent to report his or her actions to the court periodically, or even rescinding the agent's powers to act.²¹

Breach of Fiduciary Duty

Because an agent owes a fiduciary duty to his or her principal, a cause of action for breach of that

fiduciary duty may redress a wide variety of aberrant conduct by an agent.²² An agent is required to act for the advancement of the interests of the principal. The agents may not serve or acquire any private interest of his or her own that is adverse to the interests of the principal without the principal's consent.²³ The duty of the agent to the principal is one of utmost good faith and loyalty.²⁴ Furthermore, agents, as fiduciaries, are required to make full disclosure to their principals of all information material to a transaction.²⁵

An agent that breaches his or her fiduciary duty may be liable in tort.²⁶ All of the traditional tort damages are available, including punitive damages where conduct is wanton or willful.²⁷ An agent who is dishonest may also forfeit his or her right to compensation for those duties.²⁸

Conversion

Conversion is the wrongful or unauthorized exercise of dominion or control over a chattel.²⁹ A conversion action is a tort.³⁰ The tort of conversion is "bottomed upon a tortious interference with possessory rights."³¹

An example of a case involving an agent under a power of attorney for finances document is *Alexopoulos v. Dakouras*³² in which the Wisconsin Supreme Court held that the agent who failed to account for the principal's funds was liable for conversion. The court readily discounted as "bizarre" the defendant's argument that general language in the power of attorney document authorizing the agent to dispose of the principal's money in the same manner that the principal could do personally was tantamount to a gift.³³

Fraud or Misrepresentation

Litigants successfully brought a tort cause of action for fraud against agents in both West Virginia³⁴ and Nebraska.³⁵ In the West Virginia case, a bank, as executor of an estate, filed a declaratory judgment action to determine ownership of funds in two joint bank accounts that had rights of survivorship. The trial court ruled that the funds were owned by the defendant, the decedent's brother-in-law, as the joint tenant and survivor. Four nieces who were to inherit under the decedent's will appealed, arguing that the decedent and the defendant had a confidential relationship since the defendant was the decedent's agent under a power of attorney for finances. They

further argued that a confidential relationship creates a presumption of fraud where a fiduciary is shown to have obtained any benefit from the fiduciary relationship. The West Virginia Supreme Court of Appeals agreed, holding that, since the defendant had failed to explain the necessity for placing proceeds of a sale of Treasury bills worth \$30,000 in the joint savings account or to show whether the decedent had even been aware of, much less sanctioned this action, he failed to meet his burden of proving that the funds were a bona fide gift.³⁶

In the Nebraska case, an agent/attorney was found to have fraudulently converted the principal's money when he gifted \$500,000 of to himself.³⁷ The court held that, although a plaintiff generally bears the burden of establishing fraud, a fiduciary relationship may nevertheless be sufficient to allow a finding of fraud when, in the absence of such a status it could not be so found. Thus, the party charged with fraud bears the burden of going forward with the evidence.³⁸

An Action for an Accounting

Under the common law of many states, an action for an accounting as a separate and distinct cause of action may be available.³⁹ These cases are normally premised on the principal that a fiduciary that administers the property and affairs of another is subject to an action for an accounting.⁴⁰

Under the common law, an agent has a duty to account to his principal. An agent must keep and render accounts and, when called upon for an accounting, has the burden of proving that she or he properly disposed of funds that she or he is shown to have received for her or his principal.⁴¹ The relationship between a principal and an attorney-in-fact can be analogized to the relationship between a trust beneficiary and trustee. Thus, the agent bears the burden of proving that he or she has properly disposed of funds.

Actions for accounting are also available under the statutes of a number of states. An individual who serves as an agent under a power of attorney for finances document and later becomes a personal representative or guardian may be ordered to appear and account to the court.

A Constructive Trust as an Equitable Remedy

A court of equity imposes a constructive trust to prevent the unjust enrichment of one who receives a

benefit, the retention of which would be unjust as against the other party. One seeking a constructive trust must establish both the elements of unjust enrichment and that the other party obtained or retained the benefit by means of actual or constructive fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong, or other unconscionable conduct.⁴² A court will impose a constructive trust only if the plaintiff shows that (1) title to the property is held by someone who, in equity and good conscience, should not be entitled to its beneficial enjoyment; and (2) title was obtained by means of actual or constructive fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong, or any form of unconscionable conduct.⁴³

In *Johnson v. Johnson*,⁴⁴ the Wisconsin Court of Appeals imposed a constructive trust on \$140,000 of a \$203,000 pre-death transfer by an adult daughter from the assets of her mother. The court held that the daughter, as alternate agent under her mother's power of attorney for finances, had a confidential relationship with her mother that she abused by allowing her mother to transfer funds to her while knowing that her mother's death was imminent.⁴⁵

However, the Wisconsin Court of Appeals refused to impose a constructive trust in somewhat similar circumstances in *In re Estate of Fliss*.⁴⁶ Prior to his death, a man transferred all of his property to his daughter, giving nothing to his three other children. He granted the daughter a durable power of attorney. He retained an attorney to quit-claim two parcels of real property to the daughter and retained a life estate. He also transferred all of his bank accounts into joint or payment on demand accounts with his daughter. The court did not impose a constructive trust in this situation, relying in part on the testimony of the attorney who had prepared the legal documents and who testified that he saw no evidence that the father had been unduly influenced by the daughter and that the father wanted to avoid probate.⁴⁷

A principal who has given a durable power of attorney to another often retains sufficient mental capacity to transact many of his or her own affairs, despite the fact that his or her agent is also actively managing the principal's affairs. In one such case, the Nebraska Supreme Court refused to impose a constructive trust on funds placed into a joint survivorship account between a father/principal and

son/agent, in part because the principal appeared to be quite capable of evaluating financial transactions.⁴⁸ The court recognized that the agent may not profit from the agency relationship to the detriment of his principal or have a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal. However, the court reasoned that the funds were placed in the joint account by the principal, who continued to actively handle his financial affairs, despite the existence of the power of attorney with his son.

