

HB

8

<TARGET><BILL>HB 8</BILL><SUBJECT>HB
8</SUBJECT><COMM>SHSS29</COMM></TARGET>

SENATE COMMITTEE REPORT

DATE: 3/11/15

FURTHER: Judiciary

DATE TURNED
IN TO OFFICE: 1/27/16

Health and Social Services Committee considered CS FOR HOUSE BILL NO. 8(JUD) am

HB 8-POWERS OF ATTORNEY

"An Act relating to powers of attorney and other substitute decision-making documents; relating to the uniform probate code; relating to notaries public; and providing for an effective date."

and recommends:

- be replaced with SCS CS HB 8 (HSS) Same Title Technical Title Change
 New Title/SCR No. _____
- adopt previous SCS _____ (_____) Same Title Technical Title Change
 New Title/SCR No. _____
- attached amendment(s)
- adopt _____ Letter of Intent
- further referral to _____ Committee

Dept Abbr.	
ADM	LWF
CED	LAW
CRT	LEG
EED	MVA
DEC	DNR
DFG	DPS
GOV	REV
DHS	DOT
AJS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
DHS)			✓	3
LAW)			✓	4

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Staita			✓	
	Biessel	✓			
	ELLIS	✓			
	Kelly	✓			
CHAIR:	STEDMAN			✓	

Fiscal Note

State of Alaska
2015 Legislative Session

Bill Version:	CSHB 8(JUD)
Fiscal Note Number:	1
(H) Publish Date:	2/25/2015

Identifier: HB008-DHSS-SDSA-02-07-15
 Title: POWERS OF ATTORNEY
 Sponsor: HUGHES
 Requester: House Judiciary Committee

Department: Department of Health and Social Services
 Appropriation: Senior and Disabilities Services
 Allocation: Senior and Disabilities Services Administration
 OMB Component Number: 2663

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2016	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2016 Request	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
OPERATING EXPENDITURES	FY 2016	FY 2016					
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues

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Estimated SUPPLEMENTAL (FY2015) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2016) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? no
 If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Not applicable, initial version.

Prepared By:	Duane Mayes	Phone:	(907)465-4874
Division:	Senior and Disabilities Services	Date:	02/07/2015 12:00 PM
Approved By:	Sarah Woods, Deputy Director Finance & Management Services	Date:	02/07/15
Agency:	Health & Social Services		

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2015 LEGISLATIVE SESSION**Analysis**

This bill will strengthen Alaska's power of attorney statute by clarifying the responsibilities of the "agent" receiving the power of attorney, and by adding key definitions to statute.

The bill will make Alaska's power of attorney statute interstate compatible by incorporating provisions of model "Uniform Power of Attorney Act" used by many states to regulate power of attorney issues when the agent and principal live in different states.

The bill makes changes to the "statutory power of attorney form" so that the principal must expressly approve the agent's authority in each type of transaction, a change from the current "blanket" approval.

The department does not anticipate additional costs as a result of this legislation.

Fiscal Note

State of Alaska
2015 Legislative Session

Bill Version:	CSHB 8(JUD)
Fiscal Note Number:	2
(H) Publish Date:	2/25/2015

Identifier: HB008-LAW-CIV-02-05-15
Title: POWERS OF ATTORNEY
Sponsor: HUGHES
Requester: (H) JUDICIARY

Department: Department of Law
Appropriation: Civil Division
Allocation: Commercial and Fair Business
OMB Component Number: 2717

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2016 Appropriation Requested	Included in Governor's FY2016 Request	Out-Year Cost Estimates					
			FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
OPERATING EXPENDITURES								
Personal Services								
Travel								
Services								
Commodities								
Capital Outlay								
Grants & Benefits								
Miscellaneous								
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None								
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time								
Part-time								
Temporary								

Change in Revenues

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Estimated SUPPLEMENTAL (FY2015) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2016) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Prepared By:	Valerie Rose, Budget Analyst	Phone:	(907)465-3674
Division:	Administrative Services Division	Date:	02/05/2015 09:52 AM
Approved By:	Craig W. Richards, Attorney General	Date:	02/05/15
Agency:	Department of Law		

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2015 LEGISLATIVE SESSION

Analysis

HB 8 makes numerous changes to the Uniform Probate Code and the power of attorney statutes. It outlines the duties of agents and how agents are to act. It also adds a new chapter to Title 13 dealing with substitute decision-making documents, when they are valid, who may rely on these documents, and when they are to be accepted. These matters are not typically handled by the Department of Law but rather by private attorneys and financial advisors.

We see no fiscal impact to the Department of Law should HB 8 become law.

REPRESENTATIVE
SHELLEY HUGHES

Transportation
Co-Chair
Labor and Commerce
Vice Chair
Unmanned Aircraft Systems Legislative Task Force
Co-Chair
Military & Veterans' Affairs Committee
Community & Regional Affairs Committee
Transportation Finance Subcommittee
Corrections Finance Subcommittee
Fish & Game Subcommittee

ALASKA STATE LEGISLATURE



HOUSE OF REPRESENTATIVES
District 11 – Greater Palmer

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Wasilla, AK 99654
907-376-3725
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Rep.Shelley.Hughes@akleg.gov
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SCS CSHB 8(HSS)
Powers of Attorney and
Substitute Decision-Making Documents
Version G

Explanation of Changes
January 25, 2016

Page 11, beginning at line 21: added additional signature verification by a notary
"If a person other than the principal executes the signature for the principal, the person may not be a person who is appointed an agent in the power of attorney, and the following signature line and notary verification must also be completed:"

Page 36, beginning at line 25:

- (1) Signs the power of attorney or, if the principal is physically unable to sign the power of attorney, directs, in the principal's conscious preens, another individual to sign the principal's name on the power of attorney; and
- (b) Notwithstanding AS 44.50.062(5)(A), a notary public may consider that the principal has signed a power of attorney if the principal is physically unable to sign the power of attorney, and, in the presence of the notary public, directs another individual to sign under (a)(1) of this section.

Sincerely,

A handwritten signature in cursive script that reads "Shelley Hughes".

Representative Shelley Hughes
District 11 - Greater Palmer

29-LS0055\G
Bannister
1/20/16

**SENATE CS FOR CS FOR HOUSE BILL NO. 8(HSS)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-NINTH LEGISLATURE - SECOND SESSION**

BY THE SENATE HEALTH AND SOCIAL SERVICES COMMITTEE

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVES HUGHES, Gruenberg

SENATOR Giessel

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to powers of attorney and other substitute decision-making documents;**
2 **relating to the uniform probate code; relating to notaries public; and providing for an**
3 **effective date."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 *** Section 1.** AS 13.06.050(1) is repealed and reenacted to read:

6 (1) "agent" means a person granted authority to act for a principal
7 under a power of attorney or to whom an agent's authority is delegated, whether
8 denominated an agent, attorney-in-fact, original agent, coagent, successor agent, or
9 otherwise;

10 *** Sec. 2.** AS 13.06.050(46) is amended to read:

11 (46) "state" means a state of the United States, the District of
12 Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or a
13 territory or insular possession subject to the jurisdiction of the United States;

14 *** Sec. 3.** AS 13.06.050 is amended by adding new paragraphs to read:

15 (57) "durable," with respect to a power of attorney, means not

1 terminated by the principal's incapacity; in this paragraph, "incapacity" has the
2 meaning given in AS 13.26.359;

3 (58) "electronic" means relating to technology having electrical, digital,
4 magnetic, wireless, optical, electromagnetic, or similar capabilities;

5 (59) "power of attorney" means a writing or other record that grants
6 authority to an agent to act in the place of the principal, whether or not the term
7 "power of attorney" is used;

8 (60) "principal" means an individual who grants authority to an agent in
9 a power of attorney;

10 (61) "record" means information that is inscribed on a tangible medium
11 or that is stored in an electronic or other medium and is retrievable in perceivable
12 form;

13 (62) "sign" means, with present intent to authenticate or adopt a record,
14 (A) to execute or adopt a tangible symbol; or
15 (B) to attach to or logically associate with the record an
16 electronic sound, symbol, or process.

17 * **Sec. 4.** AS 13.26 is amended by adding new sections to article 5 to read:

18 **Sec. 13.26.326. Agent's acceptance and liability.** (a) Except as otherwise
19 provided in the power of attorney, a person accepts appointment as an agent under a
20 power of attorney by exercising authority or performing duties as an agent or by any
21 other assertion or conduct indicating acceptance.

22 (b) An agent that violates a provision in AS 13.26.326 - 13.26.359 is liable to
23 the principal or the principal's successors in interest for the amount required to

24 (1) restore the value of the principal's property to what it would have
25 been had the violation not occurred; and

26 (2) reimburse the principal or the principal's successors in interest for
27 the attorney fees and costs paid on the agent's behalf.

28 **Sec. 13.26.327. Agent's duties.** (a) Notwithstanding provisions in the power of
29 attorney, an agent that has accepted appointment shall

30 (1) act in accordance with the principal's reasonable expectations to the
31 extent actually known by the agent and, otherwise, in the principal's best interest;

- 1 (2) act in good faith; and
- 2 (3) act only within the scope of authority granted in the power of
- 3 attorney.
- 4 (b) Except as otherwise provided in the power of attorney, an agent that has
- 5 accepted appointment shall
- 6 (1) act loyally for the principal's benefit;
- 7 (2) act so as not to create a conflict of interest that impairs the agent's
- 8 ability to act impartially in the principal's best interest;
- 9 (3) act with the care, competence, and diligence ordinarily exercised by
- 10 agents in similar circumstances;
- 11 (4) keep a record of all receipts, disbursements, and transactions made
- 12 on behalf of the principal;
- 13 (5) cooperate with a person that has authority to make health care
- 14 decisions for the principal to carry out the principal's reasonable expectations to the
- 15 extent actually known by the agent and, otherwise, act in the principal's best interest;
- 16 and
- 17 (6) attempt to preserve the principal's estate plan, to the extent actually
- 18 known by the agent, if preserving the plan is consistent with the principal's best
- 19 interest based on all relevant factors, including
- 20 (A) the value and nature of the principal's property;
- 21 (B) the principal's foreseeable obligations and need for
- 22 maintenance;
- 23 (C) minimization of taxes, including income, estate, inheritance,
- 24 generation-skipping transfer, and gift taxes; and
- 25 (D) eligibility for a benefit, a program, or assistance under a
- 26 statute or regulation.
- 27 (c) An agent that acts in good faith is not liable to any beneficiary of the
- 28 principal's estate plan for failure to preserve the plan.
- 29 (d) An agent that acts with care, competence, and diligence for the best interest
- 30 of the principal is not liable solely because the agent also benefits from the act or has
- 31 an individual or conflicting interest in relation to the property or affairs of the

1 principal.

2 (e) If an agent is selected by the principal because of special skills or expertise
3 possessed by the agent or in reliance on the agent's representation that the agent has
4 special skills or expertise, the special skills or expertise must be considered in
5 determining whether the agent has acted with care, competence, and diligence under
6 the circumstances.

7 (f) Absent a breach of duty to the principal, an agent is not liable if the value of
8 the principal's property declines.

9 (g) An agent that exercises authority to delegate to another person the authority
10 granted by the principal or that engages another person on behalf of the principal is not
11 liable for an act, error of judgment, or default of that person if the agent exercises care,
12 competence, and diligence in selecting and monitoring the person.

13 (h) Except as otherwise provided in the power of attorney, an agent is not
14 required to disclose receipts, disbursements, or transactions conducted on behalf of the
15 principal unless ordered by a court or requested by the principal, a guardian, a
16 conservator, another fiduciary acting for the principal, a governmental agency having
17 authority to protect the welfare of the principal, or, upon the death of the principal, the
18 personal representative or successor in interest of the principal's estate. If so requested,
19 within 30 days the agent shall comply with the request or provide a writing or other
20 record substantiating why additional time is needed and shall comply with the request
21 within an additional 30 days.

22 **Sec. 13.26.328. Acceptance of power of attorney.** (a) A third party asked to
23 accept a power of attorney may request, and rely upon, without further investigation

24 (1) an agent's certification under penalty of perjury of any factual
25 matter concerning the principal, agent, or power of attorney;

26 (2) an English translation of the power of attorney if the power of
27 attorney contains, in whole or in part, language other than English; and

28 (3) an opinion of counsel as to any matter of law concerning the power
29 of attorney if the person making the request provides in a writing or other record the
30 reason for the request.

31 (b) An English translation or an opinion of counsel requested under this section

1 must be provided at the principal's expense unless the request is made more than seven
2 business days after the power of attorney is presented for acceptance.

3 (c) For purposes of this section, a person that conducts activities through
4 employees is without actual knowledge of a fact relating to a principal, agent, or
5 power of attorney if the employee conducting the transaction involving the power of
6 attorney is without actual knowledge of the fact.

7 (d) Except as otherwise provided in (e) of this section,

8 (1) a person shall accept an acknowledged power of attorney or request
9 a certification, a translation, or an opinion of counsel under (a) of this section not later
10 than seven business days after presentation of the power of attorney for acceptance;

11 (2) if a person requests a certification, a translation, or an opinion of
12 counsel under (a) of this section, the person shall accept the power of attorney not later
13 than five business days after receipt of the certification, translation, or opinion of
14 counsel; and

15 (3) a person may not require an additional or different form of power of
16 attorney for authority granted in the power of attorney presented.

17 (e) Notwithstanding AS 13.26.357, a person is not required to accept an
18 acknowledged power of attorney if

19 (1) the person is not otherwise required to engage in a transaction with
20 the principal in the same circumstances;

21 (2) engaging in a transaction with the agent or principal in the same
22 circumstances would be inconsistent with federal law;

23 (3) the person has actual knowledge of the termination of the agent's
24 authority or of the power of attorney before exercise of the power;

25 (4) a request for a certification, a translation, or an opinion of counsel
26 under (a) of this section is refused;

27 (5) the person in good faith believes that the power is not valid or that
28 the agent does not have the authority to perform the act requested, whether or not a
29 certification, a translation, or an opinion of counsel under (a) of this section has been
30 requested or provided; or

31 (6) the person makes, or has actual knowledge that another person has

1 made, a report to Department of Health and Social Services or other governmental
2 agency, stating a good faith belief that the principal may be subject to physical or
3 financial abuse, neglect, exploitation, or abandonment by the agent or a person acting
4 for or with the agent.

5 (f) A person that refuses in violation of this section to accept an acknowledged
6 power of attorney is subject to

7 (1) a court order mandating acceptance of the power of attorney; and
8 (2) liability as provided by court rules of this state for attorney fees and
9 costs incurred in any action or proceeding that confirms the validity of the power of
10 attorney or mandates acceptance of the power of attorney.

11 **Sec. 13.26.329. Termination of power of attorney; agent's resignation;**
12 **notice.** (a) Except as provided in AS 13.26.356, a power of attorney terminates when

13 (1) the principal dies;
14 (2) there is an incapacity of the principal, if the power of attorney is not
15 durable;

16 (3) the principal revokes the power of attorney;
17 (4) the power of attorney provides that it terminates;
18 (5) the purpose of the power of attorney is accomplished; or
19 (6) the principal revokes the agent's authority, there is an incapacity of
20 the agent, the agent dies, or the agent resigns, and the power of attorney does not
21 provide for another agent to act under the power of attorney.

22 (b) Unless the power of attorney provides a different method for an agent's
23 resignation, an agent may resign by giving notice to the principal and, if there is an
24 incapacity of the principal,

25 (1) to the conservator or guardian, if one has been appointed for the
26 principal, and a coagent or successor agent; or

27 (2) if there is no person described in (1) of this subsection, to
28 (A) the principal's custodian or caregiver;
29 (B) another person reasonably believed by the agent to have
30 sufficient interest in the principal's welfare; or

31 (C) a governmental agency having statutory authority to protect

1 the welfare of the principal.

2 * **Sec. 5.** AS 13.26 is amended by adding a new section to article 5 to read:

3 **Sec. 13.26.331. Validity of power of attorney executed in another state.** A

4 power of attorney executed other than in this state is valid in this state if, when the
5 power of attorney was executed, the execution complied with

6 (1) the law of the jurisdiction where the power of attorney was
7 executed; or

8 (2) the requirements for a military power of attorney under 10 U.S.C.
9 1044b, as amended.

10 * **Sec. 6.** AS 13.26.332 is amended to read:

11 **Sec. 13.26.332. Statutory form power of attorney.** A person who wishes to
12 designate another as [ATTORNEY-IN-FACT OR] agent by a power of attorney may
13 execute a statutory power of attorney set out in substantially the following form:

14 GENERAL POWER OF ATTORNEY

15 THE POWERS GRANTED FROM THE PRINCIPAL TO THE
16 AGENT OR AGENTS IN THE FOLLOWING DOCUMENT ARE
17 VERY BROAD. THEY MAY INCLUDE THE POWER TO
18 DISPOSE, SELL, CONVEY, AND ENCUMBER YOUR REAL AND
19 PERSONAL PROPERTY. ACCORDINGLY, THE FOLLOWING
20 DOCUMENT SHOULD ONLY BE USED AFTER CAREFUL
21 CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT
22 THIS DOCUMENT, YOU SHOULD SEEK COMPETENT ADVICE.

23 YOU MAY REVOKE THIS POWER OF ATTORNEY AT
24 ANY TIME.

25 Pursuant to AS 13.26.338 - 13.26.359 [AS 13.26.338 -
26 13.26.353], I, (Name of principal), of (Address of principal), do hereby
27 appoint (Name and address of agent or agents), my agent(s)
28 [ATTORNEY(S)-IN-FACT] to act as indicated below in my name,
29 place, and stead in any way which I myself could do, if I were
30 personally present, with respect to the following matters, as each of
31 them is defined in AS 13.26.344, to the full extent that I am permitted

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by law to act through an agent:

MARK THE BOXES BELOW TO INDICATE THE POWERS YOU WANT TO GIVE YOUR AGENT OR AGENTS. MARK THE BOX FOR "YES" THAT IS OPPOSITE A CATEGORY BELOW TO GIVE YOUR AGENT OR AGENTS THE POWER IN THAT CATEGORY. MARK THE BOX FOR "NO" THAT IS OPPOSITE A CATEGORY BELOW TO INDICATE THAT YOU ARE NOT GIVING YOUR AGENT OR AGENTS THE POWER IN THAT CATEGORY. MARK A BOX FOR EVERY CATEGORY. IF YOU DO NOT MARK EITHER OF THE BOXES OPPOSITE A CATEGORY, OR IF YOU MARK BOTH OF THE BOXES OPPOSITE A CATEGORY, YOUR AGENT OR AGENTS WILL NOT HAVE THE POWER IN THAT CATEGORY [THE AGENT OR AGENTS YOU HAVE APPOINTED WILL HAVE ALL THE POWERS LISTED BELOW UNLESS YOU DRAW A LINE THROUGH A CATEGORY, AND INITIAL THE BOX OPPOSITE THAT CATEGORY].

	<u>YES</u>	<u>NO</u>
(A) real estate transactions	()	()
(B) transactions involving tangible personal property, chattels, and goods	()	()
(C) bonds, shares, and commodities transactions	()	()
(D) banking transactions	()	()
(E) business operating transactions	()	()
(F) insurance transactions	()	()
(G) estate transactions	()	()
(H) <u>retirement plans</u> [GIFT TRANSACTIONS]	()	()
(I) claims and litigation	()	()
(J) personal relationships and affairs	()	()
(K) benefits from government programs and <u>civil or</u> military service	()	()

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- (L) records, reports, and statements
- (M) [DELEGATION
- (N)] voter registration and absentee
ballot requests
- (N) [(O)] all other matters, including those
specified as follows:

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

The agent or agents you have appointed WILL NOT have the power to do any of the following acts UNLESS you MARK the box opposite that category:

- create, amend, revoke, or terminate an inter vivos trust;**
- make a gift, subject to the limitations of AS 13.26.344(q) and any special instructions in this power of attorney;**
- create or change a beneficiary designation;**
- revoke a transfer on death deed made under AS 13.48;**
- create or change rights of survivorship;**
- delegate authority granted under the power of attorney;**
- waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;**
- exercise fiduciary powers that the principal has authority to delegate.**

IF YOU HAVE APPOINTED MORE THAN ONE AGENT, **MARK** [CHECK] ONE OF THE FOLLOWING:

- Each agent may exercise the powers conferred separately, without the consent of any other agent.
- All agents shall exercise the powers conferred jointly, with the consent of all other agents.

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TO INDICATE WHEN THIS DOCUMENT SHALL BECOME EFFECTIVE, **MARK** [CHECK] ONE OF THE FOLLOWING:

- () This document shall become effective upon the date of my signature.
- () This document shall become effective upon the date of my **incapacity** [DISABILITY] and shall not otherwise be affected by my **incapacity** [DISABILITY].

IF YOU HAVE INDICATED THAT THIS DOCUMENT SHALL BECOME EFFECTIVE ON THE DATE OF YOUR SIGNATURE, **MARK** [CHECK] ONE OF THE FOLLOWING:

- () This document shall not be affected by my subsequent **incapacity** [DISABILITY].
- () This document shall be revoked by my subsequent **incapacity** [DISABILITY].

IF YOU HAVE INDICATED THAT THIS DOCUMENT SHALL BECOME EFFECTIVE UPON THE DATE OF YOUR SIGNATURE AND WANT TO LIMIT THE TERM OF THIS DOCUMENT, COMPLETE THE FOLLOWING:

This document shall only continue in effect for _____ () years from the date of my signature.

NOTICE OF REVOCATION OF THE POWERS GRANTED IN THIS DOCUMENT

You may revoke one or more of the powers granted in this document. Unless otherwise provided in this document, you may revoke a specific power granted in this power of attorney by completing a special power of attorney that includes the specific power in this document that you want to revoke. Unless otherwise provided in this document, you may revoke all the powers granted in this power of attorney by completing a subsequent power of attorney.

NOTICE TO THIRD PARTIES

A third party who relies on the reasonable representations of an **agent**

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[ATTORNEY-IN-FACT] as to a matter relating to a power granted by a properly executed statutory **form** power of attorney does not incur any liability to the principal or to the principal's heirs, assigns, or estate as a result of permitting the **agent** [ATTORNEY-IN-FACT] to exercise the authority granted by the power of attorney. A third party who fails to honor a properly executed statutory form power of attorney may be liable to the principal, the **agent** [ATTORNEY-IN-FACT], the principal's heirs, assigns, or estate for a civil penalty, plus damages, costs, and fees associated with the failure to comply with the statutory form power of attorney. If the power of attorney is one which becomes effective upon the **incapacity** [DISABILITY] of the principal, the **incapacity** [DISABILITY] of the principal is established by an affidavit, as required by law.

IN WITNESS WHEREOF, I have hereunto signed my name this ____ day of _____, _____.

Signature of Principal

Acknowledged before me at _____

_____ on _____.

Signature of Officer or Notary

If a person other than the principal executes the signature for the principal, the person may not be a person who is appointed an agent in the power of attorney, and the following signature line and notary verification must also be completed:

IN WITNESS WHEREOF, I have hereunto signed my name this ____ day of _____, _____.

Signature of person signing at the request of

Name of Principal

Printed name of person signing

Form of identification of person signing

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serve as my guardian or conservator, or in any similar representative capacity.