An Action for Surcharge Against the Agent for Lost Income or Attorney's Fees

In some states, a court may exercise its equity powers to impose a surcharge against a trustee, personal representative, or guardian for mismanagement of a principal's, beneficiary's, or ward's estate.⁴⁹ This surcharge may include a fee for income lost as a result of mismanagement of funds and may require the fiduciary to pay attorney's fees.⁵⁰

These theories are applicable to an agent under a power of attorney for finances as well. Thus, a court in its equity jurisdiction could impose a surcharge on an agent for mismanagement of the principal's assets as part of an action for an accounting or other action. An interested person could also bring a lawsuit against the agent for conversion or breach of fiduciary duty, and seek reimbursement for his or her attorney's fees. In one state, the interested party must allege that the agent committed bad faith, fraud, deliberate dishonesty, or extreme mismanagement of the funds before attorney's fees may be awarded.⁵¹

Undue Influence

Undue influence is considered a species of fraud.⁵² In most cases, proof of undue influence will rest solely on circumstantial evidence.⁵³ The basic question in undue influence is whether the free agency of the subject individual has been destroyed.⁵⁴ States typically require the plaintiff to prove some combination of elements, including susceptibility, opportunity and disposition to influence, suspicious circumstances, coveted result, and/or a confidential or fiduciary relationship.

Most undue influence cases involve will contests. However, in some states, undue influence in the execution of an *inter vivos* conveyance is proved in the same way that undue influence is proved in the execution of a will.⁵⁵

In many jurisdictions, courts give the case heightened scrutiny where a power of attorney for finances agent is involved in unduly influencing the principal. However, in other jurisdictions, no presumption of undue influence results from the execution of a power of attorney for finances.⁵⁶

In an Oregon case, the court found that an adult son, who was named as agent under his elderly mother's power of attorney for finances document, exercised undue influence in procuring the deed to his mother's home.⁵⁷ The son convinced his mother that, because she was receiving Medicaid, the state would take her house if she kept it titled in her name.⁵⁸ The son, in fact, knew that the state would not take her home away from her as long as it was her primary residence.⁵⁹ After his mother had been hospitalized three times in the span of one year, the son drove his mother to a title company where he filled out a warranty deed transferring title from his mother to himself.⁶⁰ It was signed by the mother, notarized, and recorded. The court held that the existence of a power of attorney establishes a confidential relationship between the agent and the principal, which in turn raises an inference of undue influence. Notably, the court considered the fact that *the son never encouraged his mother to seek independent advice*, thus breaching his fiduciary duty.⁶¹

In an Illinois case, a court held that an adult daughter, serving as agent for her elderly mother under a power of attorney for finances, failed to rebut a presumption of undue influence in connection with the transfer of property from mother to daughter.⁶² The daughter and the principal's second husband, while acting as co-agents under the principal's power of attorney for finances, transferred funds from the principal's personal bank account to a new account in which the two co-agents were joint tenants. In addition, the home where the principal and her husband lived as joint tenants was retitled in the names of the daughter and the husband. After the principal's husband died a few years after these transfers took place, the principal's son from a previous marriage petitioned the court to nullify these transfers on the grounds of fraud and undue influence. In Illinois, when a transaction pursuant to a power of attorney for finances benefits the agent, there is a presumption of fraud and undue influence. The Illinois Court of Appeals overruled the trial court's determination that the daughter had successfully rebutted the presumption of fraud and

undue influence and issued an order nullifying the transfers.

In a second Illinois case, an Illinois appellate court upheld the trial court's finding that the defendant had exerted undue influence over a relative.⁶³ A number of suspicious circumstances surrounded the decedent's last year. First, the defendant convinced the decedent to live with him and told another relative and a doctor that he would never let the decedent go to a nursing home because they would take everything he had. The defendant took the decedent to the bank to have all of the accounts transferred to joint tenancy. On the same day the defendant took the decedent to an attorney to have a deed to the decedent's home transferred to the defendant. Finally, the defendant told other relatives that relatives on the decedent's side of the family didn't deserve anything under the will.

In a Montana case, a neighbor was held to have exerted undue influence over an elderly man, who was especially vulnerable because he had recently lost his wife of 53 years.⁶⁴ The neighbor used a power of attorney for finances document to obtain the man's house and all the property therein, his car, and almost all of his savings. The Montana Supreme Court held that even though the principal may have been competent, he was nonetheless unduly influenced by his neighbor.

Wisconsin is another jurisdiction where it is easier to prove undue influence when the perpetrator is the principal's agent under a power of attorney for finances document. This is because when the agent is the perpetrator a major element in one of Wisconsin's two tests for undue influence is established as a matter of law. In order to meet the test one must establish the existence of (1) a confidential or fiduciary relationship between the testator and the favored beneficiary, and (2) suspicious circumstances surrounding the making of the will or other transaction.⁶⁵ A fiduciary relationship between the principal and agent is established as a matter of law when a person executes a power of attorney for finances.⁶⁶ Thus, if suspicious circumstances exist in creation of the will or conveyance, the burden is shifted to the perpetrator/agent to prove that he or she did not unduly influence the principal/victim.

Voiding a Contract Based on the Principal's Lack of Competence

If the power of attorney for finances document provides that the agent will be compensated, the

document is likely to be viewed as a contract and all of the general contract defenses and remedies are available to a principal who contracts with an agent such as rescission, restitution, and unjust enrichment.

In some instances, the financial exploitation of the older person occurs when he or she is either incompetent or marginally competent. The agent may attempt to convince the principal to enter into a contractual relationship with the agent that is extremely favorable to the agent. In one example, a personal care worker became a 90-year-old man's agent under a power of attorney for finances document and then "contracted" with him to reimburse her for \$35,000 worth of personal care she allegedly provided to him over a period of three years. In such a situation, an action alleging that the principal lacked mental capacity to enter into the contract would be viable in some states.⁶⁷

In most states, the law presumes competency rather than incompetency; it will presume that every person is fully competent until satisfactory proof to the contrary is presented.⁶⁸ The test for determining incompetency is usually whether the person involved has sufficient mental ability to know what he was doing and to know the nature and consequences of the transaction.⁶⁹ Almost any conduct may be relevant, as may lay opinions, expert opinions, and prior and subsequent adjudications of incompetency.⁷⁰

An issue may arise as to the perpetrator's knowledge of the victim's incompetence. In some states, the infancy doctrine, which holds that a minor who disaffirms a contract may recover the purchase price without liability for use, depreciation, or other diminution in value, does not apply in mental incapacity to contract actions.⁷¹ The adult mental incompetent may be subject to varying degrees of infirmity or mental illness, not all equally incapacitating. Thus, absent fraud or knowledge of the incapacity by the other contracting party, the contractual act of an incompetent is voidable by the incompetent only if avoidance accords with equitable principles.⁷² The unadjudicated mental incompetence of one of the parties is not a sufficient reason for setting aside an executed contract if the parties cannot be restored to their original positions, provided that the contract was made in good faith, for a fair consideration, and without knowledge of the incompetence.⁷³ The issue of whether one party knows of the incompetence of the other party may not be limited to actual knowledge, but also whether the party had "reason to know of the incompetence."⁷⁴

In some states, if a guardianship action has been filed on behalf of a principal whose assets are being depleted by an agent under a power of attorney for finances document, all contracts, gifts, and transfers of property, except for necessities, are void after the filing of the guardianship petition and order for hearing with the office of the register of deeds for the county. The only exceptions are if the court determines that the ward continues to be able to enter into contracts in a limited guardianship or a guardian is not appointed.

Duress

A claim for duress may be available in two situations: (1) as an affirmative defense or action to void a contract, or (2) as an intentional tort.⁷⁵ Duress, in its broadest sense, includes instances where a condition of mind, caused by fear of personal injury or loss of limb or injury, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his or her free will power.⁷⁶ There must be a full and free consent by the parties to the terms of a contract. Duress involves "... wrongful acts ... that compel a person to manifest apparent assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction."⁷⁷ If consent of the parties is obtained through duress, that party may either void or ratify the contract.⁷⁸

A claim for duress should be considered whenever the agent has used force or threat of force to cause the principal to suffer financial loss to the benefit of the agent. A claim for duress may be appropriate when the principal has, for example, changed his or her beneficiary on a life insurance policy at the request of the agent, if threat of force or veiled threats are involved.⁷⁹ Where the principal has been coerced into changing title to his or her home or other property, a claim for duress may also be used to void the transaction.⁸⁰

Tortious Interference with an Expected Inheritance

Some states have adopted the Restatement (Second) of Torts Section 774B, which provides that one "who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift he would have otherwise received is subject to liability to the other for

the loss of the inheritance or gift."⁸¹ The elements of this cause of action are

1. Existence of the plaintiff's expectancy;
2. That the defendant intentionally interfered with that expectancy;
3. That the conduct of the defendant, in and of itself, is tortious (e.g., fraud, defamation, bad faith, or undue influence);
4. That there exists a reasonable certainty that the testator would have left a particular legacy had he or she not been persuaded by the defendant's tortious conduct; and
5. Existence of damages.

An executor of an estate may consider such a claim against an agent who has converted his principal's assets thereby depriving rightful heirs of their inheritance.

Eviction

Unfortunately, agent/abusers living with their victims/principals is an all too common scenario. The victim of financial abuse may be at a loss as to how to legally remove the abuser from his or her home when there is no formal lease agreement or rent paid. In these circumstances, an attorney will want to research how his or her state treats such holders. In some states these individuals are treated as "tenants-at-will," defined as a tenant holding with the permission of the landlord without a valid lease and under circumstances not involving periodic payment of rent.⁸² The tenancy-at-will terminates after service of a statutory notice on the tenant and the notice period has expired.

Federal Income Tax—Theft Loss as a Deduction from Taxable Income

Federal tax rules allow theft as a categorical itemized deduction to reduce federal taxable income.⁸³ Although criminal charges need not be brought to obtain the deduction, where the theft involves family members, the deduction will be disallowed if there is no attempt to gain reimbursement through civil action.⁸⁴ Legal expenses and other consequential costs of the theft or mismanagement may also be deducted as itemized miscellaneous deductions to the extent they exceed 2 percent of adjusted gross income.

The remedy of tax deductions is especially useful to offset the principal's tax penalty for early

withdrawal of IRAs where the agent has embezzled those IRAs. The costs/benefits of consulting a tax specialist should be considered in cases where substantial assets have been stolen by an agent, in order to properly draft the complaint.

Conclusion

Lawyers can provide a great service to their clients and to their communities by vigorously pursuing abusing financial agents. Despite common belief, financial power of attorney documents are not blank checks authorizing the agent to do with the principal's assets as the agent wishes. In fact, the common law provides a formidable body of case law clearly defining the agent's fiduciary responsibility. Additionally, many causes of action and remedies are available, and, indeed, become easier to establish, as a result of the abuser acting as an agent under a financial power of attorney document. With these tools, lawyers can assure their clients' financial security.

Endnotes

1. Frontline, National Center on Elder Abuse (NCEA) Exchange, Fall, 1997.
2. Data are taken from a national survey that identified 270 incidents of abuse. JONATHAN FEDERMAN & MEG REED, GOV'T. LAW CTR. OF ALBANY LAW SCH., ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM (1994).
3. *Id.* at 12.
4. Other examples of legal remedies also available to a principal whose agent has violated his or her duty to the principal include contract actions and remedies such as rescission of contracts, unjust enrichment, restitution, an action in equity to enforce the provisions of an express trust, or refusal to pay compensation to the agent as previously agreed to in the power of attorney document. *See generally*, 3 AM JUR 2D AGENCY § 333 (1986); RESTATEMENT (SECOND) OF AGENCY § 399 (1957).
5. For example, Wis. STAT. ch. 243 (1999) provides statutory authority for the creation of a durable power of attorney for finances. Chapter 243 is replete with references to "agent" and "agency." Under Wis. STAT. § 243.07(1)(a), a durable power of attorney is defined as "a power of attorney by which a principal designates another as his or her agent in writing" (emphasis added). Under Wis. STAT. § 243.10(1), the statutory form power of attorney provides that "by accepting or acting under the appointment, the agent assumes the fiduciary and other legal responsibilities of an agent." Thus, an *agency* relationship is created as a matter of law whenever a power of attorney for finances is executed.
6. *Bank of Cal. v. Hoffmann*, 38 N.W.2d 506, 509 (Wis. 1949).
7. *King v. Bankerd*, 492 A.2d 608, 611 (Md. 1985).
8. *Bank of Cal.*, 38 N.W.2d at 509.
9. *Alexopoulos v. Dakouras*, 179 N.W.2d 836, 840-41 (Wis. 1970), (by analogy, the fiduciary obligation of an agent and a trustee impose similar duties). *See also* *Schock v. Nash*, 732 A.2d 217, 225 (Del. 1999) (the fiduciary duty principles of trust law must be applied to the relationship between principal and her attorney-in-fact, since the common-law fiduciary relationship created by a durable power of attorney is like the relationship created by a trust (citing RESTATEMENT (SECOND) OF AGENCY § 387 cmt. b (1958) and RESTATEMENT (SECOND) OF TRUSTS § 170 (1959))).
10. *Kotsch v. Kotsch*, 608 So. 2d 879 (Fla. Dist. Ct. App. 1992); *In re Estate of Crabtree*, 550 N.W.2d 168 (Iowa 1996); *Mercantile Trust Co., N.A. v. Harper*, 622 S.W.2d 345 (Mo. Ct. App. 1981); *Whitford v. Gaskill*, 460 S.E.2d 346 (N.C. Ct. App. 1995); *King v. Bankerd*, 492 A.2d 608 (Md. 1985).
11. *Crabtree*, 550 N.W.2d at 170; *King*, 492 A.2d at 611.
12. *First Nat. Bank of Paulding Cty. v. Cooper*, 312 S.E.2d 607, 608 (Ga. 1984) (holding that the clear and unambiguous purpose of the power of attorney was to serve and benefit only the grantor of the power, and there was no authorization for the agent to use such powers on his own behalf, e.g., to secure a personal loan for himself).
13. *Schock*, 732 A.2d at 225 (citing RESTATEMENT (SECOND) OF AGENCY § 34 cmt. h (1957)).
14. *Alexopoulos*, 179 N.W.2d at 836; *Wis. v. Hartman*, 194 N.W.2d 653, 656 (1972).
15. *King*, 492 A.2d at 612-13.
16. *Schock*, 732 A.2d at 227-28.