* **Sec. 8.** AS 13.26.341 is amended to read:

Sec. 13.26.341. Applicability of provisions of statutory form power of attorney. In the instrument set out in AS 13.26.332 - 13.26.335,

(1) if the principal has appointed more than one person to act as [ATTORNEY-IN-FACT OR] agent and failed to mark [CHECK] whether the agents may act "jointly" or "severally," the agents are required to act jointly;

(2) if the principal has failed to indicate when the instrument shall become effective, the instrument shall become effective upon the date of the principal's signature;

(3) if the principal has indicated that the instrument shall become effective upon the date of the principal's signature or has failed to indicate when the instrument shall become effective and has failed to indicate the effect of the principal's subsequent incapacity [DISABILITY] on the instrument, the instrument shall be revoked by the subsequent incapacity [DISABILITY] of the principal;

(4) if the principal has failed to indicate a specific term for the instrument, the instrument shall continue in effect until revoked;

(5) if the principal has failed to mark either of the "Yes" or "No" boxes opposite a category of power, or if the principal has marked both the "Yes" and "No" boxes opposite a category of power, the agent does not have the power in that category.

* **Sec. 9.** AS 13.26.344(a) is amended to read:

(a) In a statutory form power of attorney, the language conferring general authority with respect to real estate transactions shall be construed to mean that, as to an estate or interest in land of the principal, whether in the state or elsewhere, the principal authorizes the agent to

(1) accept as a gift or as security for a loan, demand, buy, lease, receive, or otherwise acquire either ownership or possession of any estate or interest in land;

(2) sell, exchange, convey, quitclaim, release, surrender, mortgage,

1 encumber, partition or consent to the partitioning, [REVOKE, CREATE OR MODIFY
2 A TRUST,] grant options concerning, lease or sublet, or otherwise to dispose of, an
3 estate or interest in land;

4 (3) release in whole or in part, assign the whole or a part of, satisfy in
5 whole or in part, and enforce a mortgage, encumbrance, lien, or other claim to land
6 that exists, or is claimed to exist, in favor of the principal;

7 (4) do any act of management or of conservation with respect to an
8 estate or interest in land owned, or claimed to be owned, by the principal, including by
9 way of illustration, but not of restriction, power to insure against any casualty,
10 liability, or loss, obtain or regain possession or protect the estate or interest, pay,
11 compromise, or contest taxes or assessments, or apply for refunds in connection with a
12 payment, compromise, or tax, purchase supplies, hire assistance of labor, and make
13 repairs or alterations in the structures or land;

14 (5) use, develop, modify, alter, replace, remove, erect, or install
15 structures or other improvements on land in which the principal has, or claims to have,
16 an estate or interest;

17 (6) demand, receive, or obtain money or any other thing of value to
18 which the principal is, or may become, or may claim to be entitled as the proceeds of
19 an interest in land or of one or more of the transactions enumerated in this subsection;
20 conserve, invest, disburse, or use anything so received for purposes enumerated in this
21 subsection; and reimburse the agent for an expenditure properly made in the execution
22 of the powers conferred by the statutory form power of attorney;

23 (7) participate in any reorganization with respect to real property and
24 receive and hold any shares of stock or instrument of similar character received under
25 a plan of reorganization, and act with respect to a plan of reorganization, including by
26 way of illustration, but not of restriction, power to sell or otherwise to dispose of
27 shares, to exercise or to sell an option, conversion, or similar right, and to vote in
28 person by the granting of a proxy;

29 (8) agree and contract, in any manner, and with any person and on any
30 terms that the agent may select, for the accomplishment of any of the purposes
31 enumerated in this subsection, and perform, rescind, reform, release, or modify an

1 agreement or contract made by or on behalf of the principal;

2 (9) execute, acknowledge, seal, and deliver a deed, [REVOCAION,
3 DECLARATION OR MODIFICATION OF TRUST,] mortgage, lease, notice, check,
4 or other instrument that the agent considers useful for the accomplishment of any of
5 the purposes enumerated in this subsection;

6 (10) prosecute, defend, submit to arbitration, settle, and propose or
7 accept a compromise with respect to, a claim existing in favor of, or against, the
8 principal based on or involving a real estate transaction or intervene in any related
9 action;

10 (11) hire, discharge, and compensate an attorney, accountant, expert
11 witness, or assistant when the agent considers that action to be desirable for the proper
12 execution of a power described in this subsection, and for the keeping of records about
13 that action; and

14 (12) do any other act or acts that the principal can do through an agent
15 with respect to any estate or interest in land.

16 * **Sec. 10.** AS 13.26.344(b) is amended to read:

17 (b) In a statutory form power of attorney, the language conferring general
18 authority with respect to tangible personal property, chattels, and goods transactions
19 shall be construed to mean that, as to tangible personal property, chattels, or goods
20 owned by the principal, whether located in the state or elsewhere, the principal
21 authorizes the agent to

22 (1) accept as a gift, or as a security for a loan, reject, demand, buy,
23 receive, or otherwise acquire either ownership or possession of chattels or goods or an
24 interest in the tangible personal property, chattels, or goods;

25 (2) sell, exchange, convey, release, surrender, mortgage, encumber,
26 pledge, hypothecate, pawn, [REVOKE, CREATE, OR MODIFY A TRUST,] grant
27 options concerning, lease or sublet to others, or otherwise dispose of tangible personal
28 property, chattels, or goods or an interest in them;

29 (3) release in whole or in part, assign the whole or a part of, satisfy in
30 whole or in part, and enforce a mortgage, encumbrance, lien, or other claim that exists,
31 or is claimed to exist, in favor of the principal with respect to any tangible personal

1 property, chattels, or goods or an interest in them;

2 (4) do any act of management or of conservation with respect to any
3 tangible personal property, chattels, or goods or to an interest in any tangible personal
4 property, chattels, or goods owned, or claimed to be owned, by the principal, including
5 by way of illustration, but not of restriction, power to insure against any casualty,
6 liability, or loss, obtain or regain possession, or protect the tangible personal property,
7 chattels, or goods or an interest in them, pay, compromise, or contest taxes or
8 assessments, apply for refunds in connection with a payment, compromise, or tax,
9 move from place to place, store for hire or on a gratuitous bailment, use, alter, and
10 make repairs or alterations of any tangible personal property, chattels, or goods, or an
11 interest in them;

12 (5) demand, receive, and obtain money or any other thing of value to
13 which the principal is, or may become, or may claim to be, entitled as the proceeds of
14 any tangible personal property, chattels, or goods or of an interest in them, or of one or
15 more of the transactions enumerated in this subsection, conserve, invest, disburse, or
16 use anything so received for purposes enumerated in this subsection, and reimburse
17 the agent for any expenditures properly made in the execution of the powers conferred
18 by the power of attorney;

19 (6) agree and contract, in any manner, and with any person and on any
20 terms that the agent may select, for the accomplishment of the purposes enumerated in
21 this subsection, and perform, rescind, reform, release, or modify any agreement or
22 contract or any other similar agreement or contract made by or on behalf of the
23 principal;

24 (7) execute, acknowledge, seal, and deliver a conveyance,
25 [REVOCAION, DECLARATION OR MODIFICATION OF TRUST,] mortgage,
26 lease, notice, check or other instrument that the agent considers useful for the
27 accomplishment of the purposes enumerated in this subsection;

28 (8) prosecute, defend, submit to arbitration, settle, and propose or
29 accept a compromise with respect to, a claim existing in favor of, or against, the
30 principal based on or involving a transaction involving tangible personal property,
31 chattels, or goods, or intervene in an action or proceeding;

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(9) hire, discharge, and compensate an attorney, accountant, expert witness, or assistant when the agent considers the action to be desirable to the proper execution of a power described in this subsection, and for the keeping of records about that action;

(10) do any other act or acts that the principal can do through an agent with respect to any chattels or goods or interest in any tangible personal property, chattels, or goods.

* **Sec. 11.** AS 13.26.344(c) is amended to read:

(c) In a statutory form power of attorney, the language conferring general authority with respect to bonds, shares, and commodities transactions shall be construed to mean that, with respect to a bond, share, or commodity of the principal, whether in the state or elsewhere, the principal authorizes the agent to

(1) accept as a gift, or as a security for a loan, reject, demand, buy, receive, or otherwise acquire either ownership or possession of, a bond, share, or instrument of similar character including, by way of illustration, but not of restriction, stock in a corporation organized under 43 U.S.C. 1601 et seq. (Alaska Native Claims Settlement Act), commodity interest, or an instrument with respect to a bond, share, or instruments of similar character, together with the interest, dividends, proceeds, or other distributions connected with a bond, share, or instrument of a similar character;

(2) sell, exchange, transfer, release, surrender, hypothecate, pledge, [REVOKE, CREATE, OR MODIFY A TRUST,] grant options concerning, loan, trade in, or otherwise dispose of a bond, share, instrument of similar character, commodity interest, or a related instrument;

(3) release, assign the whole or part of, satisfy in whole or in part, and enforce a pledge, encumbrance, lien, or other claim as to a bond, share, instrument of similar character, commodity interest, or a related interest, when the pledge, encumbrance, lien, or other claim is owned, or claimed to be owned, by the principal;

(4) do any act of management or of conservation with respect to a bond, share, instrument of similar character, commodity interest, or a related instrument, owned or claimed to be owned by the principal or in which the principal has or claims to have an interest, including by way of illustration, but not of

1 restriction, power to insure against a casualty, liability, or loss, obtain or regain
 2 possession or protect the principal's interest, pay, compromise, or contest taxes or
 3 assessments, apply for a refund in connection with a payment, compromise, or tax,
 4 consent to and participate in a reorganization, recapitalization, liquidation, merger,
 5 consolidation, sale or lease or other change in or revival of a corporation or other
 6 association, or in the financial structure of a corporation or other association, or in the
 7 priorities, voting rights, or other special rights with respect to a corporation or
 8 association, become a depositor with a protective, reorganization or similar committee
 9 of the bond, share, other instrument of similar character, commodity interest or a
 10 related instrument, belonging to the principal, make a payment reasonably incident to
 11 them, and exercise or sell an option, conversion, or similar right, or vote in person or
 12 by the granting of a proxy for the accomplishment of the purposes enumerated in this
 13 subsection;

14 (5) carry in the name of a nominee selected by the agent evidence of
 15 the ownership of a bond, share, other instrument of similar character, commodity
 16 interest, or related instrument belonging to the principal;

17 (6) employ, in any way believed to be desirable by the agent, a bond,
 18 share, other instrument of similar character, commodity interest, or a related
 19 instrument, in which the principal has or claims to have an interest, for the protection
 20 or continued operation of a speculative or margin transaction personally begun or
 21 personally guaranteed, in whole or in part, by the principal;

22 (7) demand, receive, or obtain money or any other thing of value to
 23 which the principal is, or may claim to be, entitled as the proceeds of an interest in a
 24 bond, share, other instrument of similar character, commodity interest or a related
 25 instrument, or of one or more of the transactions enumerated in this subsection,
 26 conserve, invest, disburse, or use anything so received for purposes enumerated in this
 27 subsection; and reimburse the agent for an expenditure properly made in the execution
 28 of the powers conferred by the statutory form power of attorney;

29 (8) agree and contract, in any manner, and with a broker or other
 30 person, and on terms that the agent may select, for the accomplishment of the purposes
 31 enumerated in this subsection, and perform, rescind, reform, release, or modify the

1 agreement or contract or other similar agreement made by or on behalf of the
2 principal;

3 (9) execute, acknowledge, seal, and deliver a consent, agreement,
4 authorization, assignment, [REVOCAION, DECLARATION OR MODIFICATION
5 OF TRUST,] notice, waiver of notice, check, or other instrument that the agent
6 considers useful for the accomplishment of the purposes enumerated in this
7 subsection;

8 (10) execute, acknowledge and file a report or certificate required by
9 law or regulation;

10 (11) prosecute, defend, submit to arbitration, settle, and propose or
11 accept a compromise with respect to, a claim existing in favor of, or against, the
12 principal based on or involving a bond, share, or commodity transactions, or intervene
13 in a related action or proceeding;

14 (12) hire, discharge, and compensate an attorney, accountant, expert
15 witness, or assistant when the agent considers that action to be desirable for the proper
16 execution of the powers described in this subsection, and for the keeping of records
17 about that action; and

18 (13) do any other act or acts that the principal can do through an agent,
19 with respect to an interest in a bond, share, or other instrument of similar character,
20 commodity, or instrument with respect to a commodity.

21 * **Sec. 12.** AS 13.26.344(d) is amended to read:

22 (d) In a statutory form power of attorney, the language conferring general
23 authority with respect to banking transactions shall be construed to mean that, as to a
24 banking transaction engaged in by the principal, whether in the state or elsewhere, the
25 principal authorizes the agent to

26 (1) continue, modify, or terminate a deposit account or other banking
27 arrangement made by or on the behalf of the principal before the execution of the
28 power of attorney;

29 (2) open, either in the name of the agent alone or in the name of the
30 principal alone, or in both their names jointly, a deposit account of any type in a
31 financial institution selected by the agent, hire a safe deposit box or vault space, and

1 enter into contracts for the procuring of other services made available by the
2 institution that the agent considers desirable;

3 (3) make, sign, and deliver checks or drafts for any purpose, and
4 withdraw funds or property of the principal deposited with or left in the custody of a
5 financial institution, wherever located, either before or after the execution of the
6 power of attorney;

7 (4) prepare financial statements concerning the assets and liabilities or
8 income and expenses of the principal, and deliver the statements to a financial
9 institution or person whom the agent believes to be reasonably entitled to them;

10 (5) receive statements, vouchers, notices, or other documents from a
11 financial institution and act with respect to them;

12 (6) have free access to a safe deposit box or vault to which the principal
13 would have access if personally present;

14 (7) borrow money as the agent may determine, give security out of the
15 assets of the principal as the agent considers necessary for the borrowing, and pay,
16 renew, or extend the time of payment of a financial institution by any other procedure
17 made available by the institution;

18 (8) make, assign, endorse, discount, guarantee, use, and negotiate
19 promissory notes, bills of exchange, checks, drafts, credit and debit cards, electronic
20 transaction authorizations, or other negotiable or nonnegotiable paper of the
21 principal, or payable to the principal or to the principal's order, receive the cash or
22 other proceeds of them; and accept any bill of exchange or draft drawn by any person
23 upon the principal, and pay it when due;

24 (9) receive for the principal and deal in and with a negotiable or
25 nonnegotiable instrument in which the principal has or claims to have an interest;

26 (10) apply for and receive letters of credit or traveler's checks from a
27 banker or banking institution selected by the agent, giving indemnity or other
28 agreements in connection with the applications or receipts that the agent considers
29 desirable or necessary;

30 (11) consent to an extension in the time of payment with respect to
31 commercial paper or a banking transaction in which the principal has an interest or by

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which the principal is, or might be, affected in any way;

(12) pay, compromise, or contest taxes or assessments and apply for refunds in connection with the payment, compromise, or contest;

(13) demand, receive, or obtain money or any other thing of value to which the principal is, or may become, or may claim to be entitled as the proceeds of any banking transaction conducted by the principal or by the agent in the execution of the powers described in this subsection, or partly by the principal and partly by the agent; conserve, invest, disburse, or use anything received for purposes enumerated in this subsection, and reimburse the agent for an expenditure properly made in the execution of the powers conferred by the statutory form power of attorney;

(14) execute, acknowledge, seal, and deliver an instrument, in the name of the principal or otherwise, that the agent considers useful for the accomplishment of a purpose enumerated in this subsection;

(15) prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to, a claim existing in favor of, or against, the principal based on or involving a banking transaction, or intervene in an action or proceeding relating to a banking transaction;

(16) hire, discharge, and compensate an attorney, accountant, expert witness, or assistant when the agent considers that the action is desirable for the proper execution of the powers described in this subsection, and for the keeping of records about that action; and

(17) do any other act or acts that the principal can do through an agent in connection with a banking transaction that does or might in any way affect the financial or other interests of the principal.

* **Sec. 13.** AS 13.26.344(e) is amended to read:

(e) In a statutory form power of attorney, the language conferring general authority with respect to business operating transactions shall be construed to mean that, with respect to a business in which the principal has an interest, whether in the state or elsewhere, the principal authorizes the agent

(1) to the extent that an agent is permitted by law to act for a principal, to discharge and perform any duty or liability and exercise any right, power, privilege,

1 or option that the principal has, or claims to have, under a contract of partnership,
2 whether as a general or special partner, enforce the terms of the partnership agreement
3 for the protection of the principal that the agent considers desirable or necessary, and
4 defend, submit to arbitration, settle, or compromise an action to which the principal is
5 a party because of membership in a partnership;

6 (2) to exercise in person or by proxy or enforce a right, power,
7 privilege, or option that the principal has as the holder of a bond, share, or other
8 instrument of similar character, and defend, submit to arbitration, settle, or
9 compromise an action to which the principal is a party because of a bond, share, or
10 other instrument of similar character;

11 (3) with respect to a business enterprise that is owned solely by the
12 principal, to

13 (A) continue, modify, renegotiate, extend and terminate a
14 contractual arrangement made with a person, firm, association, or corporation
15 by or on behalf of the principal;

16 (B) determine the policy of the enterprise as to the location of
17 the site or sites to be used for its operation, the nature and extent of the
18 business to be undertaken by it, the methods of manufacturing, selling,
19 merchandising, financing, accounting, and advertising to be employed in its
20 operation, the amount and types of insurance to be carried, the mode of
21 securing compensation and dealing with accountants, attorneys, and employees
22 required for its operation, agree and contract, in any manner, and with any
23 person and on any terms, that the agent considers desirable or necessary to
24 carry out any or all of the decisions of the agent as to policy, and perform,
25 rescind, reform, release, or modify an agreement or contract or any other
26 similar agreement or contract made by or on behalf of the principal;

27 (C) change the name or form of organization under which the
28 business is operated and enter into a partnership agreement with others or
29 organize a corporation to take over the operation of the business, or any part of
30 it, that the agent considers desirable or necessary;

31 (D) demand and receive all money that is or may become due to

1 the principal, or that may be claimed by the principal or on the principal's
2 behalf, in the operation of the enterprise, and control and disburse the funds in
3 the operation of the enterprise in any way that the agent considers desirable or
4 necessary, and engage in banking transactions that the agent considers
5 desirable or necessary to carry out the execution of the powers of the agent
6 described in this subparagraph;

7 (4) to prepare, sign, file, and deliver all reports, compilations of
8 information, returns, and other papers with respect to a business operating transaction
9 of the principal that is required by a government agency or that the agent considers
10 desirable or necessary for any purpose, and make any payments with respect to the
11 agency;

12 (5) to pay, compromise, or contest taxes or assessments and do any act
13 or acts that the agent considers desirable or necessary to protect the principal from
14 illegal or unnecessary taxation, fines, penalties, or assessments in connection with the
15 business operations;

16 (6) to demand, receive, or obtain money or any other thing of value to
17 which the principal is or may claim to be entitled as the proceeds of a business
18 operation of the principal, conserve, invest, disburse, and use anything so received for
19 purposes enumerated in this subsection, and reimburse the agent for expenditures
20 properly made in the execution of the powers conferred by the statutory form power of
21 attorney;

22 (7) to execute, acknowledge, seal, and deliver a deed, assignment,
23 mortgage, lease, notice, consent, agreement, authorization check, or other instrument
24 that the agent considers useful for the accomplishment of any of the purposes
25 enumerated in this subsection;

26 (8) to prosecute, defend, submit to arbitration, settle, and propose or
27 accept a compromise with respect to, a claim existing in favor of, or against, the
28 principal based on or involving a business operating transaction or intervene in a
29 related action;

30 (9) to hire, discharge, and compensate an attorney, accountant, expert
31 witness, or assistant when the agent reasonably believes that the action is desirable for

1 the proper execution of the powers described in this subsection, and for the keeping of
2 records about that action;

3 (10) to operate, buy, sell, enlarge, reduce, or terminate an
4 ownership interest;

5 (11) to put additional capital into an entity or business in which the
6 principal has an interest;

7 (12) to join in a plan of reorganization, consolidation, conversion,
8 domestication, or merger of the entity or business;

9 (13) to sell or liquidate all or part of an entity or business; and

10 (14) to establish the value of an entity or business under a buy-out
11 agreement to which the principal is a party; and

12 (15) to [AND (10)] do any other act or acts that the principal can do
13 through an agent in connection with a business operated by the principal that the agent
14 considers desirable or necessary for the furtherance or protection of the interests of the
15 principal.

16 * **Sec. 14.** AS 13.26.344(f) is amended to read:

17 (f) In a statutory form power of attorney, the language conferring general
18 authority with respect to insurance transactions shall be construed to mean that, as to a
19 contract of insurance in which the principal has an interest, whether in the state or
20 elsewhere, the principal authorizes the agent to

21 (1) continue, pay the premium or assessment on, modify, rescind,
22 release, or terminate any contract of life, accident, health, disability, or liability
23 insurance, or any combination of insurance, procured by or on behalf of the principal
24 before the creation of the agency that insures either the principal or any other person
25 without regard to whether the principal is or is not a beneficiary under the insurance
26 coverage;

27 (2) procure new, different, or additional contracts on the life of the
28 principal or protecting the principal with respect to ill health, disability, accident, or
29 liability of any sort, select the amount, the type of insurance contract, and the mode of
30 payment under each policy, pay the premium or assessment on, modify, rescind,
31 release, or terminate a contract so procured by the agent; and designate the beneficiary

1 of the contract of insurance, except that the agent cannot be the beneficiary unless the
2 agent is spouse, child, grandchild, parent, brother, or sister of the principal;

3 (3) apply for and receive a loan on the security of the contract of
4 insurance, whether for the payment of a premium or for the procuring of cash;
5 surrender and receive the cash surrender value; exercise an election as to beneficiary
6 or mode of payment, change the manner of paying premiums, change or convert the
7 type of insurance contract with respect to any insurance that the principal has, or
8 claims to have, as to any power described in this subsection; and change the
9 beneficiary of a contract of insurance, except that the agent cannot be the new
10 beneficiary unless the agent is spouse, child, grandchild, parent, brother, or sister of
11 the principal;

12 (4) demand, receive, or obtain money or any other thing of value to
13 which the principal is, or may become, or may claim to be entitled as the proceeds of a
14 contract of insurance or of one or more of the transactions enumerated in this
15 subsection; conserve, invest, disburse, or use anything received for purposes
16 enumerated in this subsection and reimburse the agent for expenditures properly made
17 in the execution of the powers conferred by the statutory form power of attorney;

18 (5) apply for and procure available government aid in the guaranteeing
19 or paying of premiums of a contract of insurance on the life of the principal;

20 (6) sell, assign, hypothecate, borrow upon, or pledge the interest of the
21 principal in any contract of insurance;

22 (7) pay, from the proceeds of an insurance contract or otherwise,
23 compromise, or contest, and apply for refunds in connection with, a tax or assessment
24 levied by a taxing authority with respect to a contract of insurance or the proceeds of
25 or liability accruing by reason of a tax or assessment;

26 (8) agree and contract, in any manner and with any person and on any
27 terms that the agent may select, for the accomplishment of the purposes enumerated in
28 this subsection, and perform, rescind, reform, release, or modify any agreement or
29 contract;

30 (9) execute, acknowledge, seal, and deliver any consent, demand,
31 request, application, agreement, indemnity, authorization, assignment, pledge, notice,

1 check, receipt, waiver, or other instrument that the agent considers useful for the
2 accomplishment of a purpose enumerated in this subsection;

3 (10) continue, procure, pay the premium or assessment on, modify,
4 rescind, release, terminate, or otherwise deal with any contract of insurance, other than
5 those enumerated in (1) and (2) of this subsection, or any combination of insurance;
6 and do any act with respect to the contract or with respect to its proceeds or
7 enforcement that the agent considers desirable or necessary for the promotion or
8 protection of the interests of the principal;

9 (11) prosecute, defend, submit to arbitration, settle, and propose or
10 accept a compromise with respect to a claim existing in favor of, or against, the
11 principal based on or involving an insurance transaction, or intervene in an action
12 relating to an insurance transaction;

13 (12) hire, discharge, and compensate an attorney, accountant, expert
14 witness, or assistant when the agent considers the action to be desirable for the proper
15 execution of a power described in this subsection, and for the keeping of records about
16 that action; [AND]

17 (13) exercise investment powers available under a contract of
18 insurance or annuity; and

19 (14) do any other act or acts that the principal can do through an agent
20 in connection with procuring, supervising, managing, modifying, enforcing, and
21 terminating contracts of insurance in which the principal is the insured or has an
22 interest.

23 * **Sec. 15.** AS 13.26.344(h) is repealed and reenacted to read:

24 (h) In a statutory form power of attorney, the language conferring authority
25 with respect to retirement plans shall be construed to mean that the principal
26 authorizes the agent to

27 (1) select the form and timing of payments under a retirement plan and
28 withdraw benefits from a plan;

29 (2) make a rollover, including a direct trustee-to-trustee rollover, of
30 benefits from one retirement plan to another;

31 (3) establish a retirement plan in the principal's name;

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- (4) make contributions to a retirement plan;
- (5) exercise investment powers available under a retirement plan; and
- (6) borrow from, sell assets to, or purchase assets from a retirement plan.

* Sec. 16. AS 13.26.344(j) is amended to read:

(j) In a statutory form power of attorney, the language conferring general authority with respect to personal relationships **is neither dependent on, nor limited by, authority that an agent may or may not have with respect to gifts under AS 13.26.326 - 13.26.359, and** shall be construed to mean that, as to real and personal property owned by the principal, whether in the state or elsewhere, the principal authorizes the agent to

(1) do all acts necessary to maintain the customary standard of living of the spouse, children, [AND] other dependents of the principal, **whether living when the power of attorney is executed or later born, and individuals whom the principal has customarily supported or indicated the intent to support,** including by way of illustration and not by way of restriction, power to provide living quarters by purchase, **by** lease, or by other contract, or by any payment of the operating costs, including interest, amortization payments, repairs, and taxes, of premises owned by the principal and occupied by the principal's family or dependents, to provide normal domestic help for the operation of the household, to provide usual vacations and usual travel expenses, to provide usual educational facilities, [AND] to provide funds for all the current living costs of the spouse, children, and other dependents, including, among other things, shelter, clothing, food, and incidentals, **and to make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;**

(2) provide, whenever necessary, medical, dental, and surgical care, hospitalization, and custodial care for the spouse, children, and other dependents of the principal;

(3) continue whatever provision has been made by the principal for the principal's spouse, children, and other dependents, with respect to automobiles, or other means of transportation, including by way of illustration, but not by way of

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restriction, power to license, insure, and replace automobiles owned by the principal and customarily used by the spouse, children, or other dependents of the principal;

(4) continue whatever charge accounts have been opened for the convenience of the principal's spouse, children, or other dependents, open any new accounts that the agent considers desirable to accomplish the purposes enumerated in this subsection, and pay the items charged on these accounts by a person authorized or permitted by the principal to make the charges;

(5) continue the discharge of any services or duties assumed by the principal to a parent, relative, or friend of the principal;

(6) supervise, enforce, defend, or settle any claim by or against the principal arising out of property damages or personal injuries suffered by or caused by the principal, or under any circumstance that the resulting loss will or may fall on the principal;

(7) continue payments incidental to the membership or affiliation of the principal in a church, club, society, order, or other organization, or continue contributions to the organization;

(8) demand, receive, or obtain money or any other thing of value to which the principal is or may become or may claim to be entitled as remuneration for services performed, or as a stock dividend or distribution, or as interest or principal upon indebtedness, or as a periodic distribution of profits from any partnership or business in which the principal has or claims an interest, and endorse, collect, or otherwise realize upon an instrument for the payment received;

(9) prepare, execute, and file all tax, social security, unemployment insurance, and information returns required by the laws of the United States or of any state or subdivision, or of any foreign government; prepare, execute, and file all other papers and instruments that the agent considers desirable or necessary for the safeguarding of the principal against excess or illegal taxation or against penalties imposed for claimed violation of a law or regulation; and pay, compromise, or contest or apply for refunds in connection with a tax or assessment for which the principal is or may be liable;

(10) use an asset of the principal to perform a power enumerated in this

1 subsection, including by way of illustration and not by way of restriction, power to
2 draw money by check or otherwise from a bank deposit of the principal, to sell land or
3 a chattel, bond, share, commodity interest, or other asset of the principal, to borrow
4 money, and to pledge as security for the loan any asset, including insurance, that
5 belongs to the principal;

6 (11) execute, acknowledge, verify, seal, file, and deliver an application,
7 consent, petition, notice, release, waiver, agreement, or other instrument that the agent
8 considers useful to accomplish a purpose enumerated in this subsection;

9 (12) prosecute, defend, submit to arbitration, settle, and propose or
10 accept a compromise with respect to a claim existing in favor of, or against, the
11 principal based on or involving a transaction enumerated in this subsection, or
12 intervene in any action or proceeding related to a transaction;

13 (13) hire, discharge, and compensate an attorney, accountant, expert
14 witness, or assistant when the agent considers the action to be desirable for the proper
15 execution of any of the powers described in this subsection, and for the keeping of
16 records, about that action; [AND]

17 (14) do any other act or acts that the principal can do through an agent,
18 for the welfare of the spouse, children, or dependents of the principal or for the
19 preservation and maintenance of the other personal relationships of the principal to a
20 parent, relative, friend, or organization; and

21 (15) act as the principal's personal representative under 42 U.S.C.
22 1320d (Health Insurance Portability and Accountability Act and secs. 1171 -
23 1179, Social Security Act), as amended, and applicable regulations, in making
24 decisions related to the past, present, or future payment for the provision of
25 health care consented to by the principal or anyone authorized under the law of
26 this state to consent to health care on behalf of the principal.

27 * Sec. 17. AS 13.26.344(k) is amended to read:

28 (k) In a statutory form power of attorney, the language conferring general
29 authority with respect to benefits from government programs or civil or [AND]
30 military service shall be construed to mean that, whether the benefits from the
31 government programs or civil or military service have accrued to the principal in the

1 state or elsewhere, the principal authorizes the agent to

2 (1) prepare and execute vouchers, applications, requests, forms, and
3 other legal documents in the name of the principal for all benefits, bonuses, dividends,
4 allowances, and reimbursements payable under any government program or military
5 service of the United States, a state, or a subdivision, **including allowances and**
6 **reimbursements for transportation of the individuals described in (i)(1) of this**
7 **section, and for shipment of their household effects,** and receive, endorse, and
8 collect the proceeds of a check payable to the order of the principal drawn on the
9 treasurer or other fiscal officer or depository of the United States, a state, or a
10 subdivision;

11 (2) take possession and order the removal and shipment of property of
12 the principal from any post, warehouse, depot, dock, or other place or storage or
13 safekeeping and execute and deliver any release, voucher, receipt, bill of lading,
14 shipping ticket, certificate, or other instrument that the agent considers desirable or
15 necessary for that purpose;

16 (3) prepare, file, and prosecute the claim of the principal to any benefit
17 or assistance to which the principal is, or claims to be, entitled under the provisions of
18 a statute or regulation of the United States, a state, or a subdivision;

19 (4) receive the financial proceeds of a claim of the type described in
20 this subsection; conserve, invest, disburse or use anything received for purposes
21 enumerated in this subsection; and reimburse the agent for expenditures properly made
22 in the execution of the powers conferred by the statutory form power of attorney;

23 (5) prosecute, defend, submit to arbitration, settle, and propose or
24 accept a compromise with respect to a claim existing in favor of, or against, the
25 principal based on or involving a benefit from a government program or military
26 service, or intervene in an action relating to a claim;

27 (6) hire, discharge, or compensate an attorney, accountant, expert
28 witness, or assistant when the agent considers that action to be desirable for the proper
29 execution of any of the powers described in this subsection; [AND]

30 (7) **enroll in, apply for, select, reject, change, amend, or**
31 **discontinue, on the principal's behalf, a benefit or program; and**

1 (8) do any other act or acts that the principal can do through an agent,
2 and that [WHICH] the agent considers desirable or necessary to assure to the principal
3 and to the dependents of the principal [,] the maximum possible benefit from the
4 government programs or civil or military service of the United States, a state, or a
5 subdivision.

6 * **Sec. 18.** AS 13.26.344 is amended by adding a new subsection to read:

7 (q) In a statutory form power of attorney, unless the power of attorney
8 otherwise provides, the language conferring specific authority with respect to gift
9 transactions shall be construed to mean that the principal authorizes the agent only

10 (1) to make a gift of the principal's property only as the agent
11 determines is consistent with the principal's objectives if actually known by the agent
12 and, if unknown, as the agent determines is consistent with the principal's best interest
13 based on all relevant factors, including

14 (A) the value and nature of the principal's property;

15 (B) the principal's foreseeable obligations and need for
16 maintenance;

17 (C) minimization of taxes, including income, estate, inheritance,
18 generation-skipping transfer, and gift taxes;

19 (D) eligibility for a benefit, a program, or assistance under a
20 statute or regulation; and

21 (E) the principal's personal history of making or joining in
22 making gifts;

23 (2) subject to (1) of this subsection, to make outright to, or for the
24 benefit of, a person, a gift of any of the principal's property, including by the exercise
25 of a presently exercisable general power of appointment held by the principal, in an
26 amount for each donee not to exceed the annual dollar limits of the federal gift tax
27 exclusion under 26 U.S.C. 2503(b) (Internal Revenue Code), as amended, without
28 regard to whether the federal gift tax exclusion applies to the gift, or if the principal's
29 spouse agrees to consent to a split gift under 26 U.S.C. 2513 (Internal Revenue Code),
30 as amended, in an amount for each donee not to exceed twice the annual federal gift
31 tax exclusion limit; in this paragraph, "presently exercisable general power of

1 appointment," with respect to property or a property interest subject to a power of
 2 appointment, means power exercisable at the time in question to vest absolute
 3 ownership in the principal individually, the principal's estate, the principal's creditors,
 4 or the creditors of the principal's estate; the term includes a power of appointment not
 5 exercisable until the occurrence of a specified event, the satisfaction of an
 6 ascertainable standard, or the passage of a specified period only after the occurrence of
 7 the specified event, the satisfaction of the ascertainable standard, or the passage of the
 8 specified period; the term does not include a power exercisable in a fiduciary capacity
 9 or only by will; and

10 (3) subject to (1) of this subsection, to consent, under 26 U.S.C. 2513
 11 (Internal Revenue Code), as amended, to the splitting of a gift made by the principal's
 12 spouse in an amount for each donee not to exceed the aggregate annual gift tax
 13 exclusions for both spouses.

14 * **Sec. 19.** AS 13.26.347 is amended to read:

15 **Sec. 13.26.347. Validity of modified statutory form power of attorney.** A
 16 power of attorney that satisfies the requirements of AS 13.26.332 - 13.26.344 is not
 17 prevented from being a statutory form power of attorney by the fact that it also
 18 contains additional language that

19 (1) eliminates from the power of attorney one or more of the powers
 20 enumerated in one or more of the subsections of AS 13.26.344 with respect to a
 21 section of the statutory form power of attorney that is not eliminated by the principal;

22 (2) supplements one or more of the powers enumerated in one or more
 23 of the subsections of AS 13.26.344 with respect to a section of the statutory form
 24 power of attorney that is not eliminated by the principal by specifically listing
 25 additional powers of the agent; [OR]

26 (3) makes an additional provision that is not substantially inconsistent
 27 with the other provisions of the statutory form power of attorney; or

28 (4) relieves an agent of liability for breach of a duty under
 29 AS 13.26.327, except to the extent the provision

30 (A) relieves the agent of liability for breach of duty
 31 committed dishonestly, with an improper motive, or with reckless

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indifference to the purposes of the power of attorney or the best interest of the principal; or
(B) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

* Sec. 20. AS 13.26.350 is amended to read:

Sec. 13.26.350. When statutory form power of attorney is not affected by incapacity [DISABILITY OR INCOMPETENCE] of principal. (a) The subsequent incapacity [DISABILITY OR INCOMPETENCE] of a principal does not revoke or terminate the authority of an agent [ATTORNEY-IN-FACT] who acts under a power of attorney in a writing executed by a principal if the writing contains the words "This power of attorney shall become effective upon the incapacity [DISABILITY] of the principal," or contains the words "This power of attorney shall not be affected by the subsequent incapacity [DISABILITY] of the principal," or words substantially similar showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity [DISABILITY, INCOMPETENCE,] or uncertainty as to whether the principal is dead or alive.

(b) An act done by an agent [ATTORNEY-IN-FACT] under a power granted in a power of attorney under AS 13.26.332 - 13.26.344 during a period of incapacity [DISABILITY, INCOMPETENCE,] or uncertainty as to whether the principal is dead or alive has the same effect and enures to the benefit of and binds a principal and the principal's distributees, devisees, legatees, and personal representatives as if there were no incapacity of the principal [WERE COMPETENT AND NOT DISABLED]. If a conservator is later appointed for the principal, during the continuance of the appointment, the agent is accountable to the conservator as well as to the principal [THE ATTORNEY-IN-FACT SHALL ACCOUNT TO THE CONSERVATOR RATHER THAN TO THE PRINCIPAL]. The conservator has the same power to revoke, suspend, or terminate the power of attorney that the principal would have if there was no incapacity of the principal [WERE NOT DISABLED OR INCOMPETENT TO REVOKE, SUSPEND, OR TERMINATE THE POWER OF ATTORNEY].

1 * **Sec. 21.** AS 13.26.353(a) is repealed and reenacted to read:

2 (a) For purposes of AS 13.26.332 - 13.26.344,

3 (1) the incapacity of a principal shall be established by affidavit stating
4 that the principal is unable to manage property or business affairs because the
5 principal

6 (A) has an impairment in the ability to receive and evaluate
7 information or make or communicate decisions even with the use of
8 technological assistance, and this impairment is the result of mental illness,
9 mental deficiency, physical illness, physical disability, advanced age, use of
10 drugs, chronic intoxication, or other similar medical or psychological reason,
11 to such an extent that the principal is unable to manage the principal's property
12 or affairs; or

13 (B) is

14 (i) missing;

15 (ii) detained, including incarcerated in a penal system; or

16 (iii) outside the United States and unable to return; and

17 (2) if the incapacity is based on (1)(A) of this subsection, two
18 physicians or similarly qualified medical professionals who have personally examined
19 the principal shall sign the affidavit; however, the affidavit may be signed by only one
20 physician or similarly qualified medical professional if only one physician or similarly
21 qualified medical professional is available and the affidavit executed by the person
22 states that only one physician or similarly qualified medical professional is available.

23 * **Sec. 22.** AS 13.26.353(b) is amended to read:

24 (b) A third party who relies on the reasonable representations of an **agent**
25 [ATTORNEY-IN-FACT] designated under AS 13.26.332 - 13.26.347 [AS 13.26.332 -
26 13.26.344] as to a matter relating to a power granted by a properly executed statutory
27 form power of attorney does not incur a liability to the principal or the principal's
28 heirs, assigns, or estate as a result of permitting the **agent** [ATTORNEY-IN-FACT] to
29 exercise the authority granted by the power of attorney.

30 * **Sec. 23.** AS 13.26 is amended by adding new sections to read:

31 **Sec. 13.26.354. Judicial relief.** (a) The following persons may petition a court

1 in accordance with the provisions of AS 13.26.165 - 13.26.324 to construe a power of
2 attorney, review the agent's conduct, and grant appropriate relief:

- 3 (1) the principal or the agent;
- 4 (2) the principal's attorney or other legal representative;
- 5 (3) a guardian, conservator, or other fiduciary acting for the principal;
- 6 (4) a person authorized to make health care decisions for the principal;
- 7 (5) the principal's spouse, parent, or descendant;
- 8 (6) an individual who would qualify as a presumptive heir of the
9 principal;
- 10 (7) a person named as a beneficiary to receive any property, benefit, or
11 contractual right on the principal's death or as a beneficiary of a trust created by or for
12 the principal that has a financial interest in the principal's estate;
- 13 (8) the Department of Health and Social Services, the Department of
14 Administration, the office of the long-term care ombudsman, or other governmental
15 agency having statutory authority to protect the welfare of the principal;
- 16 (9) the principal's caregiver, custodian, or another person that
17 demonstrates sufficient interest in the principal's welfare; and
- 18 (10) a person asked to accept the power of attorney.

19 (b) Upon motion by the principal, the court shall dismiss a petition filed under
20 this section, unless the court finds that the principal lacks capacity to revoke the
21 agent's authority or the power of attorney.

22 **Sec. 13.26.355. Relationship to other laws.** (a) Except as provided in (c) of
23 this section, AS 13.26.326 - 13.26.359 do not supersede any other law applicable to a
24 financial institution or other entity, and the other law controls if inconsistent with
25 AS 13.26.326 - 13.26.359.

26 (b) The remedies in AS 13.26.326 - 13.26.359 are not exclusive and do not
27 abrogate any right or remedy under the law of this state.

28 (c) AS 13.26.326 - 13.26.359 modify, limit, or supersede 15 U.S.C. 7001 -
29 7031 (Electronic Signatures in Global and National Commerce Act), but do not
30 modify, limit, or supersede 15 U.S.C. 7001(c), or authorize electronic delivery of any
31 of the notices described in 15 U.S.C. 7003(b).

1 * **Sec. 24.** AS 13.26.356 is amended to read:

2 **Sec. 13.26.356. Powers of attorney not revoked until notice of death or**
3 **incapacity [DISABILITY].** (a) The death [, DISABILITY] or **incapacity**
4 [INCOMPETENCE] of a principal who has executed a power of attorney in writing
5 does not revoke or terminate the agency as to the [ATTORNEY-IN-FACT,] agent [,]
6 or other person who, without actual knowledge of the death [, DISABILITY,] or
7 **incapacity** [INCOMPETENCE] of the principal, acts in good faith under the power of
8 attorney [OR AGENCY]. Action so taken, unless otherwise invalid or unenforceable,
9 binds the principal and the heirs, devisees, and personal representatives of the
10 principal.

11 (b) An affidavit executed by the [ATTORNEY-IN-FACT OR] agent stating
12 that the [ATTORNEY-IN-FACT OR] agent did not have, at the time of doing an act
13 under the power of attorney, actual knowledge of the revocation or termination of the
14 power of attorney by death [, DISABILITY] or **incapacity** [INCOMPETENCE], is, in
15 the absence of fraud, conclusive proof of the nonrevocation or nontermination of the
16 power **of attorney** at that time. If the exercise of the power **of attorney** requires
17 execution and delivery of an instrument that is recordable, the affidavit when
18 authenticated for record is likewise recordable.

19 (c) A special power of attorney created before September 4, 1988, shall be
20 construed to grant the **agent** [ATTORNEY-IN-FACT] the powers set out in that
21 special power of attorney.

22 * **Sec. 25.** AS 13.26 is amended by adding a new section to read:

23 **Sec. 13.26.357. Execution of power of attorney.** (a) A power of attorney
24 executed in this state is valid if the principal

25 (1) signs the power of attorney or, if the principal is physically unable
26 to sign the power of attorney, directs, in the principal's conscious presence, another
27 individual to sign the principal's name on the power of attorney; and

28 (2) acknowledges the signature before a notary public or other
29 individual authorized by law to take acknowledgments.

30 (b) Notwithstanding AS 44.50.062(5)(A), a notary public may consider that
31 the principal has signed a power of attorney if the principal is physically unable to sign

1 the power of attorney, and, in the presence of the notary public, directs another
2 individual to sign under (a)(1) of this section.

3 * **Sec. 26.** AS 13.26.358(a) is amended to read:

4 (a) A public home care provider may not accept a designation as
5 [ATTORNEY-IN-FACT OR] agent by general or special power of attorney for an
6 individual to whom the provider furnishes services unless the designation is held
7 jointly with another individual who is not a public home care provider.

8 * **Sec. 27.** AS 13.26 is amended by adding a new section to article 5 to read:

9 **Sec. 13.26.359. Definitions.** In AS 13.26.326 - 13.26.359,

10 (1) "benefits from government programs or civil or military service"
11 means a benefit, a program, or assistance provided under a statute or regulation,
12 including Social Security, Medicare, and Medicaid; and

13 (2) "good faith" means honesty in fact;

14 (3) "incapacity" means inability of an individual to manage property or
15 business affairs because the individual

16 (A) has an impairment in the ability to receive and evaluate
17 information or make or communicate decisions even with the use of
18 technological assistance; or

19 (B) is

20 (i) missing;

21 (ii) detained, including incarcerated in a penal system; or

22 (iii) outside the United States and unable to return; and

23 (4) "retirement plan" means a plan or account created by an employer,
24 the principal, or another individual to provide retirement benefits or deferred
25 compensation of which the principal is a participant, beneficiary, or owner, including a
26 plan or account under the following sections of 26 U.S.C. (Internal Revenue Code):

27 (A) an individual retirement account under 26 U.S.C. 408
28 (Internal Revenue Code), as amended;

29 (B) a Roth IRA under 26 U.S.C. 408A (Internal Revenue Code),
30 as amended;

31 (C) an individual retirement account under 26 U.S.C. 408(q)

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- (Internal Revenue Code), as amended;
- (D) an annuity or custodial account under 26 U.S.C. 403(b) (Internal Revenue Code), as amended;
- (E) a pension, profit-sharing, stock bonus, or other retirement plan qualified under 26 U.S.C. 401(a) (Internal Revenue Code), as amended;
- (F) a plan under 26 U.S.C. 457(b) (Internal Revenue Code), as amended; and
- (G) a nonqualified deferred compensation plan under 26 U.S.C. 409A (Internal Revenue Code), as amended.

* **Sec. 28.** AS 13 is amended by adding a new chapter to read:

Chapter 28. Recognition of Substitute Decision-Making Documents.

Sec. 13.28.010. Validity of substitute decision-making document. (a) Except as provided in AS 13.26.331, a substitute decision-making document for property executed outside this state is valid in this state if, when the document was executed, the execution complied with the law of the jurisdiction indicated in the document or, if jurisdiction is not indicated, the law of the jurisdiction in which the document was executed.

(b) Except as provided in AS 13.52.010 and 13.52.247, a substitute decision-making document for health care or personal care executed outside this state is valid in this state if, when the document was executed, the execution complied with

(1) the law of the jurisdiction indicated in the document or, if jurisdiction is not indicated, the law of the jurisdiction in which the document was executed; or

(2) the laws of this state other than this chapter.

(c) Except as otherwise provided by a law of this state other than this chapter, a photocopy or electronically transmitted copy of an original substitute decision-making document has the same effect as the original.

Sec. 13.28.020. Meaning and effect of substitute decision-making document. The meaning and effect of a substitute decision-making document and the authority of the decision maker are determined by the law of the jurisdiction indicated in the substitute decision-making document or, if jurisdiction is not indicated, the law

1 of the jurisdiction in which the substitute decision-making document was executed.