17. *Estate of Casey v. Commissioner*, 948 F.2d 895, 899 (4th Cir. 1991) (also contains an extensive discussion of gifting clauses); *LeCraw v. LeCraw*, 401 S.E.2d 697, 698-99 (Ga. 1991).
18. *Schock*, 732 A.2d at 225.
19. *Bank of Cal.*, 38 N.W.2d at 509.
20. *Schock*, 732 A.2d at 225-27.
21. WIS. STAT. ch. 243 (1999).
22. *King*, 492 A.2d at 611.
23. *Burg v. Miniature Precision Components*, 319 N.W.2d 921, 924 (Wis. Ct. App. 1982).
24. *General Automotive Mfg. Co. v. Singer*, 120 N.W.2d 659, 663 (Wis. 1963); *Bank of Cal.*, 38 N.W.2d at 509.
25. *Hercules v. Robedeaux, Inc.*, 329 N.W.2d 240, 242 (Wis. Ct. App. 1982).
26. *Loehrke v. Wanta Builders, Inc.*, 445 N.W.2d 717, 721 (Wis. Ct. App. 1989) (citing RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1965)); *Burg*, 319 N.W.2d at 924 (citing RESTATEMENT (SECOND) OF AGENCY § 401 (1957)).
27. *Brown v. Maxey*, 369 N.W.2d 677, 681 (Wis. 1985).
28. *Hartford Elevator, Inc. v. Lauer*, 289 N.W.2d 280, 287 (Wis. 1980).
29. *Farm Credit Bank of St. Paul v. F & A Dairy*, 477 N.W.2d 357, 371 (Wis. Ct. App. 1991).
30. *Lucas v. Godfrey*, 467 N.W.2d 180, 185 (Wis. Ct. App. 1991) (citing WILLIAM PROSSER, LAW OF TORTS 79 (4th ed. 1971); William Prosser, *The Nature of Conversion*, 42 CORNELL L.Q. 168 (1957)).
31. *Production Credit Ass'n v. Equity Coop Livestock*, 261 N.W.2d 127, 127 (Wis. 1978).
32. *Alexopoulos*, 179 N.W. 2d at 841.
33. *Id.* at 840-41.
34. *Kanawha Valley Bank v. Friend*, 253 S.E.2d 528 (W. Va. 1979).
35. *Fletcher v. Mathew*, 448 N.W.2d 576 (Neb. 1989).
36. *Kanawha Valley Bank*, 253 S.E.2d at 531.
37. *Fletcher*, 448 N.W.2d at 583.
38. *Id.* at 581.
39. *In re Estate of Pirsch*, 435 N.W.2d 317, 321 (Wis. Ct. App. 1988).
40. *Id.* at 318.
41. *Alexopoulos*, 179 N.W.2d at 841.
42. *First Nat. Bank of Appleton v. Nennig*, 285 N.W.2d 614, 625 (Wis. 1979); *Singer v. Jones*, 496 N.W.2d 156, 158 (Wis. Ct. App. 1992).
43. *Wilharms v. Wilharms*, 287 N.W.2d 779, 783 (1980).
44. 570 N.W. 2d 910, 911 (Wis. Ct. App. 1997).
45. *Id.* at 915.
46. *In re Estate of Fliss*, 557 N.W.2d 255, 256 (Wis. Ct. App. 1996).
47. *Id.* at 260.
48. *In re Estate of Lienemann*, 382 N.W.2d 595, 601 (Neb. 1986).
49. *Pirsch*, 435 N.W.2d at 319; *In re Erlien*, 527 N.W.2d 389, 395 (Wis. Ct. App. 1994).
50. *In re Guardianship and Estate of P.A.H.*, 340 N.W.2d 577, 580 (Wis. Ct. App. 1983).
51. *Id.* at 581.
52. *In re Knierim's Will*, 68 N.W.2d 545, 548 (Wis. 1955).
53. *In re Larsen's Estate*, 96 N.W.2d 489, 492 (Wis. 1959).
54. *In re Estate of Fechter*, 277 N.W.2d 143, 154 (Wis. 1979).
55. *First Nat. Bank of Appleton*, 285 N.W.2d at 623.
56. *Fincher v. Baker*, 709 So.2d 1, 5 (Ala. Civ. App. 1996); *In re Estate of Ambers*, 477 N.W.2d 218, 221 (N. D. 1991).
57. *Rea v. Paulson*, 887 P.2d 355, 357 (Or. Ct. App. 1994).