2 **Sec. 13.28.030. Reliance on substitute decision-making document.** (a)
3 Except as otherwise provided in AS 13.26.328, a person that in good faith accepts a
4 substitute decision-making document without actual knowledge that the document is
5 void, invalid, or terminated, or that the purported decision maker's authority is void,
6 invalid, or terminated, may, without inquiry, assume that the document is genuine,
7 valid, and still in effect and that the decision maker's authority is genuine, valid, and
8 still in effect.

9 (b) A person that is asked to accept a substitute decision-making document
10 may request and may, without further investigation, rely on

11 (1) the decision maker's assertion of a fact concerning the individual for
12 whom a decision will be made, the decision maker, or the document;

13 (2) a translation of the document if the document contains, in whole or
14 in part, a language other than English; and

15 (3) an opinion of counsel regarding any matter of law concerning the
16 document if the person requesting the opinion provides in a record the reason for the
17 request.

18 **Sec. 13.28.040. Obligation to accept substitute decision-making document.**
19 (a) Except as otherwise provided in (b) of this section or by a law of this state other
20 than this chapter, a person shall, within a reasonable time, accept a substitute decision-
21 making document that purportedly meets the validity requirements of AS 13.28.010
22 and may not require an additional or different form of document for authority granted
23 in the document presented.

24 (b) A person is not required to accept a substitute decision-making document if

25 (1) the person otherwise would not be required in the same
26 circumstances to act if requested by the individual who executed the document;

27 (2) the person has actual knowledge of the termination of the decision
28 maker's authority or the document;

29 (3) the person's request under AS 13.28.030(b) for the decision maker's
30 assertion of fact, a translation, or an opinion of counsel is refused;

31 (4) the person in good faith believes that the document is not valid or

1 that the decision maker does not have the authority to request a particular transaction
2 or action; or

3 (5) the person makes, or has actual knowledge that another person has
4 made, a report to the office of the Department of Health and Social Services that
5 administers adult protective services stating a belief that the individual for whom a
6 decision will be made may be subject to abuse, neglect, exploitation, or abandonment
7 by the decision maker or a person acting for or with the decision maker.

8 (c) A person that, in violation of this section, refuses to accept a substitute
9 decision-making document is subject to

10 (1) a court order mandating acceptance of the document; and

11 (2) liability as provided by the court rules of this state for attorney fees
12 and costs incurred in an action or proceeding that mandates acceptance of the
13 document.

14 **Sec. 13.28.050. Remedies under other law.** The remedies under this chapter
15 are not exclusive and do not abrogate any right or remedy under a law of this state
16 other than this chapter.

17 **Sec. 13.28.060. Uniformity of application and construction.** In applying and
18 construing this chapter, consideration shall be given to the need to promote uniformity
19 of the law with respect to its subject matter among the states that enact it.

20 **Sec. 13.28.070. Relation to Electronic Signatures in Global and National**
21 **Commerce Act.** This chapter modifies, limits, or supersedes 15 U.S.C. 7001 - 7031
22 (Electronic Signatures in Global and National Commerce Act), but does not modify,
23 limit, or supersede 15 U.S.C. 7001(c), or authorize electronic delivery of any of the
24 notices described in 15 U.S.C. 7003(b).

25 **Sec. 13.28.090. Definitions.** In this chapter,

26 (1) "decision maker" means a person authorized to act for an individual
27 under a substitute decision-making document or to whom a decision maker's authority
28 is delegated, whether denominated a decision maker, agent, attorney-in-fact, proxy,
29 representative, original decision maker, co-decision maker, successor decision maker,
30 or otherwise;

31 (2) "good faith" means honesty in fact;

1 (3) "health care" means a service or procedure to maintain, diagnose,
2 treat, or otherwise affect an individual's physical or mental condition;

3 (4) "person" means an individual, estate, business or nonprofit entity,
4 public corporation, government or governmental subdivision, agency, or
5 instrumentality, or other legal entity;

6 (5) "personal care" means an arrangement or a service to provide an
7 individual with shelter, food, clothing, transportation, education, recreation, social
8 contact, or assistance with the activities of daily living;

9 (6) "property" means anything that may be subject to ownership,
10 whether real or personal or legal or equitable, or any interest or right in the thing;

11 (7) "record" means information that is inscribed on a tangible medium
12 or that is stored in an electronic or other medium and is retrievable in perceivable
13 form;

14 (8) "substitute decision-making document" means a record created by
15 an individual to authorize a decision maker to act for the individual with respect to
16 property, health care, or personal care.

17 **Sec. 13.28.095. Short title.** This chapter may be cited as the Uniform
18 Recognition of Substitute Decision-Making Documents Act.

19 * **Sec. 29.** AS 13.26.338(a), 13.26.344(n), and 13.26.353(c) are repealed.

20 * **Sec. 30.** The uncodified law of the State of Alaska is amended by adding a new section to
21 read:

22 **APPLICABILITY.** (a) This Act

23 (1) applies to a power of attorney or substitute decision-making document
24 created on or after the effective date of this Act;

25 (2) applies to a judicial proceeding commenced on or after the effective date of
26 this Act concerning a power of attorney or substitute decision-making document created on or
27 after the effective date of this Act; and

28 (3) does not apply to an act done before the effective date of this Act.

29 (b) In this section, "substitute decision-making document" has the meaning given in
30 AS 13.28.090, enacted by sec. 28 of this Act.

31 * **Sec. 31.** This Act takes effect January 1, 2017.

ALASKA STATE LEGISLATURE



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Representative Shelley Hughes
House District 11 ~ Greater Palmer

HB8 Powers of Attorney and Substitute Decision-Making Documents Version E

Explanation of Changes February 19, 2015

Page 5, line 17: added "Notwithstanding AS 13.26.357"

- This statutory reference was added because of new section (page 36, line 7) of validity of powers of attorney to connect the validity with the section that says you're not required to accept the powers.

Page 8, lines 10-14: added "If you do not mark either of the boxes opposite a category, or if you mark both of the boxes opposite a category, your agent or agents will not have the power in that category."

- This language satisfies the interpretation of the powers in the event the form was not filled out completely or unclearly.

Page 9, line 2: removes "Delegation" from the list of general powers because it is included in "grant of specific authority" and renumbers the remainder of the list.

Page 9, lines 19-25: includes the additional "grant of special authority" items that were not included in version A.

1. Create or change rights of survivorship
2. Delegate authority granted under the power of attorney
3. Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
4. Exercise fiduciary powers that the principal has authority to delegate

Page 12, lines 11-12: The committee requested to include definitions for Guardian or Conservator. Because both are defined elsewhere in statute, it was recommended not to repeat definitions in this Act.

- Guardian AS 13.26.005
- Conservator AS 13.26.210

Page 13, lines 4-7: new section (5) if the principal has failed to mark either of the "Yes" or "No" boxes opposite a category of power, or if the principal has marked both the "Yes" or "No" boxes opposite a category of power, the agent does not have the power in that category.

Page 34, line 30: includes the office of the long term care ombudsman in the list of agencies with specific authority to protect the welfare of the principal.

Page 36, line 4: clarification

September 4, 1988 was the date power of attorney was first entered into statute in Alaska

Page 36, line 7-13: new section 25: **Sec. 13.26.357. Execution of power of attorney.** A power of attorney executed in this state is valid if the principal

1. Signs the power of attorney or, in the principal's conscious presence, directs another individual to sign the principal's name on the power of attorney; and
2. Acknowledges the signature before a notary public or other individual authorized by law to take acknowledgements.

Page 36, line 15: definition already provided

- Public home care provider AS 47.05.017(3)(c)

ALASKA STATE LEGISLATURE



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Representative Shelley Hughes
 House District 11 ~ Greater Palmer

HB 8 Power of Attorney Uniform Law Version A

Section Analysis January 20, 2015

Section	Action	Comments
Section 1 Pg 1, ln 4	Replaces the current definition of an "agent"	The term attorney-in-fact appears similar but should be distinguished from the term attorney-at-law. An attorney-at-law in the United States is a lawyer — someone licensed to practice law in a particular jurisdiction. The Uniform Power of Attorney Act and this bill employ the term Agent . As an Agent, an attorney-in-fact is a fiduciary for the principal, so the law requires an attorney-in-fact to be completely honest with and loyal to the principal in their dealings with each other. An Agent would be held to the same level of honesty.
Section 2 Pg 1, ln 9	Corrects the definition of "state" by including <u>the United States Virgin Islands</u>	technical
Section 3 Pg 1, ln 13	Adds new definitions for "durable", "electronic", "power of attorney", "principal", "record" and "sign" as they pertain to this act	It was brought to our attention that a signature or initials could be quite difficult for someone with arthritis. Under this definition, a variety of ways for a person to "sign" would be allowed.
Section 4 Pg 2, ln 17	In this bill an Agent is the person granted powers and the finances belong to the Principal AS 13.26.326 Agent's acceptance and liability	In the event the Agent violates a provision in this act, the Agent must restore the value of the property and reimburse any fees/costs paid associated with the liability.

Section 4 Pg 2, ln 28	Agent's duties	Clearly defines the responsibilities of managing the Principle's financial best interests. An Agent acting in good faith will not be held liable if the Principle's plan cannot be preserved.
Section 4 Pg 4, ln 22	AS 13.26.328 Acceptance of Power of Attorney	This section pertains to a third party accepting the responsibilities of an Agent – such as an accounting firm, family lawyer, court appointed person, or others.
Section 4 Pg 6, ln 10	AS 13.26.329 Termination of Power of Attorney; agent's resignation notice	Identifies the circumstances when a Power of Attorney is terminated.
Section 5 Pg 7, ln 1	AS 13.26 amended to recognize a power of attorney executed in another state	A power of attorney executed in another state is valid in Alaska if the POA complied with the issuing jurisdiction's law or requirements of the military.
Section 6 Pg 7, ln 9	AS 13.26.332 Statutory Form Power of Attorney	This section edits the actual form recognized by the State of Alaska. The most substantive change to the form is requiring the Principle to mark a box for each category. This action will provide the opportunity for the principle to award POA in whole or part to an Agent(s). The form also provides optional grant of specific authority to: Create, amend, revoke, or terminate a trust; make a gift; create or change beneficiaries; or revoke a transfer on death deed.
Section 7 Pg 11, ln 10	Sec 13.26.335 Additional optional provisions	Changes the term "attorney-in-fact" to Agent
Section 8 Pg 12, ln 8	Sec 13.26.341 applicability of provisions	Changing the terms for consistency; "mark" and "incapacity"
Section 9 Pg 13, ln 2 Pg 14, ln 3	"revoke, create or modify a trust"	Removes the option to "revoke, create or modify a trust" in this section. Revoke, Create or Modify a Trust is now

Section 10 Pg 14, ln 27 Pg 15, ln 26		a separate selection on the POA form.
Section 11 Pg 16, ln 22 Pg 18, ln 5		
Section 12 Pg 19, ln 19	AS 13.26.344(d)	Allows the Agent to use credit and debit cards, and electronic transactions.
Section 13 Pg 23, ln 4	(10-14) adds additional responsibilities and clarification responsibilities of the Agent to manage the affairs of the Principal's business(es)	(10) allows the Agent to operate, buy, sell, etc. the Principal's interest in a business (11) allows the Agent to put additional capital into a business (12) allows the Agent to participate in reorganization of a business (13) sell or liquidate the business (14) establish the value under a buy-out agreement.
Section 14 Pg 25, ln 18	(13) exercise investment powers available under a contract of insurance or annuity	Identifies an additional function of managing the Principal's insurance or annuity.
Section 15 Pg 25, ln 24	AS 13.26.344(h) Repealed section with respect to gifts and replaced with instructions regarding retirement plans.	Provides the Agent with all powers to effectively manage the Principal's retirement plan(s).
Section 16 Pg 26, ln 6	AS 13.26.344 (j) amends section regarding personal relationships	May or May not include gifts. Requires the Agent to maintain the customary standard of living of the spouse, children, and other dependents of the principal. Includes court ordered financial support Acts as the Principal's personal representative under HIPAA rules.
Section 17 Pg 28, ln 28	AS 13.26.344 (k) amends section regarding government or military service	Includes civil service. Includes allowance and reimbursement for transportation of the individuals. Also allows the Agent to enroll in, apply for, select, reject, change, amend or discontinue a program.

Section 18 Pg 30, ln 7	AS 13.26.344 adds a new subsection: (q) specific authority with respect to gift transactions	This is an optional designation on the POA Form where a Principal can designate the Agent to have the powers to designate gifts.
Section 19 Pg 31, ln 15	AS 13.26.347 is amended to relieve an Agent of liability for breach of duty unless is was committed dishonestly	For example: if the Agent makes a late payment on behalf of the Principal, the Agent would not be held liable for that action. IF the Agent purposefully paid for unauthorized expenditures from the estate, or consistently made late payments and the late fees were significant, the courts could determine that the Agent did not act in the best interest of the Principal and could impose a mediating action.
Section 20 Pg 32, ln 6	AS 13.26.350 amends this section replacing the term "disability or incompetence" to "incapacity".	The definition of "incapacity" is on page 36 of this act.
Section 21 Pg 33, ln 2	AS 13.26.353 (a) repealed and reenacted: establishing the incapacity of an individual.	Clarifies the grounds for determining incapacity of an individual and includes additional provisions such as if the Principal is missing, detained, unable to return to the United States.
Section 22 Pg 33, ln 24	Technical amendment	Inserts the term Agent and updates statutory reference
Section 23 Pg 33, ln 31	AS 13.26 adds new sections: Sec. 13.26.354 Judicial relief Sec 13.26.355 Relationship to other laws	Judicial relief allows specified individuals to petition the court regarding the Agent's conduct. This act does not supersede any other law applicable to a financial institution or other entity; allows for electronic signatures.
Section 24 Pg 35, ln 3	Technical amendment	Inserts the terms Agent, incapacity, and Power of Attorney.
Section 25 Pg 35, ln 23	Technical amendment	Removes term Attorney-in-Fact

<p>Section 26 Pg 35, ln 28</p>	<p>AS 13.26 adds new definitions: “benefits from government programs or civil or military service” “good faith” “incapacity” “retirement plan”</p>	
<p>Section 27 Pg 36, ln 30</p>	<p>Adds a new chapter to read: Recognition of Substitute Decision-Making Documents</p>	
	<p>Sec 13.28.010 Validity of substitute decision-making document</p>	<p>Requires that the state of Alaska deem decision-making documents valid for a Principal as long as the documents were executed in compliance with the law from the jurisdiction from which they come. A photocopy or electronically transmitted copy of an original has the same effect as the original.</p>
	<p>Sec 13.28.020 Meaning and effect of substitute decision-making document</p>	<p>The meaning and effect of the document and the authority of the decision maker are determined by the law of the jurisdiction where the document was executed.</p>
	<p>Sec 13.28.030 Reliance on substitute decision-making document</p>	<p>A person in good faith accepts the document without the knowledge that the document is genuine, valid and in effect. A person may request that the document be translated and may obtain an opinion of counsel regarding the document.</p>
	<p>Sec 13.28.040 Obligation to accept substitute decision-making document</p>	<p>Defines circumstances where a person should or may not accept a document. If the document is deemed to be genuine, a person who refuses to accept a document is subject to court action.</p>

	Sec 13.28.050 Remedies under other law	Remedies do not abrogate and right or remedy under a law of this state.
	Sec 13.28.060 Uniformity of application and construction	When applying a uniform law, Alaska may edit the language to "fit" Alaska law.
	Sec 13.28.070 Relation to Electronic Signatures in Global and National Commerce Act	This act does not supersede
	Sec 13.28.090 Definitions "Decision maker" "good faith" "health care" "person" "personal care" "property" "record" "substitute decision-making document"	
	Sec 13.28.095 Short Title Uniform Recognition of Substitute Decision-Making Documents Act	
Sec 28 Pg 40, ln 8	AS 13.26.338(a) repealed AS 13.26.353(c) repealed	Principal no longer draws a line through the sections that he/she DOES NOT want the Agent to manage. Requirement for a person to accept the POA or could receive a \$1,000 civil penalty plus actual costs.
Sec 29 Pg 40, ln 9	applicability	
Sec 30	Effective Date	January 1, 2016

ALASKA STATE LEGISLATURE

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Representative Shelley Hughes
 House District 11 - Greater Palmer

HB 8 Power of Attorney Uniform Law Version N.A

Section Analysis

April 11, 2015

Section	Action	Comments
Section 1 Pg 1, ln 6	Replaces the current definition of an "agent"	<p>The term attorney-in-fact appears similar but should be distinguished from the term attorney-at-law. An attorney-at-law in the United States is a lawyer — someone licensed to practice law in a particular jurisdiction. The Uniform Power of Attorney Act and this bill employ the term Agent.</p> <p>As an Agent, an attorney-in-fact is a fiduciary for the principal, so the law requires an attorney-in-fact to be completely honest with and loyal to the principal in their dealings with each other. An Agent would be held to the same level of honesty.</p>
Section 2 Pg 1, ln 12	Corrects the definition of "state" by including <u>the United States Virgin Islands</u>	technical
Section 3 Pg 2, ln 1	Adds new definitions for "durable", "electronic", "power of attorney", "principal", "record" and "sign" as they pertain to this act	<p>It was brought to our attention that a signature or initials could be quite difficult for someone with arthritis. Under this definition, a variety of ways for a person to "sign" would be allowed.</p>
In this bill an Agent is the person granted powers and the finances belong to the Principal		
Section 4 Pg 2, ln 19	AS 13.26.326 Agent's acceptance and liability	In the event the Agent violates a provision in this act, the Agent must restore the value of the property and reimburse any fees/costs paid associated with the liability.

Section 4 Pg 2, ln 29	Agent's duties	Clearly defines the responsibilities of managing the Principle's financial best interests. An Agent acting in good faith will not be held liable if the Principle's plan cannot be preserved.
Section 4 Pg 4, ln 23	AS 13.26.328 Acceptance of Power of Attorney	This section pertains to a third party accepting the responsibilities of an Agent – such as an accounting firm, family lawyer, court appointed person, or others.
Section 4 Pg 6, ln 12	AS 13.26.329 Termination of Power of Attorney; agent's resignation notice	Identifies the circumstances when a Power of Attorney is terminated.
Section 5 Pg 7, ln 4	AS 13.26 amended to recognize a power of attorney executed in another state	A power of attorney executed in another state is valid in Alaska if the POA complied with the issuing jurisdiction's law or requirements of the military.
Section 6 Pg 7, ln 12	AS 13.26.332 Statutory Form Power of Attorney	This section edits the actual form recognized by the State of Alaska. The most substantive change to the form is requiring the Principle to mark a box for each category. This action will provide the opportunity for the principle to award POA in whole or part to an Agent(s). The form also provides optional grant of specific authority to: Create, amend, revoke, or terminate a trust; make a gift; create or change beneficiaries; or revoke a transfer on death deed; change rights of survivorship; delegate authority; and waive the principal's right to be a beneficiary. These are commonly referred to as "Hot Powers".
Section 7 Pg 11, ln 28	Sec 13.26.335 Additional optional provisions	Changes the term "attorney-in-fact" to Agent

Section 8 Pg 12, ln 21 Pg 13, ln 5	Sec 13.26.341 applicability of provisions	Changing the terms for consistency; "mark" and "incapacity" Subsection (5) clarifies that if the principal fails to mark either the "yes" or "no" box, or marked both boxes, the agent would not be granted that power.
Section 9 Pg 13, ln 2 Pg 14, ln 3 Section 10 Pg 14, ln 27 Pg 15, ln 26 Section 11 Pg 16, ln 22 Pg 18, ln 5	"revoke, create or modify a trust"	Removes the option to "revoke, create or modify a trust" in this section. Revoke, Create or Modify a Trust is now a separate selection on the POA form.
Section 12 Pg 20, ln 4	AS 13.26.344(d)(8)	Allows the Agent to use credit and debit cards, and electronic transactions.
Section 13 Pg 23, ln 20	(10-14) adds additional responsibilities and clarification responsibilities of the Agent to manage the affairs of the Principal's business(es)	(10) allows the Agent to operate, buy, sell, etc. the Principal's interest in a business (11) allows the Agent to put additional capital into a business (12) allows the Agent to participate in reorganization of a business (13) sell or liquidate the business (14) establish the value under a buy-out agreement.
Section 14 Pg 26, ln 3	(13) exercise investment powers available under a contract of insurance or annuity	Identifies an additional function of managing the Principal's insurance or annuity.
Section 15 Pg 26, ln 10	AS 13.26.344(h) Repealed section with respect to gifts and replaced with instructions regarding retirement plans.	Provides the Agent with all powers to effectively manage the Principal's retirement plan(s).