58. *Id.* at 358.
59. *Id.*
60. *Id.* at 357–58.
61. *Id.*
62. *Deason v. Gutzler*, 622 N.E.2d 1276, 1282 (Ill. App. Ct. 1993).
63. *White v. Raines*, 574 N.E.2d 272, 280 (Ill. App. Ct. 1991).
64. *Christensen v. Britton*, 784 P.2d 908, 910 (Mont. 1989).
65. *In re Faulks' Will*, 17 N.W.2d 423, 439 (Wis. 1945).
66. *In re Estate of Vorel*, 312 N.W.2d 850, 853 (Wis. Ct. App. 1981); *In re Friedli*, 473 N.W.2d 604, 606 (Wis. Ct. App. 1991).
67. *Hauer v. Union State Bank of Wautoma*, 532 N.W.2d 456, 460–61 (Wis. Ct. App. 1995).
68. *First Nat. Bank of Appleton*, 285 N.W.2d at 620.
69. *Id.* at 622.
70. *Hauer*, 523 N.W.2d at 461 (citing RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(a), 15 cmt. c (1979)).
71. *Id.* at 462.
72. *Id.*
73. *Id.* at 463.
74. *Id.* at 464.
75. *See, e.g., Wurtz v. Fleischman*, 293 N.W.2d 155, 160 (Wis. 1980) (where a claim for economic duress was held to be a cause of action for intentional tort).
76. *Price v. Bank of Poynette*, 128 N.W. 895, 898 (Wis. 1910).
77. *Stillwell v. Linda*, 329 N.W.2d 257, 258 (Wis. Ct. App. 1982).
78. *Id.*
79. 44 AM. JUR. 2D INSURANCE § 1762 (1982); 43 AM. JUR. 2D INSURANCE § 811 (1982) (discussing duress and undue influence in connection with an assignment or change in beneficiary).
80. 23 AM JUR 2D DEEDS §§ 203–12 (discussing the validity of deeds as affected by duress or undue influence).
81. *Harris v. Kritzik*, 480 N.W.2d 514, 517 (Wis. Ct. App. 1992).
82. *E.g., Wis. STAT. § 704.02(5)* (1999).
83. I.R.C. § 165.
84. *Solomon v. Commissioner*, T.C.M. 1978-41 (supplemented at T.C.M. 1978-105).

Comment,
**ABUSE OF A POWER OF ATTORNEY:
WHO IS MORE LIKELY TO BE PUNISHED,
THE ELDER OR THE ABUSER?**

Introduction

It happens to all of us – we begin to age and with that comes forgetfulness and difficulties such as being unable to handle our finances. However, as we age we wouldn't expect our loved ones to attempt to take advantage of us in our most trying point in life. We wouldn't expect our loved ones to do such things, but often times they do. A loved one may see an opportunity to capitalize on an elderly relative and not even think twice about it. This happens everyday. A son may attempt to have his dad deed his house to him. A local roofer may attempt to persuade an elderly woman that her perfectly fine roof needs replacing and the cost is outrageous. These types of activities could be defined as elder abuse. Elder abuse is not limited to actual physical abuse. There may be elder abuse when one takes financial disadvantage of an elderly person.¹

One common method of elder abuse is the misuse of the power of attorney that an elderly person has granted. Most times the elderly person chooses a specific person to be their power of attorney because he/she trusts that appointee. Many times the appointee of a power of attorney ends up disadvantaging the elderly person instead of benefiting him/her as a power of attorney is intended to do.

This article will address how state statutes address the financial exploitation of the elderly through the delegation of power of attorney rights. With more and more people looking for a gain and wanting the least amount of work to get that gain, elderly persons are preyed upon. States are recognizing that financially abusing elderly persons is a growing problem. As the states begin to recognize these problems, more and more legislatures are addressing them by passing laws which punish those who disadvantage the elderly by financially exploiting them.

¹ See generally Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203 (2000).

I. What is a power of attorney?

"A power of attorney is an instrument by which a principal empowers an agent to act on the principals behalf."² A person may appoint another person to take care of all of his/her financial dealings. The person acting with the power of attorney has a fiduciary duty to the elderly person that assigned the person that role.³

II. How are some states addressing the growing problem of financial exploitation of the elderly by abusing a power of attorney right?

A. Classification of misuse of power of attorney as theft

1. Arizona

Arizona has recently passed a new statute addressing the abuse of a power of attorney status, by exploiting elderly individuals. Arizona Revised Statute makes it a crime for someone to financially exploit an elderly person by abusing his power of attorney status. Section 13-1815 of the Arizona Revised Statutes is entitled "Unlawful Use of Power of Attorney."⁴ The statute makes it a theft for an individual to take advantage of his/her power of attorney status. The statute reads: "An agent who holds a principal's power of attorney. . . and who uses or manages the principal's assets or property with the intent to unlawfully deprive that person of the asset or property is guilty of theft."⁵ If a person who has been delegated a power of attorney knowingly abuses this power for his own financial gain, the Arizona statute makes it a crime and the individual may be punished by the criminal statute pertaining to theft, which is § 13-1802.⁶

² Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 576 (1996).

³ See Dessin, *supra* note 1, at 208.

⁴ ARIZ. REV. STAT. ANN. § 13-1815 (West 2000).

⁵ *Id.*

⁶ See *id.*

B. Classification of misuse of power of attorney under an elder adult abuse statute

1. Utah

Utah has an exploitation of an elder adult statute. The statute makes it an offense when another individual exploits the elderly adult by misusing the grant of a power of attorney. Subsection four of the statute states that exploitation of an elderly adult occurs when an individual misuses an elder adult's power of attorney designation to the advantage of someone other than the elderly person.⁷ If a person does exploit an elderly person by misusing his power of attorney subsection 4(b) provides for criminal liability. That section states that if a person is found guilty of exploiting an elderly individual he could be guilty of a felony or a misdemeanor depending on the intent and amount of money that is exploited.⁸

2. Montana

Montana's Elder and Persons with Developmental Disabilities Abuse Prevention Act sets forth definitions of exploitation in § 52-3-803. This section defines exploitation as:

[T]he unreasonable use of. . . a power of attorney. . . with regard to an older person. . . to obtain control of or to divert to the advantage of another the ownership, use benefit, or possession of the person's money, assets, or property by means of deception, duress, menace, fraud, undue influence, or intimidation with the intent or result of permanently depriving the older person. . . of the ownership, use, benefit, or possession of the person's money, assets, or property.⁹

⁷ UTAH CODE ANN. § 76-5-111 (2000) ("A person commits the offense of exploitation of a disabled or elder adult person when. . . (iv) unjustly or improperly uses a disabled or elder adult's power of attorney or guardianship for the profit or advantage of someone other than the disabled or elder adult").

⁸ See *id.* ("A person is guilty of the offense of exploitation of a disabled or elder adult as follows: (i) if done intentionally or knowingly and the aggregate value of the resources used or the profit made is or exceeds \$5,000 or cannot be determined, the offense is second degree felony; (ii) if done intentionally or knowingly and the aggregate value of the resources used or the profit made is less than \$5,000 or cannot be determined, the offense is a third degree felony; (iii) if done recklessly, the offense is a class A. misdemeanor; or (iv) if done with criminal negligence, the offense is a class B misdemeanor").