Section 16 Pg 26, ln 23	AS 13.26.344 (j) amends section regarding personal relationships	May or May not include gifts. Requires the Agent to maintain the customary standard of living of the spouse, children, and other dependents of the principal. Includes court ordered financial support
Pg 29, ln 7		Acts as the Principal's personal representative for financial matters under HIPAA rules.
Section 17 Pg 29, ln 14 Pg 29, ln 22	AS 13.26.344 (k) amends section regarding government or military service	Includes civil service. Includes allowance and reimbursement for transportation of the individuals.
Pg 30, ln 16		Also allows the Agent to enroll in, apply for, select, reject, change, amend or discontinue a program.
Section 18 Pg 30, ln 24	AS 13.26.344 adds a new subsection: (q) specific authority with respect to gift transactions	This is an optional designation on the POA Form where a Principal can designate the Agent to have the powers to designate gifts.
Section 19 Pg 32, ln 14	AS 13.26.347 is amended to relieve an Agent of liability for breach of duty unless is was committed dishonestly	For example: if the Agent makes a late payment on behalf of the Principal, the Agent would not be held liable for that action. IF the power of attorney is changed in a manner that is inconsistent with the rest of the principal's desires; or the agent acted dishonestly, the power of attorney could be treated as invalid.
Section 20 Pg 32, ln 23	AS 13.26.350 amends this section replacing the term "disability or incompetence" to "incapacity".	The definition of "incapacity" is on page 36 of this act.
Section 21 Pg 33, ln 19 Pg 34, ln 1	AS 13.26.353 (a) repealed and reenacted: establishing the incapacity of an individual.	Clarifies the grounds for determining incapacity of an individual and includes additional provisions such as if the Principal is missing, detained, unable to return to the United States.
Section 22 Pg 34, ln 10	Technical amendment	Inserts the term Agent and updates statutory reference

<p>Section 23 Pg 34, ln 17</p>	<p>AS 13.26 adds new sections: Sec. 13.26.354 Judicial relief</p> <p>Sec 13.26.355 Relationship to other laws</p>	<p>Judicial relief allows specified individuals to petition the court regarding the Agent's conduct.</p> <p>This act does not supersede any other law applicable to a financial institution or other entity; allows for electronic signatures.</p>
<p>Section 24 Pg 35, ln 19</p>	<p>Technical amendment</p>	<p>Inserts the terms Agent, incapacity, and Power of Attorney.</p>
<p>Section 25 Pg 35, ln 23</p>	<p>AS 13.26 adds new section: Sec. 13.26.357. Execution of power of attorney</p>	<p>A power of attorney in this state is valid if the principal signs the form or directs another to sign on his/her behalf; the signature is acknowledged by a notary. For the purposes of this section, a notary may consider the signature of the principal if another person was directed to sign.</p>
<p>Section 26 Pg 36, ln 20</p>	<p>Technical change</p>	<p>Removes term "Attorney in Fact"</p>
<p>Section 27 Pg 36, ln 24</p> <p>Pg 37, ln 7</p>	<p>AS 13.26 adds new definitions: "benefits from government programs or civil or military service" "good faith" "incapacity" "retirement plan"</p>	
<p>Section 28 Pg 37, ln 26</p>	<p>Adds a new chapter to read: Recognition of Substitute Decision-Making Documents</p>	
	<p>Sec 13.28.010 Validity of substitute decision-making document</p>	<p>Requires that the state of Alaska deem decision-making documents valid for a Principal as long as the documents were executed in compliance with the law from the jurisdiction from which they come.</p> <p>A photocopy or electronically transmitted copy of an original has the same effect as the original.</p>

Section 28 Pg 38, ln 12	Sec 13.28.020 Meaning and effect of substitute decision-making document	The meaning and effect of the document and the authority of the decision maker are determined by the law of the jurisdiction where the document was executed.
Section 28 Pg 38, ln 17	Sec 13.28.030 Reliance on substitute decision-making document	A person in good faith accepts the document without the knowledge that the document is genuine, valid and in effect. A person may request that the document be translated and may obtain an opinion of counsel regarding the document.
Section 28 Pg 39, ln 2	Sec 13.28.040 Obligation to accept substitute decision-making document	Defines circumstances where a person should or may not accept a document. If the document is deemed to be genuine, a person who refuses to accept a document is subject to court action.
Section 28 Pg 39, ln 29	Sec 13.28.050 Remedies under other law	Remedies do not abrogate and right or remedy under a law of this state.
Section 28 Pg 40, ln 1	Sec 13.28.060 Uniformity of application and construction	When applying a uniform law, Alaska may edit the language to "fit" Alaska law.
Section 28 Pg 40, ln 4	Sec 13.28.070 Relation to Electronic Signatures in Global and National Commerce Act	This act does not supersede
Section 28 Pg 40, ln 10	Sec 13.28.090 Definitions "Decision maker" "good faith" "health care" "person" "personal care" "property" "record" "substitute decision-making document"	
Section 28 Pg 41, ln 1	Sec 13.28.095 Short Title Uniform Recognition of Substitute Decision-Making Documents Act	

<p>Section 29 Pg 40, ln 8</p>	<p>AS 13.26.338(a) repealed</p> <p>AS 13.26.344(n) repealed</p> <p>AS 13.26.353(c) repealed</p>	<p>Principal no longer draws a line through the sections that he/she DOES NOT want the Agent to manage.</p> <p>Principal gives the agent full and unqualified authority to delegate power</p> <p>Requirement for a person to accept the POA or could receive a \$1,000 civil penalty plus actual costs.</p>
<p>Section 30 Pg 41, ln 49</p>	<p>applicability</p>	<p>Does not nullify any power of attorney formed prior to the effective date of this act.</p>
<p>Section 31</p>	<p>Effective Date</p>	<p>January 1, 2016</p>

Amendment No. 1 was offered by Representatives Claman and Hughes:

Page 1, line 2, following "code;" (title amendment):

Insert "relating to notaries public;"

Page 36, line 8, following "attorney.":

Insert "(a)"

Page 36, following line 13:

Insert a new subsection to read:

"(b) Notwithstanding AS 44.50.062(5)(A), a notary public may consider that the principal has signed a power of attorney if the principal, in the presence of the notary public, directs another individual to sign under (a)(1) of this section."

Representative Claman moved and asked unanimous consent that Amendment No. 1 be adopted.

Objection was heard and withdrawn. There being no further objection, Amendment No. 1 was adopted, and the new title follows:

CS FOR HOUSE BILL NO. 8(JUD) am

"An Act relating to powers of attorney and other substitute decision-making documents; relating to the uniform probate code; relating to notaries public; and providing for an effective date."

AMENDMENT

*INCORPORATED
into v. 5*

OFFERED IN THE SENATE
TO: CSHB 8(JUD) am

1 Page 11, following line 21:

2 Insert new material to read:

3 "If a person other than the principal executes the signature for the
4 principal, the following signature line and notary verification must also
5 be completed:

6 IN WITNESS WHEREOF, I have hereunto signed my name
7 this ____ day of _____, _____.

8 _____

9 Signature of Appointee acting at the bequest of _____

10 _____ Name of Principal

11 Printed name of Appointee _____

12 Form of identification of Appointee _____

13 Acknowledged before me at _____

14 _____ on _____

15 _____

16 Signature of Officer or Notary"

Ginger Blaisdell

From: Allen, Richard K (DOA) <richard.allen@alaska.gov>
Sent: Tuesday, April 14, 2015 2:30 PM
To: Goldstein, Beth (DOA); Ginger Blaisdell
Cc: Randy Ruaro; Rep. Shelley Hughes
Subject: RE: Notary discussion on HB8.docx

Ginger- I echo Beth's remarks. OPA is very pleased with this bill as we believe it will assist us in combating elder fraud and financial abuse. Thanks to you and Rep. Hughes! – Rick

Richard K. Allen
Statewide Director
Office of Public Advocacy
900 W. 5th Ave., Ste. 525
Anchorage, AK 99501
907-269-3500
<http://doa.alaska.gov/opa/>

From: Goldstein, Beth (DOA)
Sent: Tuesday, April 14, 2015 2:27 PM
To: Blaisdell, Ginger (LAA)
Cc: Ruaro, Randy (LAA); Allen, Richard K (DOA); Rep. Shelley Hughes
Subject: RE: Notary discussion on HB8.docx

Ginger,

Thank you for sending this follow up. Yes, both of these answers and the changes do alleviate the notary concern from the fraud and exploitation perspective. Again, we are delighted to see this bill go forward. Thank you for addressing our concerns.

Regards,

Beth Goldstein
Supervising Attorney
Alaska Office of Public Advocacy
Office of Elder Fraud and Assistance
907-334-5932

From: Ginger Blaisdell [<mailto:Ginger.Blaisdell@akleg.gov>]
Sent: Tuesday, April 14, 2015 2:24 PM
To: Goldstein, Beth (DOA)
Cc: Ruaro, Randy (LAA); Allen, Richard K (DOA); Rep. Shelley Hughes
Subject: RE: Notary discussion on HB8.docx

Thanks for the conversation this morning Beth,

Conscious presence:

I spoke with Legislative Legal Services and their response to "conscious presence" is:

Signing in the Principal's conscious presence means, within the range of the Principal's senses.

This supports that there is a recognition of awareness by the Principal.

The term "conscious presence" is written in the Uniform Code and is used three times in Alaska's Probate code. While there is not a written definition of "conscious presence", past cases and comments to code provide the courts with adequate terms for interpretation.

Leg Legal did not recommend inserting a specific definition because they felt it was already an understood term by other means.

Amending the form:

I appreciate your remarks and guidance from the Lt Gov office that including an additional signature line would be a good change on the Power of Attorney Form in the event another person was requested to sign on behalf of the Principal. This would identify the individual actually signing the form since the Principal could not/elected not to sign for whatever the reason. The Principal still must be in attendance when the alternate signature took place.

Do these two actions help to ease your concerns about the notary language in HB8?

thanks
Ginger

*Chief of Staff
Office of Representative Shelley Hughes
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Capital Building Room 13
Juneau, Alaska 99801*

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If you would like to subscribe to Representative Hughes' newsletter, please click <http://www.housemajority.org/members/hughes/>.

From: Goldstein, Beth (DOA) [<mailto:beth.goldstein@alaska.gov>]
Sent: Monday, April 13, 2015 6:02 PM
To: Ginger Blaisdell
Cc: Randy Ruaro; Allen, Richard K (DOA); Rep. Shelley Hughes
Subject: Re: Notary discussion on HB8.docx

Can you define conscious presence? What is it intended to mean?

If that is specified then this definitely seems to be a good solution.

Beth Goldstein
Supervising Attorney

Office of Elder Fraud and Assistance

On Apr 13, 2015, at 5:01 PM, Ginger Blaisdell <Ginger.Blaisdell@akleg.gov> wrote:

Does the solution included in the attached document resolve the issue with the notary interpreting a mark as a signature?

ginger

From: Goldstein, Beth (DOA) [<mailto:beth.goldstein@alaska.gov>]

Sent: Monday, April 13, 2015 3:23 PM

To: Ginger Blaisdell; Randy Ruaro; Allen, Richard K (DOA)

Cc: Rep. Shelley Hughes

Subject: RE: Notary discussion on HB8.docx

Ginger and Randy,

Thank you for contacting me with this question. I have spoken with my Director, Rick Allen and he has asked me to respond.

We support the POA bill and think that it has taken a tremendous step towards protecting vulnerable elders while still allowing for the need and intent of obtaining a power of attorney to easily be acquired.

We also fully support the term "sign" to mean executing a tangible symbol, such as making someone's mark which the notary observes.

There is concern that 62(b) places an undue burden on a notary to now have to interpret whether something other than someone's mark, which is made before the notary, is that person's intent to "sign" a power of attorney. Notaries, to the best of our knowledge, are not provided with any type of training or ability to make this determination. As that relates to fraud, this section could very well have a negative impact on being able to prove fraud cases related to fraudulent or invalid POA's. It can very well lead to extended litigation over whether a valid POA was obtained where we will be required to litigate whether the notary properly assessed the individual's intent and how that was discerned. It appears this section expands "sign" to place additional burdens on notaries and is potentially ripe for extensive litigation in future fraud cases.

I hope that this answers your question and thank you for keeping the Office of Elder Fraud involved with this very important legislation.

Beth Goldstein
Supervising Attorney
Alaska Office of Public Advocacy
Office of Elder Fraud and Assistance
907-334-5932

From: Ginger Blaisdell [<mailto:Ginger.Blaisdell@akleg.gov>]

Sent: Monday, April 13, 2015 2:26 PM

To: Ruaro, Randy (LAA); Goldstein, Beth (DOA); Allen, Richard K (DOA)

Cc: Rep. Shelley Hughes

Subject: Notary discussion on HB8.docx

HB8 Power of Attorney includes a new definition for "sign"

Page 2, line 14

(62) "sign" means, with present intent to authenticate or adopt a record,

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic sound, symbol, or process.

The ability for a principal to "sign" a document in a variety of ways is included in HB8 so that individuals who may have a physical impairment but can fully comprehend financial transactions, have other options rather than a traditional signature to validate the document Power of Attorney. Electronic sound (many tools provide computerized signature recognition), symbol (including an "X" or thumbprint or other), and a process (could include assigning another person to sign on their behalf).

Thank you Beth, for identifying that we needed additional language to allow a notary public to recognize the optional signatures as valid forms of signature when notarizing the document. This language has been added as (b) on page 36.

Senator Stedman, Chairman (S)HSS, asked that I review the notary requirements to insure that the bill does not open up the opportunity for fraud by widening the ability of the principal to sign in a variety of ways. After meeting with the Lieutenant Governor's office, a suggested change is listed on the attachment that may further strengthen Alaska's power of attorney form and statutes. Particularly, requiring the notary to verify the identity of the person signing on behalf of the principal.

Please provide your comments regarding the notary requirements as provided for in this financial power of attorney.

Thank you

Ginger Blaisdell

Chief of Staff

Office of Representative Shelley Hughes

Serving Greater Palmer

Capital Building Room 13

Juneau, Alaska 99801

907-465-5265

1-800-565-3743

<image001.png><image002.png><image003.jpg>

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[http://www.housemajority.org/members/hughes/.](http://www.housemajority.org/members/hughes/)

<Notary discussion on HB8.docx>

HB8 Power of Attorney
Version N.A

Following the check off boxes for selection of powers and instructions on the form, a Notary is required to witness the signature to make the power of attorney valid.

Page 7

Statutory Form Power of Attorney

15 IN WITNESS WHEREOF, I have hereunto signed my name

16 this ____ day of _____, _____.

17 _____

18 Signature of Principal

19 Acknowledged before me at _____

20 _____ on _____.

21 Signature of Officer or Notary

Additional language was added to clarify that a notary public could consider the signature of someone other than the principal if the principal was in their presence and directs another person to sign on their behalf.

Page 36

8 * **Sec. 25.** AS 13.26 is amended by adding a new section to read:

9 **Sec. 13.26.357. Execution of power of attorney.** (a) A power of attorney

10 executed in this state is valid if the principal

11 (1) signs the power of attorney or, in the principal's conscious presence,

12 directs another individual to sign the principal's name on the power of attorney; and

13 (2) acknowledges the signature before a notary public or other

14 individual authorized by law to take acknowledgments.

15 (b) Notwithstanding AS 44.50.062(5)(A), a notary public may consider that

16 the principal has signed a power of attorney if the principal, in the presence of the

17 notary public, directs another individual to sign under (a)(1) of this section.

After working with the Lieutenant Governor's office, who approve and issue notaries, the following suggestions were offered to reduce the likelihood of fraud at execution of the power of attorney.

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"For many generations, it has been customary for the impaired to write the letter "X" or to place their thumb print on the signature line in lieu of a signature. Often, it is required that the notary write the person's name adjacent their mark, and even provide for witnesses to sign their names as well.

The mark or thumbprint inherently, by definition, constitutes a valid signature. Adding the names of the signer and witnesses to the thumbprint may be surplusage, albeit required in some states. It is useful for clarity and full disclosure of the nature of the execution of the document by the physically impaired signer."

While many states allow for an alternative signature of the principal, the purpose of HB8 is to strengthen the power of attorney statutes to better prevent fraud. Additional notary verification may be one course of action to allow assistance to the principal when needed.

Current:

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Signature of Officer or Notary

Suggested to be added:

If a person other than the principal executes the signature for the principal, an additional signature line and notary verification should be included on the statutory form power of attorney.

IN WITNESS WHEREOF, I have hereunto signed my name
this ____ day of _____, _____.

Signature of Appointee Acting at the bequest of _____
Name of Principal
Printed name of Appointee _____
Form of Identification of Appointee _____
Acknowledged before me at _____
_____ on _____.
Signature of Officer or Notary

not for distribution

HB 8 POWERS OF ATTORNEY

- Financial scams targeting vulnerable adults in Alaska are far too common.
- Sadly they often involve relatives or friends who steal money from an elder when the elder grants them a power of attorney.
- Older Alaskans are more susceptible to fraud and financial abuse because
 - they commonly experience some degree of cognitive decline
 - through natural causes or from medications
 - and can have difficulty understanding their changing world.

Last year in Alaska

- More than 600 allegations of financial exploitation between
 - Adult Protective Services Division
 - Office of the Long Term Care Ombudsman
 - Office of Public Advocacy, Elder Fraud Unit
- In Elder Fraud Unit as an ex., more than half were specific to POA abuse.
- Out of this office alone, an average of ONCE/2 WEEKS one of our seniors finds themselves in a legal interaction with the courts pertaining to POA.
- One common method of abuse is the misuse of the POA that a person has granted.
- HB8 strengthens Alaska's existing Power of Attorney statutes.
- clarifying the responsibilities of the person receiving the power of attorney
- improving the statutory form.
- While keeping our statutes customized for Alaska, specific to circumstances unique in our state,
- aligns some wording with other states' language to eliminate problems when the senior and the power of attorney live in different states.
- better for both the senior and the person serving as the power of attorney when the two are separated by a state line.

- **New terminology throughout the bill that updates existing statute with today's language choice specifically using "Principal" and "Agent".**
- **Page 2: new definition for "sign" that allows the Principal to sign the document in a variety of ways such as sound, tangible symbol or process (maybe asking someone to sign for them). The signature would be witnessed and notarized indicating the form was completed as the Principal desired.**
- **Page 2: Agent's Duties are defined so that someone who becomes the Agent understands what their roll is when tending to the Principal's finances. This had not been identified before.**
- **Page 8: The current statutory form instructs the Principle to assign "everything" to the Agent unless specifically crossing out lines of responsibility – this is counterintuitive. Now the Principal marks "yes" or "no" for each area of category of financial responsibility that the Agent will manage on their behalf.**
- **Page 9: The statutory form also separates out specific powers of authority that are more significant than routine financial actions. They include gifts, beneficiary designation, changing a trust and more.**
- **Page 34: Judicial Relief is a new section added to further protect the best interest of the Principal. A list of qualified persons may petition the court to review the Agent's conduct if it is believed that the Agent is not acting in "good faith" to conduct financial management in the best way for the Principal.**

- **Page 37: Substitute Decision-Making Documents** allows for the recognition of documents between states or identifying which state's laws the Principal want the documents to follow.

HB8 provides for

- **Better definitions and**
- **clarifies areas of concern**
- **will help the Principle make better decisions when it comes to assigning the responsibility of their finances and property to someone.**

We honor our elders and have an obligation to vulnerable adults to help protect them.

This bill will strengthen existing statutes to better protect them and better guide those who help care for them.

I ask for your vote to improve the existing Powers of Attorney to safeguard financial fraud against Alaskans.

Financial Exploitation Alaska Statistics

This information was requested by Representative Hughes' staff from each of three departments.

Department of Health and Social Services

Adult Protective Services

Summary of Financial Exploitation (FE) Allegations: SFY2011 through SFY2015

Fiscal Year	Number of FE Investigation	Number of FE Allegations
SFY11	447	508
SFY12	354	365
SFY13	270	279
SFY14	492	535
SFY15 (07/01/2014 - 01/31/2015)	244	267

Department of Revenue

Office of Long Term Care Ombudsman

In FFY 2014 we had 16 complaints

In FFY 2013 we had 31 complaints

In FFY 2012 we had 26 complaints

In FFY 2011 we had 20 complaints

In FFY 2010 we had 13 complaints

Department of Administration

Office of Public Advocacy, Elder Fraud

FY14 50 cases were reviewed with 26 cases specific to POA abuse



March 12, 2015

The Honorable Shelley Hughes
House District 8 – Greater Palmer
Alaska State Legislature
120 East 4th Street
Juneau, Alaska 99801

Dear Representative Hughes,

On behalf of the 1.3 million members of AMAC, the Association of Mature American Citizens, including the 6,000 members in Alaska, I am writing to offer our support to HB 8, the “Uniform Power of Attorney” bill, which has already been passed by the Alaska State House of Representatives. This important piece of legislation seeks to protect seniors from fraud and financial abuse as a result of vulnerabilities in the state’s existing power of attorney statutes.

By clarifying the responsibilities and duties of those receiving the power of attorney, HB 8 strengthens current law and works to minimize instances of elder financial abuse. This legislation also amends existing statute so that if the individual receiving the power of attorney acts inappropriately, then his powers can be removed. AMAC believes that enhancing accountability within the state’s laws will give mature Americans and seniors the added protections they need.

Unfortunately, scams targeting seniors have become far too common. As older Americans experience some degree of cognitive decline, they often become increasingly susceptible to fraud and financial abuse from relatives or close friends. Taking these critical concerns into consideration, HB 8 has worked to align its statutory wording with that of other states in order to eliminate problems when the senior and the power of attorney live in different states. AMAC is pleased that HB 8 seeks to address myriad aspects of this problem and that it has been specifically designed to better guide those who help care for seniors.

AMAC is wholly committed to protecting the interests of older Americans and remains very concerned about abuses of power of attorney statutes. Thus, we are pleased to join you in honoring our elders and protecting them as they enter a vulnerable time in life. Thanks to your concern for seniors and your leadership on this significant issue, AMAC is proud to support HB 8 and strongly encourages the Alaska State Senate to adopt this bill.

Sincerely,

Dan Weber
President and Founder of AMAC

February 9, 2015

Representative Shelley Hughes
Alaska State Capitol, Room 13
Juneau, Alaska 99801-1182

RE: HB 8 – Powers of Attorney - SUPPORT

Dear Representative Hughes,

Thank you very much for your sponsorship of HB 8. AARP Alaska, on behalf of our 86,000 members, strongly supports enactment of HB 8, as an update to existing statute to more closely conform to the Uniform Powers of Attorney Act and the Uniform Recognition of Substitute Decision-Making Documents Act. The HB 8 update to current Alaska statute will strengthen protections for vulnerable adults, their agents, and third parties.

Powers of attorney are essential tools for delegating authority to a trusted person to handle financial matters in many situations, including potential incapacity for decision-making. It is a legal document used by an individual (the principal) to name someone else (the agent) to make financial decisions and act on the principal's behalf.

To be useful as an incapacity planning tool, a power of attorney must give broad authority to the agent. A power of attorney is private, and there is no oversight by a court as there would be for a guardian or conservator. State laws are often unclear about the duty owed by the agent to the principal. This combination of broad consent, lack of oversight, and unclear duties makes it possible for agents to misuse their authority.

When such authority is misused as a means of financial exploitation, powers of attorney have been called a "license to steal". This is cause for concern and explains why we think it's critical that our state laws help prevent, detect and redress the abuse of powers of attorney. Powers of attorney abuse can take many forms, including:

- Forging the principal's signature on a power of attorney form or making a fraudulent document;
- Spending the principal's money for the benefit of the agent;
- Making gifts when the power of attorney does not provide authority to do so; and
- Undermining the principal's estate plan by giving assets to unintended recipients.

Additionally, we are concerned about third party acceptance of powers of attorney. A power of attorney will not be useful if third parties, such as financial institutions, refuse to honor an agent's directions. It is true that third parties that refuse to honor a power of attorney because they believe the agent is misusing authority may help prevent exploitation of the principal. Sometimes, however, third

parties refuse to honor the POA for less legitimate reasons, such as because it is old or from another state.

While the Act can't prevent bad actors from committing theft and other forms of abuse, it does set forth clear agent duties and prohibitions that will make civil actions and criminal prosecutions more effective. It also provides important protections to third parties to encourage their acceptance of powers of attorney in appropriate circumstances. Highlights include provisions that:

- Contain mandatory and default duties that prohibit self-dealing and mandate preservation of the principal's estate plan;
- Make clear that a power of attorney terminates when the principal dies;
- Set forth the powers, often referred to as "hot powers", that an agent cannot exercise unless the principal specifically authorizes such actions;
- Establish liability for agents who violate the power of attorney law;
- Address third-party acceptance of and reliance upon a power of attorney; and
- List circumstances under which a third party may legitimately refuse to accept a power of attorney and provide sanctions for unlawful refusals.

HB 8 also incorporates a newly drafted uniform code, the Uniform Recognition of Substitute Decision-Making Documents. The purpose of this provision is to provide for portability among U.S. jurisdictions. Lack of recognition and acceptance of a substitute decision-making document (i.e., POA), defeats the purpose, particularly when a principal's POA was created in another jurisdiction or seeks acceptance in another jurisdiction. Documents covered by HB 8 would be those that delegate decision-making authority over property, health care or personal care to a specific decision-maker. This provision would apply to all substitute decision-making documents, whether created in Alaska or in another jurisdiction. Fundamentally, the provision gives flexibility and broadens acceptance of substitute decision-making documents that strengthen an individual's advance planning for incapacity. Enactment of HB 8 would strengthen the power of attorney law to better protect vulnerable or incapacitated Alaskans and to benefit our businesses and courts.

AARP supports the adoption of HB 8 and encourages its passage and enactment. We are happy to elaborate our position or answer any questions. Thank you.

Respectfully,



Ken Helander
Advocacy Director
AARP Alaska
762-3314
khelander@aarp.org



Marie Darlin
Chair, AARP Capitol City Task Force

CC: Representative Max Gruenberg, Co-sponsor

David Scott

From: Randy Ruaro
Sent: Friday, November 13, 2015 9:57 AM
To: David Scott
Subject: FW: Notary discussion on HB8.docx

FYI

From: Allen, Richard K (DOA) [mailto:richard.allen@alaska.gov]
Sent: Tuesday, April 14, 2015 2:30 PM
To: Goldstein, Beth (DOA) <beth.goldstein@alaska.gov>; Ginger Blaisdell <Ginger.Blaisdell@akleg.gov>
Cc: Randy Ruaro <Randy.Ruaro@akleg.gov>; Rep. Shelley Hughes <Rep.Shelley.Hughes@akleg.gov>
Subject: RE: Notary discussion on HB8.docx

Ginger- I echo Beth's remarks. OPA is very pleased with this bill as we believe it will assist us in combating elder fraud and financial abuse. Thanks to you and Rep. Hughes! – Rick

Richard K. Allen
Statewide Director
Office of Public Advocacy
900 W. 5th Ave., Ste. 525
Anchorage, AK 99501
907-269-3500
<http://doa.alaska.gov/opa/>

From: Goldstein, Beth (DOA)
Sent: Tuesday, April 14, 2015 2:27 PM
To: Blaisdell, Ginger (LAA)
Cc: Ruaro, Randy (LAA); Allen, Richard K (DOA); Rep. Shelley Hughes
Subject: RE: Notary discussion on HB8.docx

Ginger,

Thank you for sending this follow up. Yes, both of these answers and the changes do alleviate the notary concern from the fraud and exploitation perspective. Again, we are delighted to see this bill go forward. Thank you for addressing our concerns.

Regards,

Beth Goldstein
Supervising Attorney
Alaska Office of Public Advocacy
Office of Elder Fraud and Assistance
907-334-5932

From: Ginger Blaisdell [mailto:Ginger.Blaisdell@akleg.gov]
Sent: Tuesday, April 14, 2015 2:24 PM
To: Goldstein, Beth (DOA)

Cc: Ruaro, Randy (LAA); Allen, Richard K (DOA); Rep. Shelley Hughes
Subject: RE: Notary discussion on HB8.docx

Thanks for the conversation this morning Beth,

Conscious presence:

I spoke with Legislative Legal Services and their response to “conscious presence” is:

Signing in the Principal’s conscious presence means, within the range of the Principal’s senses.

This supports that there is a recognition of awareness by the Principal.

The term “conscious presence” is written in the Uniform Code and is used three times in Alaska’s Probate code. While there is not a written definition of “conscious presence”, past cases and comments to code provide the courts with adequate terms for interpretation.

Leg Legal did not recommend inserting a specific definition because they felt it was already an understood term by other means.

Amending the form:

I appreciate your remarks and guidance from the Lt Gov office that including an additional signature line would be a good change on the Power of Attorney Form in the event another person was requested to sign on behalf of the Principal. This would identify the individual actually signing the form since the Principal could not/elected not to sign for whatever the reason. The Principal still must be in attendance when the alternate signature took place.

Do these two actions help to ease your concerns about the notary language in HB8?

thanks
Ginger

*Chief of Staff
Office of Representative Shelley Hughes
Serving Greater Palmer
Capital Building Room 13
Juneau, Alaska 99801*

907-465-5265
1-800-565-3743



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From: Goldstein, Beth (DOA) [<mailto:beth.goldstein@alaska.gov>]
Sent: Monday, April 13, 2015 6:02 PM
To: Ginger Blaisdell
Cc: Randy Ruaro; Allen, Richard K (DOA); Rep. Shelley Hughes
Subject: Re: Notary discussion on HB8.docx

Can you define conscious presence? What is it intended to mean?

If that is specified then this definitely seems to be a good solution.

Beth Goldstein
Supervising Attorney
Office of Elder Fraud and Assistance

On Apr 13, 2015, at 5:01 PM, Ginger Blaisdell <Ginger.Blaisdell@akleg.gov> wrote:

Does the solution included in the attached document resolve the issue with the notary interpreting a mark as a signature?

ginger

From: Goldstein, Beth (DOA) [<mailto:beth.goldstein@alaska.gov>]

Sent: Monday, April 13, 2015 3:23 PM

To: Ginger Blaisdell; Randy Ruaro; Allen, Richard K (DOA)

Cc: Rep. Shelley Hughes

Subject: RE: Notary discussion on HB8.docx

Ginger and Randy,

Thank you for contacting me with this question. I have spoken with my Director, Rick Allen and he has asked me to respond.

We support the POA bill and think that it has taken a tremendous step towards protecting vulnerable elders while still allowing for the need and intent of obtaining a power of attorney to easily be acquired.

We also fully support the term "sign" to mean executing a tangible symbol, such as making someone's mark which the notary observes.

There is concern that 62(b) places an undue burden on a notary to now have to interpret whether something other than someone's mark, which is made before the notary, is that person's intent to "sign" a power of attorney. Notaries, to the best of our knowledge, are not provided with any type of training or ability to make this determination. As that relates to fraud, this section could very well have a negative impact on being able to prove fraud cases related to fraudulent or invalid POA's. It can very well lead to extended litigation over whether a valid POA was obtained where we will be required to litigate whether the notary properly assessed the individual's intent and how that was discerned. It appears this section expands "sign" to place additional burdens on notaries and is potentially ripe for extensive litigation in future fraud cases.

I hope that this answers your question and thank you for keeping the Office of Elder Fraud involved with this very important legislation.

Beth Goldstein
Supervising Attorney
Alaska Office of Public Advocacy
Office of Elder Fraud and Assistance
907-334-5932

From: Ginger Blaisdell [mailto:Ginger.Blaisdell@akleg.gov]
Sent: Monday, April 13, 2015 2:26 PM
To: Ruaro, Randy (LAA); Goldstein, Beth (DOA); Allen, Richard K (DOA)
Cc: Rep. Shelley Hughes
Subject: Notary discussion on HB8.docx

HB8 Power of Attorney includes a new definition for "sign"

Page 2, line 14

(62) "sign" means, with present intent to authenticate or adopt a record,

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic sound, symbol, or process.

The ability for a principal to "sign" a document in a variety of ways is included in HB8 so that individuals who may have a physical impairment but can fully comprehend financial transactions, have other options rather than a traditional signature to validate the document Power of Attorney. Electronic sound (many tools provide computerized signature recognition), symbol (including an "X" or thumbprint or other), and a process (could include assigning another person to sign on their behalf).

Thank you Beth, for identifying that we needed additional language to allow a notary public to recognize the optional signatures as valid forms of signature when notarizing the document. This language has been added as (b) on page 36.

Senator Stedman, Chairman (S)HSS, asked that I review the notary requirements to insure that the bill does not open up the opportunity for fraud by widening the ability of the principal to sign in a variety of ways. After meeting with the Lieutenant Governor's office, a suggested change is listed on the attachment that may further strengthen Alaska's power of attorney form and statutes. Particularly, requiring the notary to verify the identity of the person signing on behalf of the principal.

Please provide your comments regarding the notary requirements as provided for in this financial power of attorney.

Thank you

Ginger Blaisdell

*Chief of Staff
Office of Representative Shelley Hughes
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Capital Building Room 13
Juneau, Alaska 99801*

[907-465-5265](tel:907-465-5265)

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<image001.png><image002.png><image003.jpg>

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<Notary discussion on HB8.docx>

HB8 Power of Attorney
Version N.A

Following the check off boxes for selection of powers and instructions on the form, a Notary is required to witness the signature to make the power of attorney valid.

Page 7

Statutory Form Power of Attorney

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17 _____

18 Signature of Principal

19 Acknowledged before me at _____

20 _____ on _____.

21 Signature of Officer or Notary

Additional language was added to clarify that a notary public could consider the signature of someone other than the principal if the principal was in their presence and directs another person to sign on their behalf.

Page 36

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14 individual authorized by law to take acknowledgments.

15 (b) Notwithstanding AS 44.50.062(5)(A), a notary public may consider that

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While many states allow for an alternative signature of the principal, the purpose of HB8 is to strengthen the power of attorney statutes to better prevent fraud. Additional notary verification may be one course of action to allow assistance to the principal when needed.

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Version N.A

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Signature of Appointee Acting at the bequest of _____
Name of Principal
Printed name of Appointee _____
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Signature of Officer or Notary

STATE OF ALASKA

DEPARTMENT OF REVENUE
Alaska Mental Health
Trust Authority

BILL WALKER, GOVERNOR

Office of the Long Term Care Ombudsman

3745 Community Park Loop, Suite 200
Anchorage AK 99508
Phone (907) 334-4480
Fax (907) 334-4486

February 19, 2015
Representative Shelley Hughes
Alaska State Capitol, Room 13
Juneau, Alaska 99801-1182

Re: HB 8 Powers of Attorney and other substitute decision-making documents

Representative Hughes,

Thank you for sponsoring HB 8 enacting significant reforms to Alaska's power of attorney law. The Office of the Long Term Care Ombudsman strongly supports this bill which adds new sections and clarifies existing language for the implementation of power of attorney documents in Alaska. It also brings Alaska's statute closer to conforming to the Uniform Powers of Attorney Act and the Uniform Recognition of Substitute Decision-Making Documents Act.

As you know, the Office of the Long Term Care Ombudsman frequently investigates cases in which family members, friends, and others misuse power of attorney documents to exploit vulnerable older Alaskans. Seniors need a legal document that allows them (the principal) to delegate authority to a trusted person (the agent) to handle financial and other matters according to their wishes, including when they become incapacitated. In the cases the Long Term Care Ombudsman investigates, unscrupulous agents spend the senior's assets for items that do not benefit the senior. These situations range from personal care attendants using an elder's debit card to withdraw money to purchase items for themselves to situations where a family member has spent hundreds of thousands of dollars on vacations and automobiles for themselves. Power of attorney documents are also used to transfer the elder's home to the person who holds the power of attorney. Sometimes these agents even dissolve a family trust, directly ignoring the senior's expressed wishes for the distribution of their assets. After working all their adult lives to save for old age, older Alaskans are defrauded of assets that should be used to provide for their care.

HB 8 clarifies and updates the current definitions as well as adds new definitions needed to implement this bill. One of these clarifications is to change the word "disability" to "incapacity" which is important as individuals can become unable to make decisions on their own behalf but not have a disability. The definitions have also been updated to keep pace with the technological advancements in our society including the use of electronic records and signatures. This bill clarifies that this law applies to any document that grants authority for an individual to act on behalf of another even if the words "power of attorney" are not used in the document. Another significant improvement for seniors is the clarification that a signature can be a tangible symbol or completed electronically so that seniors who have difficulty writing can still execute a power of attorney document.

HB 8 adds important protections by defining the duties of the agent and holds agents who violate these duties liable to restore or reimburse the principal or their successors. Section 13.26.327 is a new section that defines the duties of the agent and clarifies that an agent must act in accordance with the principal's wishes, best interest and within the scope of the power of attorney. The agent must also keep records showing their actions. They are required to preserve the principal's estate, if beneficial to the principal, and cooperate with other decision makers such as conservators or others designated to make health care decisions. In section 13.26.326, an agent who violates these new protections and uses the power of attorney for their own interest are liable to restore or reimburse the principal or principal's successors.

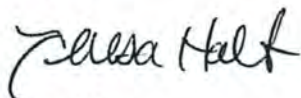
The Office of the Long Term Care Ombudsman is especially supportive of the changes to the power of attorney form. The form in this bill would require individuals to indicate "yes" or "no" for each of the fourteen powers they want to delegate. This is an improvement over the current form which requires individuals to cross out any powers they do not want to delegate, which is counter-intuitive. This change will help prevent older Alaskans from signing away their powers unintentionally. The new form also includes the option to delegate power over retirement plans and super powers (trusts, gifts, beneficiary designation, death deed transfers) which are not in the current form. This bill also provides provisions for judicial review when the principal, family member, state agency, care provider or other interested party feels the power of attorney document is being misused or abused.

Another section added to the bill clarifies when third parties must accept a power of attorney document and when they can decline. Currently, state law provides a "safe haven" which unintentionally encourages financial institutions to accept power of attorney, even when they believe them fraudulent. HB 8 will encourage institutions to refuse questionable powers of attorney and to report suspected exploitation to the authorities without fear of penalty. Timelines are also added for various procedures such as translations or seeking an opinion of counsel. It also makes it clear when a power of attorney enacted in another state is valid in Alaska. HB 8 clarifies under what conditions a power of attorney document can be terminated and directs the agent to notify the appropriate person when the principal is incapacitated.

The final section of the bill expands many of these same provisions to other substitute decision making documents in which a person gives power for an individual to make decisions on their behalf with respect to healthcare and personal care. This section also allows Alaska to align with the Uniform Recognition of Substitute Decision-Making Documents Act.

The Office of the Long Term Care Ombudsman believes that HB 8 strengthens Alaska's power of attorney law and will help prevent the exploitation of elders and other vulnerable adults as well as make it easier to prosecute individuals who abuse power of attorney documents. Thank you for your leadership in bringing this bill forward. Please do not hesitate to contact our office if we can assist you in this effort.

Sincerely,



Teresa Holt
State Long Term Care Ombudsman

Power of Attorney Abuse: What States Can Do About It

A Comparison of Current State Laws with the New Uniform Power of Attorney Act

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American Bar Association Commission on Law and Aging

AARP's Public Policy Institute informs and stimulates public debate on the issues we face as we age. Through research, analysis, and dialogue with the nation's leading experts, PPI promotes development of sound, creative policies to address our common need for economic security, health care, and quality of life.

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EXECUTIVE SUMMARY

A power of attorney (POA) is a legal document used by individuals to allow someone else to act on their behalf, commonly recommended by elder law and estate planning attorneys as a tool for planning for incapacity. In most cases when used for this purpose, the POA specifies that it will continue if incapacity occurs, and it is known as a durable power of attorney.

Powers of attorney are regulated by state law. In 2006, the Uniform Law Commissioners (ULC), who draft and propose specific statutes in areas of the law where uniformity among the states is desirable, approved the Uniform Power of Attorney Act (UPOAA or Act). Among other goals, the UPOAA aims to promote autonomy and prevent, detect, and redress power of attorney abuse. The Act defines a POA as durable unless otherwise indicated by the person who creates it, and this report will use the term POA to include durable powers (unless that would be inconsistent with a title or text of a referenced document).

The primary goal of this report is to inform state legislators, policymakers, practitioners, and advocates about the UPOAA provisions that protect against POA abuse and promote autonomy, and to support enactment efforts within the states. The report provides background on POAs and their use and misuse. In addition, it gives readers—including legal professionals—information about their own state's laws and the laws of other states, explains why the UPOAA was developed, and identifies and discusses the relevant UPOAA provisions.

The report provides a series of charts that compares the state POA laws in effect on December 31, 2007, to each relevant provision of the UPOAA. A master chart of all provisions allows readers to assess (1) whether their state law has provisions related to protecting against POA abuse or preserving autonomy similar to the UPOAA provisions and (2) how their state law compares to those of other states. Finally, the report includes materials aimed at helping advocates to promote adoption of the UPOAA provisions in their state.

Through the charts, this report highlights key provisions of the UPOAA that benefit and protect people who execute powers of attorney, such as the following:

- The clear statement of an agent's duties, including the agent's responsibility to act in good faith, within the scope of authority granted, and according to the principal's known expectations or best interests—as well as more specific duties such as preserving the principal's estate plan, keeping careful records, and cooperating with the principal's health care proxy (sections 114(a) and (b));
- The mandate that express language is required to give the agent “hot powers,” which authorize actions with a particularly high propensity for dissipating the principal's property or altering the estate plan, such as creating a trust, making a gift, or changing a beneficiary designation (sections 201 and 301);
- The provision that a third party may refuse to honor a POA when there is good faith belief that the principal may be subject to abuse, and the requirement that the third

person make a report to adult protective services (section 114(h); Alternative A, section 120(b); and Alternative B, section 120(c))

- The provision that an agent found liable for violating the Act must restore the value of the principal's property to what it would have been had the agent not breached his or her duties and reimburse any attorney's fees and costs advanced from the principal's property to defend the agent (section 117); and
- The imposition of sanctions for an unlawful refusal by a third party to accept a POA (Alternative A, section 120(c) and Alternative B, section 120(d)).

These and other provisions of the UPOAA enhance the effectiveness of a POA as a planning tool and help to prevent, detect, or remedy abuse of this legal instrument.

The analysis in this report's narrative and the detailed charts within the report serve as a yardstick for each state's current law and a guide for improving protections through legislative reform and drafting stronger individual documents. Advocacy tips and a fact sheet for states (developed by the ULC) will aid in efforts to enact the UPOAA.

INTRODUCTION

“Ronald Slomski is described as a man who married a woman with two daughters, whom he helped raise to adulthood. Slomski named his step-daughters as the successor beneficiaries of both his pension plan and will. Because he and his wife both became ill, Slomski gave his mother broad authority under a general power of attorney to handle his affairs. Slomski’s wife predeceased him by six months. Two weeks before Slomski’s own death, his mother instructed his employer to change the beneficiaries on his pension plan to his siblings. The office manager, who was described as uneasy about the change, consulted the company’s lawyer, but then permitted Slomski’s mother to make the beneficiary changes because she had the authority under Slomski’s power of attorney to ‘exercise all powers with respect to retirement plans that the principal could if present.’ As stated in the newspaper account, by the time Slomski died, ‘[e]verything he had saved had been moved beyond the reach of the heirs designated in his will.’

“Sadly, there may be no recourse under Pennsylvania law for Slomski’s step-daughters because Slomski’s mother had actual authority to change the beneficiary designations and these changes did not amount to self dealing in the technical sense.”²

A power of attorney (POA) is a type of legal document used by individuals to allow someone else to act on their behalf temporarily for purposes of convenience or, as often recommended by elder law and estate planning attorneys, for purposes of planning for incapacity. In most states, the latter purpose necessitates the use of a POA that specifies that it will continue if incapacity occurs, and such a POA is known as a durable power of attorney (DPA). The Slomski case offers an example of the problems increasingly associated with POAs, durable or otherwise. At the same time, the case demonstrates the benefits of the new Uniform Power of Attorney Act (UPOAA or Act), which contains a number of provisions related to (1) preventing, detecting, and remedying POA abuse and (2) promoting the autonomy of the individual who makes the POA. The Slomski stepdaughters might have been able to successfully challenge the agent’s actions had the UPOAA been in effect in their jurisdiction.

In keeping with the UPOAA’s new definition of a POA as durable unless otherwise indicated by the person who is authorizing someone else to act on his or her behalf,³ this report will use the term POA rather than DPA unless doing so would be inconsistent with the terminology used in the title or text of a document discussed in the report. Furthermore, this report will generally use “protect against POA abuse and promote autonomy” as shorthand for the concepts of (1) preventing, detecting, and remedying POA abuse and (2) promoting the autonomy of the individual who makes the POA.

2 The description of this case and how it might have been redressed had the Uniform Power of Attorney Act been law in Pennsylvania is quoted directly from Linda S. Whitton, “The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection,” *Phoenix L. Rev. Symposium*, 10-13 (Jan. 25, 2008). The quotations within Professor Whitton’s description are from Dennis P. Roddy, “Courting Trouble: The document granting ‘power of attorney’ often leads to abuse,” *Pitt. Post-Gazette*, Sept. 2, 2007, <http://www.post-gazette.com/pg/07245/814095-84.stm>.

3 Unif. Power of Atty Act, § 104 (2006).

The primary goal of this report is to inform state legislators, policymakers, practitioners, and advocates about the UPOAA provisions that protect against POA abuse and promote autonomy, and to support enactment efforts within the states. The secondary goal is to offer legal professionals information about their own state's law and the laws of other states. The latter information may foster inclusion of additional protections in the POA those professionals draft for clients, as well as inform advocacy efforts by the state bar association or other organizations.

Toward those goals, this report highlights the problem of POA abuse, explains why the UPOAA was developed, and identifies and discusses the UPOAA provisions related to protecting against POA abuse and promoting autonomy. It provides a series of charts that compare the state POA laws in effect on December 31, 2007, to each relevant provision of the UPOAA, as well as a master chart for all provisions. Finally, the report's appendixes include tips for advocates who desire to promote adoption of the UPOAA provisions in their state, a document titled "Why States Should Adopt the Uniform Power of Attorney Act (2006)," and a chart of citations to state POA laws.

The UPOAA with Prefatory Note and Comments is available on the Internet at www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm. Background information, including drafts, memoranda, and an analysis of statutory research and survey results, is available at www.law.upenn.edu/bll/archives/ulc/ulc.htm#dpoaa.

Terminology

This report uses a number of terms that require definition. Some of these definitions are taken from the UPOAA, because it provides a clear and current statement of the meaning of these terms.

- The "principal" is "an individual who grants authority to an agent in a power of attorney."⁴
- The "agent" is "a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated."⁵
- A "power of attorney" (POA) is a "writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used."⁶ An agent's authority ends if the principal revokes that authority or if the principal dies. Under most state statutes, the agent's authority also ends if the principal becomes incapacitated and cannot revoke the agent's authority unless

(continued)

4 Unif. Power of Atty Act, § 102(9) (2006).

5 Unif. Power of Atty Act, § 102(1) (2006).

6 Unif. Power of Atty Act, § 102(7) (2006).

the principal indicates that the POA is durable. The law does this to protect incapacitated principals who are no longer able to monitor their agents and take action if the agents abuse their authority. However, the UPOAA makes a significant change by providing that a POA is durable “unless it expressly provides that it is terminated by the incapacity of the principal.”⁷

- “‘Durable,’ with respect to a power of attorney, means not terminated by the principal’s incapacity.”⁸ A “durable power of attorney” (DPA) is a POA that remains valid even if the principal becomes incapacitated and unable to revoke the agent’s authority. State laws established the DPA as an inexpensive, accessible legal tool for people who wanted to plan for the possibility of incapacity. Many people plan for incapacity to avoid the appointment of a guardian or conservator, which occurs when a court declares that a person lacks decision-making capacity and then appoints someone to make personal or property decisions on behalf of the incapacitated person.
- “Springing power of attorney” is a POA that does not become effective when the principal signs it (unlike the immediate POA, which does become effective upon signing). Instead, it springs into effect at a later time or when a certain event specified in the POA, such as a determination of the principal’s incapacity, occurs. A springing POA may also be known as a “contingent” POA.
- “‘Incapacity’ means inability of an individual to manage property or business affairs because the individual:
 - (A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance....”⁹

NOTE: This report addresses powers concerning the principal’s finances and property. It does not address health care POAs (also known as health care proxies) that authorize an agent to make health care decisions on the principal’s behalf. A few states still have provisions authorizing health care POAs embedded in their financial power of attorney law, but the recent trend has been to have separate laws on those issues.¹⁰

7 Unif. Power of Atty Act, § 104 (2006).

8 Unif. Power of Atty Act, § 102(2) (2006).

9 Unif. Power of Atty Act, § 102(5) (2006). The definition also contains a second part that is not relevant to the purpose of this report. That part adds the following to the definition: “or (B) is (i) missing, (ii) detained, including incarcerated in a penal system; or (iii) outside the United States and unable to return.”

10 Charles P. Sabatino, Health Care Power of Attorney and Combined Advance Directive Legislation. January 2008 (2008), <http://www.abanet.org/aging/legislativeupdates/docs/HCPA-CHT08-Final.pdf>.

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

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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.

Michele M. Hughes has worked as a lawyer in the public interest for 12 years, at the Coalition of Wisconsin Aging Groups (Wisconsin), the Advocacy Center for Persons with Disabilities, Inc. (Florida), and Western Wisconsin Legal Services.

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 unflinchingly 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 Erlie*, 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.