⁹ MONT. CODE ANN. § 52-3-803 (1999).

Section 52-3-825 of the act addresses the penalties for the exploitation of an elderly adult by the misuse of a power of attorney. The statute states that if a person exploits an elderly individual he will be guilty of a misdemeanor.¹⁰ The exploiter may be fined, jailed or both the first time he is found guilty.¹¹ The second time that he is found guilty he may be fined, imprisoned, or both, however the time and amount is exceedingly higher.¹²

3. Nevada

Nevada has implemented an act that is similar to Montana's Elder and Persons with Developmental Disabilities Abuse Prevention Act. Nevada's equivalent is termed Abuse, Neglect, Exploitation and Isolation of Older Persons. In the statutes definition section it defines exploitation as:

[A]ny act taken by a person who has the trust and confidence of an older person or any use of the power of attorney or guardianship of an older person to obtain control, through deception, intimidation or undue influence, over the older person's money, assets or property with the intention of permanently depriving the older person of the ownership, use, benefit or possession of his money, assets or property.¹³

In Nevada's penalty section of its Abuse, Neglect, Exploitation and Isolation of Older Persons statute, criteria is set out as to what consequences one will pay for violating the statute. Nevada Revised Statute § 200.5099.3 states that if a person exploits an elderly person he will be punished based on the value of what was exploited.¹⁴ If a person exploits less than \$250 it is considered a misdemeanor and is punishable by imprisonment, a fine or both.¹⁵ If the person exploits \$250 to \$5,000 it will be classified

¹⁰ See *id.* § 52-3-825.2. ("Any individual who purposely or knowingly abuses, sexually abuses, neglects, or exploits an older person or a person with a developmental disability is guilty of a misdemeanor. . .").

¹¹ See *id.* (" . . . upon a first conviction may be fined an amount not to exceed \$1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both").

¹² See *id.* ("Upon a second or succeeding conviction, an individual may be imprisoned for a term not to exceed 10 years and may be fined an amount not to exceed \$10,000, or both").

¹³ NEV. REV. STAT. ANN. § 200.5092.2 (Michie 1999).

¹⁴ See *id.*

¹⁵ See *id.*

as a felony and one could be imprisoned, fined or both.¹⁶ Lastly, if the person exploits more than \$5,000 from an elderly person by misusing his power of attorney status it will be classified as a felony but the imprisonment time and/or fine is larger than the previously stated offense of exploiting \$250 to \$5,000.¹⁷

C. Misuse or abuse of power of attorney status classified as an embezzlement

1. California

California has a statute that classifies the misuse of power of attorney as embezzlement. Section 507 of California's Penal Code states "[e]very person intrusted. . . with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement."¹⁸ If an individual has a power of attorney to sell or transfer certain property for an elderly person and he fraudulently converts the property or money received from the sale of the property into his own the courts in California will find the individual guilty of embezzlement. The individual that is guilty of misusing his power of attorney will be punished under the state embezzlement statute.

2. Oklahoma

Oklahoma's misuse of power of attorney statute is practically identical to California's embezzlement statute. Oklahoma's statute states that if the individual with a power of attorney fraudulently converts the proceeds from the sale of the entrusted items, to his own, he will be guilty of embezzlement.¹⁹ Again, as in the California statute, the individual who misuses his power of

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ CAL. PENAL CODE § 507 (West 2000).

¹⁹ See OKLA. STAT. ANN. tit. 21, § 1455 (2000) ("If any person being entrusted. . . with any power of attorney for the sale or transfer thereof, fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, he is guilty of embezzlement. . .").

attorney will be prosecuted under the state embezzlement statute.

D. *Misuse of a power of attorney classified as exploitation of an infirmed individual*

1. *Louisiana*

Louisiana's statute specifically addresses the exploitation of elderly persons. Section 14:93.4 of the Louisiana statute is entitled "Exploitation of the infirmed."²⁰ It defines the exploitation of the infirmed as "[t]he use of an infirmed person's, or aged person's, or disabled adult's power of attorney. . . for one's own profit or advantage by means of fraudulent conduct, practices, or representations."²¹

Sections B and C of the statute define the penalties for an individual who exploits an elderly person by misuse of his power of attorney. Section B states that an individual will be fined up to ten thousand dollars or put in jail up to ten years or both as a punishment.²² Section C of the statute explains that once an individual is convicted or makes a plea agreement for exploiting an elderly person the individual will be banned from having access to the victim's assets or any other elderly person's assets.²³ The violating individual will also be banned from ever obtaining another power of attorney right from any elderly person, including the victim.²⁴

E. *Misuse of power of attorney implied, but not specifically addressed, in the statute*

1. *Florida*

Section 825.103 of the Florida statutes suggest that a person could be liable for misusing his power of attorney status. The statute does not specifically state that a misuse of a power of at-

²⁰ LA. REV. STAT. ANN. 14:93.4 (West 2000).

²¹ *Id.*

²² *See id.*

²³ *See id.* § 14:93.4(C). ("Whoever is convicted, or who enters a plea agreement for exploitation of the infirmed shall be prohibited from having access to the victim's or any other disabled or aged person's assets or property").

²⁴ *See id.* ("The offender shall be prohibited from being appointed as a power of attorney or guardian for the victim or any other disabled or aged person").

torney could be criminal, however it does state that anyone standing in a position of trust with an elderly person could be liable for financially exploiting that individual.²⁵ If a person holds a position of trust and confidence with an elderly person, and knowingly deceives that person by exploiting his assets and property and using them for his own benefit he will be liable under this statute. The appointment of a power of attorney is a position of trust and confidence, therefore taking advantage of this trust for one's own gain could be declared exploitation and punishable under § 825.103.

The penalties for the exploitation of an elderly person depends on the amount of money that the person in trust exploited. If the exploitation was valued at \$100,000 or more the court will consider this a first degree felony.²⁶ If the exploitation is less than \$100,000, but more than \$20,000, the court will consider it as a second degree felony.²⁷ Lastly, if the exploitation consists of less than \$20,000 the trusted individual will be guilty of a third degree felony.²⁸

2. Illinois

One is guilty of financial exploitation under § 16-1.3 of the Illinois statute if the individual holds a position of trust with an elderly adult and then deceives the elderly adult by taking the elderly adult's property and depriving the elderly adult from using the property.²⁹ Again, as in the Florida statute, it could be implied that a person who holds a power of attorney for an elderly person is in a position of trust, therefore liable under the statute. If the person with the power of attorney knowingly deceives the elderly adult and uses the exploited funds for his own use, he will be guilty of financially exploiting the elderly person.

²⁵ FLA. STAT. ANN. § 825.103.1(a)(1) (West 2000).

²⁶ *See id.* § 825.103.2(a).

²⁷ *See id.* § 825.103.2(b).

²⁸ *See id.* § 825.103.2(c).

²⁹ *See* 720 ILL. COMP. STAT. ANN. § 5/16-1.3(a) (West 2000) ("A person commits the offense of financial exploitation of an elderly person or a person with a disability when he or she stands in a position of trust or confidence with the elderly person. . . and he or she knowingly and by deception or intimidation obtains control over the property of an elderly person. . . with the intent to permanently deprive the elderly person. . . of the use, benefit, or possession of his or her property").

The penalties, for financially exploiting an elderly adult in Illinois, are based on the values of the exploitation. The exploitation is considered a Class four felony if the value is \$300 or less; a Class three felony if the value is less than \$5000 but greater than \$300; a Class two felony if the amount exploited is more than \$5000 but less than \$100,000; a Class one felony if the person exploits a value of \$100,000 or more.³⁰

There are also civil penalties within the statute for an individual who exploits an elderly adult. If the person who exploits the adult is charged and he does not return the elderly victim's property that he exploited, he will be liable to the victim for "treble the amount of the value of the property obtained, plus reasonable attorney fees and court costs."³¹

3. *North Dakota*

As did Florida and Illinois, North Dakota has enacted a statute that calls for liability when a person of trust deceives an elderly person for his own personal gain and exploits something of value from that elderly adult.³² The criminal code of North Dakota states that there are penalties for the exploitation of a vulnerable elderly adult.³³ A vulnerable elderly adult is defined as "a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by physical, mental, or emotional dysfunctioning to the extent that the person is incapable of adequately providing for the person's own health or personal care."³⁴ This position of trust could be a power of attorney

³⁰ *See id.*

³¹ *Id.* § 5/16-1.3(g).

³² *See* N.D. CENT. CODE 12.1-31-07.1(1) (1999) ("A person is guilty of exploitation of a . . . vulnerable elderly adult if: (a) The person stands in a position of trust and confidence. . . with the . . . vulnerable elderly adult and knowingly, by deception or intimidation, obtains or uses, or attempts to obtain or use, the . . . vulnerable elderly adult's funds, assets, or property with the intent to temporarily or permanently deprive the . . . vulnerable elderly adult of the use, benefit, or possession of the property, for the benefit of someone other than the . . . vulnerable elderly adult").

³³ *See id.*

³⁴ *Id.* § 12.1-31-07(1)(c).

Section 12.1-31-07.1 of the criminal code makes the exploitation of such a vulnerable elderly adult a crime.³⁵ An individual may be held liable for violating the statute if he holds a position of trust and confidence with the vulnerable elderly adult and abuses that trust by using the assets or money of the elderly adult for his own gain.³⁶

The penalties for abusing a position of trust granted by an elderly adult, which could be a power of attorney, are as follows: Class A felony if the amount exploited is greater than \$100,000; Class B felony if the value is less than \$100,000 but greater than \$20,000; Class C felony if the exploitation value is less than \$20,000 but more than \$1000.³⁷

4. Oregon

According to § 124.110 of the Oregon statute an individual could be held liable for financially abusing an elderly person when he illicitly takes property or money from an elderly person.³⁸ If a person with a power of attorney wrongfully takes money from an elderly person he should be prosecuted under § 124.100. Under this statute the elderly adult may recover all of the economic damages that he has endured if they total more than \$500.³⁹ However, if the elderly person's damages are less than \$500, he will collect \$500.⁴⁰ The statute states that the elderly individual receives the greater of actual damages or \$500.⁴¹ If the elderly person does not endure monetary damages, but instead sustains non-economic damages, he will be able to recover whatever damages they might have been.⁴² The elderly adult is

³⁵ See N.D. CENT. CODE, *supra* note 32.

³⁶ *Id.* § 12.1-31-07.1(1)(a).

³⁷ See *id.* §§ 12.1-31-07.2(a), (b) & (c).

³⁸ See OR. REV. STAT. § 124.110.1(a) (2000) ("An action may be brought under ORS 124.100 for financial abuse in the following circumstances: (a) When a person wrongfully takes or appropriates money or property of an elderly. . . person, without regard to whether the person taking or appropriating the money has a fiduciary relationship with the elderly. . . person").

³⁹ See *id.* § 124.100.1(a).

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.* § 124.100.1(b).

also entitled to all reasonable attorney fees that he expended in order to prosecute the exploiter.⁴³

5. *Vermont*

Under Vermont's Programs and Services for Elderly and Disabled Adults statute exploitation is defined as "[w]ilfully using, withholding, or disposing of funds or property of an elderly or disabled adult without legal authority for the wrongful profit or advantage of another [or] [a]cquiring possession or control of or an interest in funds or property of an elderly or disabled adult through the use of undue influence, harassment, duress, or fraud."⁴⁴ An individual holding a power of attorney could very well misuse that power of attorney by willfully using an elderly adult's funds for his own advantage. If this occurs the holder of the power of attorney could be liable for up to \$10,000 and/or up to eighteen months in prison.⁴⁵

6. *Georgia*

Exploitation, as defined in Georgia's Protection of Disabled Adults and Elder Persons Act is "the illegal or improper use of a disabled adult or elder person or that person's resources for another's profit or advantage."⁴⁶ When a person misuses his power of attorney status it may fall within this definition. If an individual exploits an elderly person he will be punished under § 30-5-8 which states that it is unlawful for an individual to exploit an elderly person.⁴⁷ If an individual exploits an elderly person as defined in the statute that individual will be guilty of a misdemeanor.⁴⁸

7. *Minnesota*

Minnesota has a statute which provides for the criminal prosecution of an individual who financially exploits a vulnerable

⁴³ See OR. REV. STAT. § 124.100.1(c).

⁴⁴ VT. STAT. ANN. tit. 33, § 6902.7(A) & (B).

⁴⁵ See *id.* § 6913(b).

⁴⁶ GA. CODE ANN. § 30-5-3(9) (2000).

⁴⁷ See *id.* § 30-5-8(a)(1). ("In addition to any other provision of law, it shall be unlawful for any person to abuse, neglect, or exploit any. . . elder person").