Amanda A. Thilges



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Power of Attorney Summary

The concept of a "power of attorney" was first incorporated into the Uniform Probate Code in 1969 to offer an inexpensive method of surrogate decision making to those whose modest assets did not justify pre-incapacity planning with a trust or post-incapacity property management with a guardianship. After more than three decades, the durable power of attorney is now used by both the wealthy and the non-wealthy for incapacity planning as well as convenience. The Uniform Power of Attorney Act (2006) (UPOAA) is necessary because over the years many states adopted non-uniform provisions to deal with issues on which the Uniform Probate Code and the original Uniform Durable Power of Attorney Act are silent. The UPOAA, which provides uniformity on these issues, enhances the usefulness of durable powers while protecting the principal, the agent, and those who deal with the agent.

A national study of durable powers of attorney, conducted in 2002, revealed the need to address numerous issues not contemplated in the original Uniform Durable Power of Attorney Act such as the authority of multiple agents, the authority of later-appointed guardians, and the impact of dissolution or annulment of the principal's marriage to the agent. The study also revealed other topics about which the states had legislated, although not necessarily in a divergent manner, including: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on powers that alter a principal's estate plan. In a national survey, trust and estate lawyers' responses demonstrated a high degree of consensus about the need to improve portability and acceptance of powers of attorneys as well as the need to better protect incapacitated principals.

The UPOAA, which supersedes the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code, consists of four articles. The first contains all of the general provisions that pertain to creation and use of a power of attorney. While most of these provisions are default rules that can be altered by the power of attorney, certain mandatory provisions in Article 1 serve as safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority. Article 2 provides default definitions for the various areas of authority that can be granted to an agent. The genesis for most of these definitions is the Uniform Statutory Form Power of Attorney Act (1988); however, the language is updated where necessary to reflect modern day transactions. Article 2 also identifies certain areas of authority that must be granted with express language because of the propensity of such authority to dissipate the principal's property or alter the principal's estate plan. Article 3 contains an optional statutory form that is designed for use by lawyers as well as lay persons. Step-by-step prompts are given for designation of the agent, successor agents, and the grant of authority. Article 3 also contains a sample agent certification form. Article 4 contains miscellaneous provisions concerning the relationship of the Act to other law and pre-existing powers of attorney.

The UPOAA seeks to preserve the durable power of attorney as a low-cost, flexible, and private form of surrogate decision making while deterring use of the power of attorney as a tool for financial abuse of incapacitated individuals. It contains provisions that encourage acceptance of powers of attorney by third persons, safeguard incapacitated principals, and provide clearer guidelines for agents.

The UPOAA provides broad protection for good faith acceptance or refusal of an acknowledged power of attorney, consequences for unreasonable refusal of an acknowledged power of attorney and recognition of the portability of powers of attorney validly created under other law. The Act seeks to address the problem of arbitrary refusals of powers of attorney by entities such as banks, brokerage houses, and insurance companies. With respect to liability for refusal of a power of attorney, the Act provides adopting states with two choices: Section 120, Alternative A, sets out liability parameters for refusal of any acknowledged power of attorney not excluded by the statutory safe harbors. Section 120, Alternative B, applies only to refusals of acknowledged statutory form powers of attorney. As an

additional protective measure for the principal, both alternative sections 120 allow refusal of an otherwise valid power of attorney if the person believes that "the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent" and makes or knows that another person has made a report to Adult Protective Services (or the equivalent governmental agency).

Protections for the principal under the UPOAA are multi-faceted and include: mandatory as well as default fiduciary duties for the agent; liability for agent misconduct; broad standing provisions for judicial review of the agent's conduct; and the requirement of express language to grant certain authority that could dissipate the principal's property or alter the principal's estate plan. Mandatory duties include acting in good faith, within the scope of the authority granted and according to the principal's reasonable expectations (or, if unknown, the principal's best interest). Default duties that can be varied in the power of attorney include the duty to preserve the principal's estate plan (subject to certain qualifications) and the duty to cooperate with the person who has the principal's health-care decision making authority.

The UPOAA recognizes that many agents are family members who have inherent conflicts of interest, but that these conflicts may not, in and of themselves, prevent an agent from acting competently for the principal's benefit. While it is well-accepted that an agent under a power of attorney is a fiduciary, most state statutes do not specify what that means. The UPOAA addresses this dilemma in a default provision which recognizes that an agent who acts with care, competence and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has conflicting interests. Furthermore, the Act permits the principal to include in the power of attorney an exoneration clause for the benefit of the agent. Another provision that operates to the benefit of both the principal and the agent is one requiring notice of an agent's resignation. If the agent cannot effectively notify the principal because the principal is incapacitated, the provision gives a hierarchy of persons to whom the agent may give notice, including a governmental agency having authority to protect the welfare of the principal.

In the final analysis, there may be no perfect solution to meet the surrogate decision making needs of our aging society, but the UPOAA balances the competing interests at stake with legislative reforms that enhance the usefulness of durable powers while at the same time protecting the principal, the agent, and those who deal with the agent.

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Why States Should Adopt UPOAA

The Uniform Law Commission first incorporated the concept of a "power of attorney" in the 1969 Uniform Probate Code, revising it again in 1987. Originally viewed as an inexpensive method of surrogate decision making for people of modest means, the durable power of attorney is now widely used by Americans for incapacity planning as well as convenience. The **Uniform Power of Attorney Act (2006) (UPOAA)**, if widely enacted, will clarify and modernize this now largely divergent law. Every state should adopt UPOAA because it:

- Preserves the effectiveness of durable powers as a low-cost, flexible, and private form of surrogate decision-making.
- Provides mandatory provisions that provide safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority.
- Modernizes the various areas of authority that can be granted to an agent and requires express language authorization by the principal where certain authority could dissipate the principal's property or alter the principal's estate plan.
- Provides step by step prompts are given for designation of agent, successor agents, and the grant of authority through an optional statutory form.
- Offers clearer guidelines for the Agent, who is often a trusted family members such as:
 - Recognizes that an agent who acts with care, competence and diligence for the best interest of the principal is not liable solely because he or she also benefits from the act or has conflicting interests
 - Permits a Principal to include in the power of attorney an exoneration provision for the benefit of the agent.
 - Provides ways for the Agent to give notice of resignation if the Principal is incapacitated.
- Encourages acceptance of a power of attorney by third parties by:
 - Provides broad protections for the good faith acceptance or refusal of an acknowledged power of attorney.
 - Recognizes portability of powers of attorney validly created in other states.
 - Offers an additional protective measure for the Principal by providing that third persons may refuse the power if they have the belief that "the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the Agent or person acting for or with the agent, make a report to the appropriate adult protective service agency."

The **Uniform Power of Attorney Act (2006)** will enhance the usefulness of durable powers while at the same time protecting the principal, the agent, and those who deal with the agent. It should be enacted in every jurisdiction as quickly as possible.

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Why do I need an Alaska financial power of attorney?
If you become ill or injured and you can't take care of your own finances, someone else must step in to help. With a financial power of attorney, you name a trusted person to pay bills, make bank deposits, watch over investments, collect insurance or government benefits, and handle other money matters on your behalf. Without this important document, your loved ones will have to go to court to get authority over your financial affairs.
Who makes financial decisions for me under an Alaska financial power of attorney?
In Alaska, the person you name to make decisions for you is called your attorney-in-fact. Any competent adult can serve as your attorney-in-fact; the person most definitely doesn't have to be a lawyer. Honesty, common sense, and dependability should be the most important factors in your decision. It's also wise to choose someone who lives nearby—this will make it easier to take care of practical tasks.
When does my financial power of attorney take effect?
In Alaska, you can draft your financial power of attorney so that it takes effect as soon as you sign it. You must specify that you want it to be "durable." If you don't, it will automatically end if you become incapacitated.
If you don't want to make an immediately effective document, you can state that your power of attorney will not go into effect unless a doctor certifies that you have become incapacitated. This is called a "springing" durable power of attorney.
When does my financial power of attorney end?
A durable power of attorney automatically ends at your death. It also ends if:
- You revoke it. As long as you are mentally competent, you can revoke your document at any time.
- You get a divorce. In Alaska, your durable power of attorney is not automatically terminated if your spouse is your attorney-in-fact and you get a divorce. As a practical matter, it is always wise to make a new power of attorney as soon as you file for divorce.
- A court invalidates your document. It's rare, but a court may declare your document invalid if it concludes that you were not mentally competent when you signed it, or that you were the victim of fraud or undue influence.
- No attorney-in-fact is available. To avoid this problem you can name an alternate attorney-in-fact in your document.
Do I need a lawyer to make a financial power of attorney in Alaska?
You usually don't need a lawyer to prepare a durable power of attorney for finances. In fact, state governments have designed these forms for people to complete on their own by filling in the blanks. You can find a form for Alaska in Nolo's Quicken WillMaker Plus (products/quicken-willmaker-plus-2003-WQP.html) software, including detailed instructions for completing your document and making it legal in Alaska.
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authorized to act on behalf of the elder (called the "agent") Under this fiduciary duty, the agent owes the elder a duty to act with the utmost good faith and loyalty when acting on behalf of the elder

Breach of fiduciary duty. When an elder signs a power of attorney, the fiduciary duty created by the document imposes certain duties on the agent For example

- The agent must keep the elder informed of things that affect the elder's interests.
- The agent may gain a profit only if he or she informs and gets consent of the elder
- The agent may not acquire an interest adverse to the elder or reap a secret profit
- The agent may not transfer the elder's property to him or herself (or to others) unless the power of attorney specifically confers that power

If the agent fails to act in accordance with these fiduciary duties of fidelity and good faith, the agent may be liable for breaching (that is, breaking) the fiduciary duty.

Conversion. An agent who uses an elder's assets for his or her own benefit may also be liable for conversion of the elder's property In order to establish conversion of property, the elder (or the elder's lawyer) must show that the defendant managed or used the elder's property in a way that was inconsistent with the elder's rights of ownership. When the agent has used a power of attorney to convert the property, it must also be shown that 1) the elder demanded the return of the property, and 2) the defendant refused to deliver the property to the elder.

Damages. If the elder is successful in a lawsuit for breach of fiduciary duty or conversion, the court will order the defendant to return the stolen property. The court or jury may also require that the defendant pay the plaintiff's attorneys' fees. And, if the defendant's conduct was particularly egregious or involved elements of fraud, the court may award **punitive damages** ([dictionary/punitive-damages-term.html](#)) to the elder. For example, in the case discussed above (about the uncle and nephew), the jury awarded the uncle the full amount of money that his nephew stole, along with punitive damages, interest, and attorneys' fees. Happily, the uncle was eventually able to collect every penny of the judgment

Preventing Power of Attorney Scams

Not all elder victims of power of attorney scams are as lucky as the uncle in the example case. Tracing how the stolen money goes from A to Z is not easy, nor is pursuing these kinds of lawsuits. If you or a loved one plans to use a power of attorney, take steps to protect against scams. Or, if you or a loved one is scammed, act quickly to remedy the situation. Here's how

- Do not grant a power of attorney to anyone unless you know the person well and completely trust him or her.
- Do not release the power of attorney until it is needed. In the meantime, keep the signed power of attorney in your attorney's offices.
- If a power of attorney is needed, but you are later able to manage your affairs again, immediately take back the power of attorney.
- If the agent in a power of attorney transfers property into his or her own name, demand in writing that the agent immediately return the assets and render an accounting. It may be wise to contact an attorney at this point.
- If the agent refuses to return the property, immediately contact an attorney

by Craig T. Matthews, a business, employment, and litigation lawyer from the Dayton, OH area

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Elder Abuse: Financial Scams Against Seniors

Learn about the most common financial frauds and scams targeting seniors.

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Financial fraud is the fastest growing form of elder abuse. Broadly defined, financial elder abuse is when someone illegally or improperly uses a vulnerable senior's money or other property. Most states now have laws that make elder financial abuse a crime and provide ways to help the senior and punish the scammer.

Elder financial abuse is tough to combat, in part because it often goes unreported. Many elderly victims are often too confused, fearful, or embarrassed by the crime to report it. One recent study reported by Consumers Digest estimated that there are at least 5 million cases of this financial abuse in the United States each year, but law enforcement or government officials learn about only 1 in 25 cases.

You can protect yourself or your loved ones from financial elder abuse by becoming familiar with the most common scams and learning what to do if you suspect foul play.

Profiles of Elder Abuse Victims and Scammers

A recent study by the American Association of Retired Persons (AARP) highlighted characteristics of people older than 50 that make them easy targets for financial abuse. In general, they expect honesty in the marketplace, are less likely to take action when defrauded, and are less knowledgeable about their rights in an increasingly complex marketplace. And as people over 50 are more likely to be home than their younger neighbors, they are often within easy reach of devious telemarketers and home solicitors.

Scammers target elders that they perceive to be vulnerable - those that are isolated, lonely, physically or mentally disabled, unfamiliar with handling their own finances, or have recently lost a spouse.

The scam artists often pose as trustworthy helpers. They can be strangers, such as telemarketers and tradespeople, or have a relationship with the targeted victim, such as friends, family members, doctors, lawyers, accountants, and paid or volunteer caregivers. Abusers who are family members often have money troubles that may be made worse by unemployment, gambling, or substance abuse problems.

Elder financial abuse scammers can be tough to catch. Many scammers have paperwork that appears to give them legal authority to act - including powers of attorney, authorizing signature cards, and vehicle pink slips. Some work at a bank or other financial institution and have intricate ways of hiding their tracks by manipulating electronic records and such.

Common Financial Scams

Financial scams perpetrated against older people include a broad range of conduct - from outright taking of money or property to forging a signature on a legal document, such as a will or deed, to getting paid for care, products, or services and then not providing them.

Keep an eye out for these common scams

Telemarketing or mail fraud. The U.S. Department of Justice estimates that dishonest telemarketers take in an estimated \$40 billion each year, bilking one in six American consumers -- and the AARP claims that about 80% of them are 50 or older. Scammers use the phone to conduct investment and credit card fraud, lottery scams, and identity theft. Scammers also use the phone to sell seniors goods that either never arrive or are worthless junk.

Getting unauthorized access to funds. In "Sweetheart Scams," alleged suitors woo older people, convincing them that love and care are their motivations for being included on bank accounts or property deeds; the suitors usually disappear along with the property.

Charging excessive amounts of money. Smooth-talking scammers first convince seniors that they need some goods or services, then seriously overcharge them - often hiding the high cost in extravagant schemes involving interest and installment payments. This tactic is often used for products that many older people might find essential to their quality of life, such as hearing aids and safety alert devices.

Selling bogus items. Among the most egregious of false sales ploys is dubbed "Rock in a Box." In them, a senior is sweet-talked into buying an item, such as a new color television, at a bargain price. That comes in a box that's suspiciously sealed. What the box actually contains is a well-padded rock.

Getting money or property through undue influence or fraud. Many seniors have been duped into parting with their homes or other property because a scammer convinces them it is for their own good. In one infamous case, three officials from the Detroit-based Guardian Inc. were found guilty of embezzlement and fraud after selling a client's house for \$500 - to the mother of a company officer. The company also collected excessive fees from its wards, sometimes as high as 70 percent of their Social Security (dictionary/social-security-term.html) checks.

Using fraudulent legal documents. Many scammers cloak their actions in legal authority, procuring a power of attorney or will or other legal document giving them access to a senior's property. They get seniors to sign these documents by lying to, intimidating, or threatening the seniors.

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Making pigeon drops. In a typical pigeon drop, two suspects approach an older person – often in a retail shopping area or near an ATM machine – and claim they have just found a package or wallet containing a large amount of money. One of the suspects volunteers to check with a “boss” onsite to get advice on what to do with the found money, then reports that it came from an illegal source such as gambling or narcotics.

The scammers offer to split the money – but only after the older person shows “good faith” by producing money of his or her own. When the scammers send the senior to the “boss” to get the promised share of the money, the senior discovers that there is no boss and the suspects have disappeared.

Faking an Injury scenario. In this situation, a scammer claims to have a connection to law enforcement and tells an elder that a child or other close family member has been seriously injured or is in jail. The scammer then convinces the senior to give him or her money for medical treatment or bail.

Offering false prizes. A good example of this is the “You have won the lottery” scam operating out of Canada. In this scam, thousands of older people were bilked into believing they became wealthy overnight, but had to wire money in “fees and taxes” before they could collect the grand prize. In a joint crackdown, the U.S. [Attorney General](#) ([http://www.justice.gov/attorney-general/terms.html](#)) and the Solicitor General of Canada estimated the take from this mass-marketing fraud to be about \$1 billion a year.

In another version of this scam, con artists tell an elder that he or she has just won a huge cash prize, but needs to send in some money – usually in money orders – to free it up from customs officials.

Doing unsolicited home repair work. Typically working in teams of two or more, scammers scour neighborhoods with a high concentration of older residents, or even track recent widows and widowers through obituaries and death notices, then appear on their doorsteps claiming to spot something in need of fixing – a hole in the roof or clogged drainpipe, for example.

The scammers demand payment up front, and then often claim that their initial investigation reveals a more serious problem, with a more expensive solution. The “work” they do is unlicensed and often shoddy, such as applying paint to a roof to make it appear as if it has been tangibly fixed.

In a twist on this scam, one alleged worker might distract the elder while another enters the house to steal money and other valuables.

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Warning Signs of Elder Abuse (Page 2 of 2 of Elder Abuse: Financial Scams Against Seniors)

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Look out for certain factors that may indicate that a loved one is a likely target of financial abuse. Of course, no single sign is conclusive proof, but staying aware will help you avoid or limit the fallout if there are any problems

- Unusual or large withdrawals or transfers from bank accounts, or large credit card charges that the older person can't explain.
- Checks that are missing or include suspicious signatures.
- An individual who suddenly forms a close relationship with the older person, getting easy access to his or her home, money, and other property.
- Newly executed documents, such as a will or power of attorney, that the older person doesn't seem to understand
- Changes in account beneficiaries or authorized signers
- A large number of unpaid bills.
- Missing property
- Entry forms and prizes from contests, and payments made for "free" vacations or other merchandise
- Untreated physical or mental problems, including a dramatic change in mood or disposition, or other evidence of substandard care.
- Sudden social isolation

Where to Report Suspected Abuse

There are now a number of individuals and groups dedicated to investigating suspected financial abuse, and finding and stopping perpetrators. Here are some options for taking action

Notify bank personnel. Depending on the type and extent of financial abuse involved, giving a heads up to the bank tellers and officers who commonly handle the elder's accounts may be enough to stop the wrongdoing. Bank employees are often in a good position to note suspicious activity, such as a sudden withdrawal of large sums of money or use of an ATM card by an elder who is housebound.

The laws in most states encourage or require bank officials to report suspected elder financial abuse. And a federal law requires financial institutions to file a Suspicious Activity Report with the federal government when they suspect elder financial abuse

Get help from a senior services group. While the services offered -- from counseling to legal assistance -- vary widely depending on the locale, the Eldercare Locator, at 800-677-1116 directs callers to local programs and services that help prevent financial elder abuse. And INFO LINK at 800-394-2255 helps arrange and coordinate assistance with crimes

Contact Adult Protective Services. Adult Protective Services (APS) is the government-affiliated agency charged with investigating reports of elder financial abuse and offering assistance to victims. To find your state APS office, visit the National Center on Elder Abuse's website at www.ncea.aps.gov (<http://www.ncea.aps.gov/>) (click on "Find State Resources").

Alert law enforcement. The police or local prosecutor's office will often intervene when there is good evidence that a crime is being committed

To learn more about elder abuse, get *Long-Term Care: How to Plan & Pay For It* (product.cfm/objectID/BFA8AE70-24A9-47B5-96B3E339CA87B74A/118/207/#summary), by Joseph L. Matthews (Nolo).

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Durable Power of Attorney Abuse: It's a Crime Too

A National Center on Elder Abuse¹ Fact Sheet for Criminal Justice Professionals

By Lori A. Stiegel, J.D., of the American Bar Association² Commission on Law and Aging
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PURPOSE OF FACT SHEET:

Victims of durable power of attorney (DPA) abuse or their family members often report that their attempts to report this abuse to law enforcement are rebuffed with the following statement: "It's a civil problem. Go talk to a civil lawyer." While DPA abuse is a civil problem, it is also a crime and should be treated as one. An increasing number of newspaper stories describe successful investigations and prosecutions of DPA abuse. But too many criminal justice professionals still lack awareness of DPA abuse and the role they can play in holding offenders accountable and obtaining justice for victims. This fact sheet will enhance their awareness.

CASE EXAMPLE:

Helen was 85 and ailing when she made a DPA naming her daughter Susan as her agent. Two weeks later Susan used this DPA to sell Helen's home. Susan placed the sale proceeds into bank accounts that were in Helen's name. Within a year Susan had used her authority under Helen's DPA to withdraw all the money from Helen's accounts. Susan used the money to support her lavish lifestyle and her failing business. When Helen discovered her money was gone, she contacted the local law enforcement agency and was told by a detective that her only option was the civil justice system. Helen could not afford a civil lawyer and the local free legal services program for older people was not able to help her. The adult protective services agency told Helen that they couldn't help her recover her money. Helen lost all hope and died six weeks later.

TERMINOLOGY:

- The "*Principal*" is the person who authorizes another person to act on his or her behalf through a power of attorney or durable power of attorney.
- The "*Agent*" or "*Attorney-in-Fact*" is the person who acts on the principal's behalf through a power of attorney or durable power of attorney.
- A "*Power of Attorney*" (POA) is a legal document through which a principal authorizes an agent to act on the principal's behalf. An agent's authority ends if the principal revokes that authority or if the principal dies. By law, the agent's authority also ends if the principal loses decision-making capacity and can not revoke the agent's authority. The law does this to protect incapacitated principals who are no longer able to monitor their agents and take action if the agents abuse their authority.

- A “*Durable Power of Attorney*” is a POA that remains valid even if the principal loses the legal capacity to revoke the agent’s authority. This characteristic makes the DPA a useful tool for people who want to plan for the possibility of incapacity. Planning may avoid the appointment of a guardian or conservator, which occurs when a court declares that a person lacks decision-making capacity and then appoints someone to make personal or property decisions on behalf of the incapacitated person. As DPAs are used to enable an agent to act on behalf of an incapacitated principal, they usually are written very broadly and give the agent a lot of authority to handle financial matters.
- A “*Springing Durable Power of Attorney*” is a DPA that does not become effective when the principal signs it (unlike the POA or DPA, which become effective upon signing). Instead, it springs into effect at a later time or when a certain event that is specified in the DPA occurs.

THE PROBLEM:

DPA abuse (sometimes referred to as POA abuse) is the misuse by the agent of the authority granted by the principal. It means making a decision or taking an action that is not in the principal’s best interest. For example, as in the case described above, DPA abuse occurs when the agent spends the principal’s money to benefit the agent, rather than the principal. It may also include forging the principal’s signature on the DPA or coercing an older person to make a DPA against his or her wishes.

Powers of attorney, whether general, durable, or springing, usually are not subject to oversight by a court or third party. If the principal becomes incapacitated and can no longer monitor the agent’s actions, this lack of oversight for a broadly written legal document makes it very easy for an agent to abuse the authority granted by the principal. For this reason, a DPA is often called a “license to steal.”

THE AGENT’S DUTY TO THE PRINCIPAL:

Just like an agent for a sports player or actor, an agent under a DPA has a legal duty to act as a *fiduciary*. Generally this means that the agent is required to act in a trustworthy manner and to make decisions that are in the principal’s best interest or that are consistent with decisions that the principal made for himself or herself before losing decision-making capacity.