⁴⁸ See *id.* § 30-5-8(a)(2).

adult. A vulnerable adult is defined as "any person 18 years of age or older who. . . possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction. . . ." ⁴⁹ Section 609.2335 of the Minnesota Criminal Code states when a person breaches his fiduciary duty with an vulnerable adult he is liable for financially exploiting that individual.⁵⁰ Such a fiduciary obligation includes contractual obligations which in turn could entail a granted power of attorney.⁵¹ If an individual takes advantage of his fiduciary duty and gains an interest in the vulnerable adults assets he could be liable under the statute.⁵²

The criminal penalties for financially exploiting a vulnerable adult are found in § 609.52 of the Minnesota Criminal Code, which is a theft statute. Under the theft statute one may be punished by imprisonment for less than twenty years, a fine of less than \$100,000 or both for the financial exploitation of more than \$35,000 from a vulnerable adult.⁵³ If the individual exploits \$2500 or more from the vulnerable adult the punishment is imprisonment for less than ten years, a fine up to \$20,000 or both.⁵⁴ If the exploitation amounts to less than \$2500 but more than \$500 the exploiter will be punished by imprisonment for less than five years, a fine of less than \$10,000 or both.⁵⁵ Finally, if the amount exploited is less than \$250 the fine is less than \$700, the jail time is less than 90 days or the violator may be punished by both.⁵⁶

8. South Dakota

South Dakota has enacted an Abuse, Neglect or Exploitation of Disabled Adults statute. A disabled adult is defined as "a person eighteen years of age or older who suffers from a condition of. . . infirmities of aging as manifested by organic brain damage, advanced age or other physical dysfunctioning to the ex-

⁴⁹ MINN. STAT. ANN. §609.232 (Subd. 11)(4) (West 2000).

⁵⁰ See *id.* § 609.2335(Subd. 1)(1).

⁵¹ See *id.* ("Whoever does any of the following acts commits the crime of financial exploitation: (1) in breach of a fiduciary obligation recognized elsewhere in law, including pertinent regulations, contractual obligations. . . .").

⁵² See *id.* § 609.2335(Subd. 1)(2)(i).

⁵³ See *id.* § 609.52 (Subd. 3)(1).

⁵⁴ See MINN. STAT. ANN. § 609.52 (Subd. 3)(2).

⁵⁵ See *id.* § 609.52 (Subd. 3)(3).

⁵⁶ See *id.* § 609.52 (Subd. 3)(5).

tent that the person is unable to protect himself. . . ."⁵⁷ One who exploits a disabled adult will be held liable under South Dakota's theft by exploitation statute.⁵⁸ Exploitation is defined as "the wrongful taking or exercising of control over property of a disabled adult with intent to defraud him".⁵⁹ When one misuses his power of attorney over a disabled adult there is an intent to defraud the disabled adult.

Section 22-46-3 states that if a person is entrusted with property of a disabled adult by having a contractual duty, such as a power of attorney, and he has an intent to defraud the disabled adult, he will be punished under § 22-30A-17.⁶⁰ This section of the South Dakota statutes defines and sets out penalties for petty theft and grand theft. If the exploiter is guilty of grand theft he has exploited more than \$500 from the disabled adult and he is punished under a Class 4 felony.⁶¹ One is guilty of petty theft if the first degree if he exploits more than \$100 which is classified as a Class 1 misdemeanor.⁶² If the person exploits less than \$100 from a disabled adult the individual is guilty of petty theft in the second degree which is classified as a Class 2 misdemeanor.⁶³

9. *Indiana*

Financial exploitation of an endangered adult is a violation of § 35-46-1-12 in Indiana.⁶⁴ The statute states that when a person knowingly and intentionally exploits an endangered adult he is guilty of a Class A misdemeanor.⁶⁵ An endangered adult is defined as someone who is over the age of eighteen and is "incapable by reason of mental illness, mental retardation, dementia,

⁵⁷ S.D. CODIFIED LAWS § 22-46-1(2) (Michie 2000).

⁵⁸ See *id.* § 22-46-3 (stating "[a]ny person who, having assumed the duty by written contract, by receipt of payment for care, or by order of a court to provide for the support of a disabled adult and having been entrusted with the property of that disabled adult, with intent to defraud, appropriates such property to a use or purpose not in the due and lawful execution of his trust, is guilty of theft by exploitation. . . .").

⁵⁹ See *id.* § 22-46-1(3).

⁶⁰ See *id.* § 22-46-3.

⁶¹ See *id.* § 22-30A-17.

⁶² See S.D. CODIFIED LAWS § 22-30A-17.

⁶³ See *id.*

⁶⁴ See IND. CODE ANN. § 35-46-1-12 (West 2000).

⁶⁵ See *id.* § 35-46-1-12(a).

habitual drunkenness, excessive use of drugs, or other physical or mental incapacity of managing or directing the management of the individual's property or providing or directing of self-care."⁶⁶ It could be argued that if a person financially exploits an endangered adult by misusing his power of attorney, he may be held liable for such exploitation under Indiana law.

10. *Delaware*

Under Delaware law if a theft occurs, and the victim is sixty years of age or older, the person who committed the theft could be liable under Title 11 § 841 of the Delaware statute.⁶⁷ The code defines theft as "when [a] person takes, exercises control over or obtains property of another person intending to deprive that person of it or appropriate it."⁶⁸ It could be argued that a misuse of a power of attorney, to the financial deprivation of an elderly adult, would be considered a theft under the Delaware code. If the person with the power of attorney is intending to deprive the elderly person from use of his property, and he is not within the bounds of his power of attorney, he could be guilty of theft. If a person is found guilty of theft from an individual who is sixty years of age or older, he is guilty of a Class G felony if the amount taken was less than \$1000.⁶⁹ However, if the theft consists of a value over \$1000 the individual will be guilty of a Class F felony.⁷⁰

III. Conclusion

As stated, many states are acknowledging that people take advantage of elderly people when the elderly person entrusts them with a power of attorney. By recognizing that misusing the power of attorney status occurs, states are beginning to formulate consequences for those who take advantage of such a privilege in a form of monetary punishment or jail time. With such penalties states may show greedy relatives and friends that the power of

⁶⁶ *Id.* §§ 12-10-3-2(Sec. 2)(a)(1) & (2).

⁶⁷ *See* DEL. CODE. ANN. tit. 11, § 841 (1999).

⁶⁸ *Id.* § 841(a).

⁶⁹ *See id.* § 841 (c)(2).

⁷⁰ *See id.*

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attorney right is a status that is to help the elderly, not to take advantage of them.

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