THE CRIMINAL LAWS RELATED TO DPA ABUSE:

An agent who violates the duty owed to the principal may have committed one or more crimes. The agent may have violated state and federal laws, including laws on:

- Exploitation
- Embezzlement
- Forgery
- Fraud (e.g., credit card fraud, tax fraud, welfare fraud)
- Larceny
- Money laundering
- Theft³

Some states have laws criminalizing financial exploitation of older persons. Criminal laws of general application also may be used against agents who commit DPA abuse. Criminal justice professionals who are investigating or prosecuting DPA abuse should take action to prevent the agent from dissipating the principal's remaining assets. Assets should be frozen if allowed by law. Additionally, professionals should seek restitution on the principal's behalf.

OPPORTUNITIES FOR CRIMINAL JUSTICE PROFESSIONALS:

Many communities have or are establishing multidisciplinary teams (MDT) that bring together an array of professionals to review and redress elder abuse cases, improve the response to elder abuse victims, and prevent victimization of other older people. There are several types of MDT including case review teams, crisis response teams, fatality review teams, and financial/fiduciary abuse specialist teams.⁴ The expertise of criminal justice professionals is critical to the success of an MDT. Additionally, the professional contacts and knowledge gained by participating on an MDT enhances the ability of criminal justice professionals to investigate and prosecute elder abuse cases.

SELECTED RESOURCES:

- The National Center on Elder Abuse (NCEA) website (www.ncea.aoa.gov) provides a wealth of information about elder abuse. It can help you determine whether your community has an MDT and link you to numerous other resources.
- The NCEA listserv connects you to other professionals throughout the U.S. and in many other countries and enables you to discuss cases and gather information. For information about or to join the listserv, visit the NCEA website.
- The Clearinghouse on Abuse and Neglect of the Elderly, an NCEA project, is a fully computerized archive of published research, training resources, government documents, and other sources on elder abuse. To access the CANE database and annotated bibliographies (which include the subject of financial exploitation), visit the NCEA website.

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² The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

³ This list was developed based on news stories from November and December 2007 in which agents were indicted or successfully prosecuted for DPA abuse.

⁴ Brandl, B., Dyer, C.B., Heisler, C.J., Otto, J.M., Stiegel, L.A., & Thomas, R.W. (2007). *Elder Abuse Detection and Intervention: A Collaborative Approach*. New York, NY: Springer Publishing.

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16,434.76	-0.11%	4,165.19	-0.23%	1,838.13	+0.04%

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By Elizabeth O'Brien
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It's a standard part of estate planning. It's also, according to experts on elder fraud, a license to steal. It's the power of attorney, a legal instrument designed to give a trusted individual the authority to handle financial or health matters for the person creating it.

As their own parents grow older—and, in many cases, lose the capacity to make their own financial and medical decisions—growing numbers of baby boomers are beginning to wrestle with the intricacies and pitfalls of the power of attorney. And of course, the day may not be too far off when they themselves may have to trust someone else with those powers. "They have great value and opportunity to misuse," said Randy Thomas, a former police officer in Columbia, South Carolina who lectures nationally on elder financial abuse.

The MetLife Mature Market Institute estimates that older Americans lose at least \$2.9 billion annually from financial abuse of all kinds. And experts expect that amount to grow as the baby boomers age. The Administration on Aging has designated 2013 as the "Year of Elder Abuse Prevention" to raise awareness of all types of abuse at the national, state and local levels.

Statistics on power of attorney abuse are hard to come by, but experts recognize it as a prevalent problem. Some kinds of power of attorney grant their holders far-reaching authority over the affairs of people who are physically or mentally unable to conduct their own business. The Government Accountability Office released a report last November on elder financial exploitation which listed power of attorney agents as one category of potential abuser whose actions can be particularly challenging to prevent.

Indeed, family members, friends, and neighbors are the culprits in 34% of elder financial abuse cases, according to a study by MetLife. Yet much of the education on senior financial exploitation centers on scams

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perpetrated by strangers. "We've got them so scared of answering the phone or going online, when the majority of the assets are going out the back door by a trusted niece," Thomas said. And the vehicle that often enables this, Thomas said, is the power of attorney.

Here's what that can look like: A friendly neighbor offers to go pick up an elderly couple's license plates. He has them sign a specific power of attorney for that sole purpose, printed from an automobile-club website. He takes that to the bank and uses it to withdraw money from the couple's account. (That's an actual scenario that came before Thomas A. Swift, probate judge in Trumbull County,

Ohio; the bank returned the money, because the teller should have but failed to notice the limited nature of the power of attorney.)

Pamela Glasner, a filmmaker who lives in central Connecticut, experienced a more devastating scenario when a man from her parents' Florida synagogue gained the couple's confidence a few years ago. Glasner's father, who had Alzheimer's disease, had moved into a nursing home, and her mother lived alone and visited him daily. The man, who represented himself to nursing-home staff as the couple's son, had Glasner's father sign a power of attorney form that he then used to access their money and transfer their house into his name. The fraudster also had Glasner's mother rewrite her will, naming him a beneficiary. "By the time we found out about it," Glasner said, "all of our accounts were zeroed out." Glasner turned her experience and that of others into a 2012 documentary, "Last Will and Embezzlement."

Finding a trusted 'agent'

When used properly, the power of attorney can assure that a trusted person is handling your financial affairs, or making health-care decisions for you, when you're not mentally or physically capable of doing this yourself. Many lawyers include powers of attorney as part of a standard estate plan (some recommend separate documents for financial affairs and health-care, while others create one document to address both).

Estate plans usually involve what's known as a "durable" power of attorney. These allow the trusted individual—legally, the "agent"—to retain power of attorney even when the person who created the document—the "principal"—has become incapacitated. A general power of attorney expires when the principal has lost capacity; these are usually limited to a certain transaction, such as a real estate closing or the license-plate example above. All powers of attorney expire when the principal dies.

It's important that people create a power of attorney when they're still in full command of their faculties. If you fail to designate someone to handle your affairs, and you become unable to take care of them yourself, then your family will likely have to go to court and establish what most states call a conservatorship or guardianship. (This holds true even for spouses; unless an account is held in both names, one spouse won't have access to another's funds without a power of attorney.) Guardianship can be a costly and complicated process, and there's no guarantee the judge will choose as your guardian the person who you would've picked.

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Powers of attorney should be customized to each individual's wishes and situation. When crafting the document, some people might decide not to allow their agent to make gifts on their behalf. Others might decide they want to add a second agent or at least allow someone else to review the actions of the first agent. Then again, "If you get to the point where you need that level of review, you're probably naming the wrong person," said Michael A. Dribin, a partner in Miami with law firm Harper Meyer LLP. People should consult a lawyer to ensure their power of attorney will be accepted everywhere they need it to be, experts say, especially if they have property in more than one state, as the laws governing power of attorney vary by state.

Powers of attorney are vulnerable to abuse in part because they're not routinely tracked by the court system. Anyone can print a template from the Internet and put that in front of an older person to sign. Once a new power of attorney is signed, that document supersedes the old power of attorney if it addresses the same issues. Yet since these forms aren't tracked in a central repository, the old agent isn't notified of the change. Most states require witnesses, including a notary public, to the signing, but this intended safeguard can be sidestepped if witnesses are inattentive or, worse, collude with the abuser.

A mentally competent person can revoke power of attorney at any time if she notices the document being abused. Yet, if the principal's mental state is in question, the courts are often called on to determine whether she understood what was happening when she signed the power of attorney. This happens during a "proceeding to determine capacity." This kind of retrospective analysis of an older person with some cognitive decline can be very complex, even for experts, said Dr. Gary Small, director of the division of geriatric psychiatry at the Semel Institute for Neuroscience and Human Behavior at UCLA, and the author of *The Alzheimer's Prevention Program*.

Taking steps against abuse

While there's no fail-safe way to prevent power of attorney abuse, people can take steps to protect themselves and their loved ones. The most important preventative measure is for people to name an agent they trust completely, experts say. Once the decision is made, revisit it every few years, Dribin said: The family member who seemed like the perfect candidate might seem less so if he is in the midst of a divorce, for example, with fresh financial woes.

Once you've established your power of attorney, or helped an older relative do so, notify the relevant financial institutions in writing and ask them to alert you to any changes in the account, Swift said. This serves two purposes, experts say: it can alert you to potential abuse, and it can also ensure that your financial institution will honor the document. Some financial institutions will only honor their own power of attorney documents, generated by their lawyers, and state law on the issue varies.

People serving as agents for their parents or older relatives should watch for potential abuse once their loved one has become incapacitated. Monitor bank accounts for any suspicious activity. You might also consider freezing your relative's credit report to make it more difficult for fraudsters to take out loans in his or her name, said John Ulzheimer, president of consumer education at SmartCredit.com, a credit monitoring and education firm, who recently froze the reports of his 85-year-old mother-in-law for her protection. To do this, you register with each of the three credit bureaus—Equifax, TransUnion and Experian—and pay a

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nominal fee. You can always go back in and "thaw" the account if your relative needs to apply for credit. If you realize someone has used a power of attorney to take advantage of your loved one, consider requesting a proceeding to determine capacity in the local court where he or she lives, Dribin said. In some states, this request legally suspends the ability of an agent to use the power of attorney, since the principal's mental capacity is under question. As an extra measure, send a written notice to all financial institutions where your loved one has accounts—banks, brokerage houses and insurance firms—letting them know that the power of attorney has been suspended. No one likes to think about becoming reliant on others. But establishing a power of attorney, and taking steps to protect it, can lessen the burden of caregiving for your loved ones down the road. No matter how many crossword puzzles we may do, everyone experiences some degree of cognitive decline as part of the natural aging process, said Michael Finke, a professor of personal financial planning at Texas Tech University: "It may be healthier to plan for it than to try to prevent it."

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Whistleblower: Power-of-attorney law addresses 'rampant' abuse

Article by: JANE FRIEDMANN
Star Tribune
July 15, 2013 - 12:00 PM

The legal authority to sign someone else's name can lead people to do terrible things.

A man with power of attorney removes his elderly aunt from an assisted-living facility, leaves her at home unattended and spends her money.

A nursing home resident with dementia gives power of attorney to a stranger, who pays herself generously from the resident's funds.

A terminally ill man gives his mother power of attorney and in her son's final days, she changes the beneficiaries on his pension plan.

Power of attorney can be an easy-to-use tool to allow friends, family and clergy to take care of financial matters for the elderly, deployed military personnel and others.

But it can just as easily be used to exploit those people, when trust is placed in the wrong hands. Unlike conservatorships, which are court-appointed and supervised, powers of attorney come with little oversight and may be granted in minutes using a form downloaded from the Internet.

Abuse "is rampant and we really are seeing a huge increase" in incidents, according to Tara Patet, a prosecutor in the office of the St. Paul City Attorney.

Thanks to efforts by a vulnerable-adult advocacy group, a law passed in April requires those given power of attorney to keep careful records of where money goes, provide an accounting if requested and face liability if they abuse that power.

The form that grants power of attorney will soon reflect those changes. Part of the law goes into effect next month with the rest implemented in January.

'Speed bumps' installed

The standard power of attorney form will now have cautionary language that the granter will have to sign off on. "There are touchy issues where people ought to kind of reach a speed bump and make an affirmative decision," said Iris Freeman, an advocate for seniors and member of the Vulnerable Adult Justice Project (VAJP).

One of those "touchy issues" is referred to as self-gifting, whereby attorneys-in-fact, the people granted power of attorney, take money from the other person's funds for themselves or their children.

The old form simply allowed the granter to designate whether attorneys-in-fact could self-gift, with virtually no restrictions. Now the granter must check a box and write the names of the people allowed to self-gift.

"We intend that to be helpful in averting those kinds of self-gifting excesses that have been a problem," Freeman said.

The new form also lists a maximum amount of gift equal to the federal annual gift tax exclusion.

"The more information the attorney-in-fact knows, the less chance the power of attorney will be used incorrectly," said Laura Garbe, a Minneapolis lawyer with Erickson & Wessman, P.A. and co-chair of the VAJP committee that proposed the changes.

The form's new language also makes "much clearer statements of the duties that are being granted to the attorney-in-fact," Freeman said. For instance, the law says they must "act with the interests of the [granter] utmost in mind ... [and] exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs."

A third change requires attorneys-in-fact to keep detailed records and, if the granter asks, provide the records to the granter or another person on a periodic basis.

The provision of the bill that will go into effect Aug. 1 allows the granter or an authorized person to recover reasonable attorney fees and costs in the event an attorney-in-fact fails to provide an accounting.

A push nationwide

With the change in law, Minnesota joins a number of other states that have strengthened power of attorney legislation.

In 2006, prompted by widespread abuse, a group of lawyers appointed by state governments to find ways of making laws more consistent across states adopted a model power of attorney reform bill.

Since then, Minnesota is among the states that have adopted at least some of the group's recommendations.

The amended law "is a big step in the right direction but there's a lot more work that needs to be done," Patet said.

Advocates recognized the need to strike a balance. "The power of attorney is a very flexible tool, and we did not want to take away flexibility but we also wanted to add some protections in there," Garbe said.

Not just a civil matter

For every one case of elder abuse reported, 24 go unreported, according to a 2011 study conducted by Cornell University and others. Victims rarely speak up.

Many power of attorney abuses involve an elderly victim. In those and other vulnerable-adult cases, an attorney-in-fact could be charged criminally for financial exploitation.

The loss is often large enough that the person is charged with a felony. "We don't get these cases until there's tens of thousands or hundreds of thousands of dollars of loss. Because of the nature of these victims and the fact that they're isolated," Patet said.

"I do think that the additional safeguards with the new legislation are going to help us in prosecuting these kinds of crimes," Patet said.

"You have a document now that outlines for this person, here's what your obligations were under this power of attorney. You were on notice of it because it was right here in this document that you signed," she said.

Jane Friedmann • 612-673-7852

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ConsumerReports.org

Protecting Mom & Dad's money

What to do when you suspect financial abuse

Consumer Reports magazine, January 2013

The ultimate betrayal

The New York Post called it the "swindle trial." Jurors likened it to a "Shakespearean tragedy." When New York socialite Anthony D. Marshall was convicted of defrauding and stealing from his elderly mother, philanthropist Brooke Astor, reports detailed how he conspired with lawyer Francis Morrissey to amend her will in his favor, took millions without her consent, and lifted paintings from her walls while she languished in her Park Avenue home. The trial painted a portrait of greed and filial neglect. Both men were sentenced to one to three years in prison and are currently out pending appeal.

Elsie Brooks's lifestyle was a world apart from Astor's, but their stories are tragically similar. When she was 72 she sold her mobile home and moved in with her daughter and granddaughter in Monterey, Calif. She decided she didn't want to deal with her finances any longer and let the two take control. But her daughter, Lisa Karen MacAdams, and granddaughter, Christi Schoenbachler, drained Brooks of jewelry, furniture, and an annuity worth almost \$90,000, and abandoned her at a nursing facility, according to court documents. They were convicted of grand theft and financial elder abuse, both felonies, and two counts of misdemeanor elder abuse. Last summer, a California appeals court stayed one of Schoenbachler's misdemeanor charges.

Elder financial abuse is "the ultimate betrayal," says Colleen Toy White, a superior court judge in Ventura County, Calif., who sees roughly 40 cases of such abuse each month. "It's shocking to see how vulnerable the elder person is."

We've told you about scams by strangers, among them fraudulent sweepstakes phone calls and investments, and grandparent scams ("Scamnation!," October 2012 issue). Far more insidious are deceptions by neighbors, friends, employees, and relatives—the very people entrusted to care for and protect seniors.

Such abuse can be financially and emotionally devastating. And experts say it's likely to increase because of a stalled economy and an aging population. Awareness is rising thanks to cases such as Astor's. Yet because seniors might not recognize when it happens to them or are too ashamed to speak, the crime lurks largely out of sight.

In a randomized New York telephone survey released in 2011, for instance, seniors mentioned being victims of financial exploitation more frequently than any other type of abuse. Yet the study estimated that only 1 in 44 incidents of financial elder abuse is officially documented.

"Nearly every time I lecture on financial abuse, people will approach me with their personal stories," says Elizabeth Loewy, a Manhattan assistant district attorney and lead prosecutor on the Marshall case. "They will talk to me about their grandmother, aunt, or neighbor, usually a senior with cognitive issues, who had 'this problem.' And it's like a light will go on, and they'll ask, 'So this could be a crime?'"

Unreported crimes

Financial exploitation of elders is broadly defined as the illegal or improper use of the funds, property, or assets of people 60 and older. In the New York survey, 4.2 percent of older people surveyed said that they'd been exploited by family members or others. In a national study from 2009, 5.2 percent of older Americans said they'd been victimized by family members, and 6.5 percent said they'd been exploited by others. A seminal national study by the MetLife Mature Market Institute found that the cost of such abuses is at least \$2.9 billion a year. Yet John Migliaccio, the institute's director of research and gerontology, acknowledges that the study's methodology—pulling from compiled news reports of abuse—underestimates the crime's true price. "What we're seeing is a tip of the iceberg," he says.

Nevertheless, the study reports some startling facts: In 107 cases, seniors lost an average of more than \$145,000 from fraud committed by family, friends, caregivers, and neighbors. In 159 cases involving fraud by strangers, the average loss was more than \$95,000.

Studies of investment abuses tell similar stories. In a survey last year of about 2,600 financial planners by the Certified Financial Planner Board of Standards, 56 percent said they knew older clients who had been subject to unfair, deceptive, or abusive practices. Among reported cases, the average loss estimate was \$140,500; the median was \$50,000. Only a quarter of surveyed CFPs said the crimes' perpetrators rarely or never knew the victim.

Law-enforcement and social-services professionals see exploitation rising sharply. Rhode Island Attorney General Peter Kilmartin's office opened 128 financial-elder-abuse cases in 2011, a 40 percent rise from 2010. Paul Greenwood, a deputy district attorney in San Diego and head of the county's elder-abuse protection unit, says the office will prosecute about 200 cases this year. "I've never been busier," he says.

Better reporting contributes to that growth, Greenwood says. So does the flat economy. "As people become more desperate from the economy, they need that extra money," says Sally Smith, adult protective services case manager supervisor at the Franklin County (Ohio) Office on Aging.

Caregivers and freeloaders

Experts say it's not only the volume of cases that have swelled but also the variety. Greenwood says fraud committed by strangers such as unlicensed home contractors and phone sweepstakes scammers is bigger than ever. So are crimes involving people in close contact with seniors. Ninety percent of abusers are family members or trusted others. Of all reported elder-abuse cases, financial exploitation is reported most frequently.

"The referrals we get run the gamut, from someone having their Social Security check being taken to an account drained of over \$200,000," Smith says.

Professional caregivers pose particular risks because of their closeness to the victims and, perhaps, their generally low wages. We unearthed numerous cases in which health aides, either in the home



Tabloid coverage of the Brooke Astor case helped raise awareness of elder financial abuse.

In a classic elder-abuse scenario, the predator isolates the older person, creating an environment of manipulation, intimidation, and fear

or in an institution, had taken items, cash, or Social Security checks from their elderly charges, or worse. The New York study found that 12 percent of elder abuse was perpetrated by home health aides.

"I see a lot of middle-aged women, unskilled caretakers," Toy White says. "For the first time in their lives that we know of, they start to steal. The temptation of the money is so great."

New "friends" also can be perpetrators. Cynthia Gartman, president of Ikor, a for-profit advocacy and guardianship service based in Kennett Square, Pa., recalls an elderly woman with diminished mental capacity supporting a number of predators, including a minister. One was taking the woman shopping once a week so that she'd buy the freeloader groceries and supplies.

In a classic elder-abuse scenario, the predator isolates the older person, creating an environment of manipulation, intimidation, and fear. In 2012, Rodney Chapman of Damariscotta, Maine, was sentenced to five years in prison after pilfering the life savings—more than \$300,000—of his widowed neighbor, Gwendolyn Swank, now 86. According to a court document and police reports, Chapman played on Swank's fears of reported drug trafficking in the area and encouraged her to pay phony law-enforcement agents for her protection. On several occasions, he ordered the frightened woman to hide in her house. He took away her phone, restricted visitors, coerced her into drinking whiskey, and limited when she could drive. Investigators later determined that Chapman had spent some of Swank's money to renovate his home and "blew" the rest.

"By the time we intervened, she was down to living on peanut butter and rice cakes," Lincoln County, Maine, Detective Robert McFetridge told the Bangor Daily News in June 2012. "She was really a prisoner in her own home."

The scheming grandson

By far the most disturbing abuse is by family members themselves. Kin who seem reliable can turn bad from greed or desperation. They can coerce an older relative into giving up money or control of assets, threaten or intimidate, or like Astor's son, steal outright. They can ask a cognitively impaired person for repeated loans and never try to repay. Or they can abuse power of attorney or a joint account to siphon funds. "You especially want to trust family members," says Utah Attorney General Mark Shurtleff. "But even your loved ones could try to hurt you."

Those cases can also involve neglect or physical abuse. "Financial abuse is often the motivator for beating up Grandpa or neglecting Mom," says Kathleen Quinn, executive director of the National Adult Protective Services Association, which represents state and local programs that investigate abuse of vulnerable adults and takes steps to protect the victims. "You're not getting her the care she needs because you want the money for yourself."

An archetypal exploiter is a ne'er-do-well son, nephew, or grandson, living on Grandma's couch and borrowing or stealing money. He might have emotional scars or a drug habit, or he might view his elderly relative as an easy source of cash.

Another threat is a relative acting as a caregiver who starts with good intentions but then siphons money from her charge's accounts. "Many will write themselves a check to gift money to themselves," says Steve Starnes, a certified financial planner in McLean, Va., who counsels advisers on dealing with the elderly. "They feel like, 'I'm looking after my loved one and I deserve something in return.'"

At the heart of these cases is a grievous breach of trust. Arthur Green, 74, of Brooks, Maine, signed over the deed to his lakefront home and adjoining cottage to his granddaughter, Nevin Bennoch, assuming that he could live there rent-free through retirement, according to Green's attorney, Denis Culley, of the nonprofit Legal Services for the Elderly in Augusta, Maine. Instead, Bennoch and other family members moved into Green's house, put the cottage up for sale, and began a campaign of harassment, Culley said. When Green, a former construction worker, was served with an eviction notice, he contacted Culley, who fought successfully to return his properties. Without the agency's help, Green says, "I'd probably be under a bridge in a cardboard box."

Sometimes prosecutors and judges characterize such financial shenanigans as civil cases, rather than criminal ones, which could prevent or delay their resolution. Prosecutors also may be unwilling to use seniors as witnesses if their mental capacity is in question. And often the victim may not want to talk, out of shame or fear of losing their independence. Smith of the Franklin County Office on Aging recalls a client who was sitting in the dark because her son was taking her Social Security checks and not paying her utility bills. She refused to press charges.

Predators who succeed once often try again. "You don't want to admit that you were taken the first time," says Jaye Martin, executive director of Maine's Legal Services for the Elderly. "So you don't say no when they keep coming back."

As in domestic-abuse cases, victims may fear their abuser's wrath if they report them—or they might be afraid of losing them. "Most of the time the person who's exploiting her is her caregiver," Smith says. "So if they go to jail, who's going to take care of her?"

In fact, the similarity to domestic violence helps explain why elder financial abuse goes underreported. "It took people a while to wrap their heads around the idea that domestic violence was a crime," says Loewy, the Manhattan assistant district attorney. "We're where domestic violence was about 20 years ago."

Addressing the problem

Those problems haven't stopped law-enforcement and other professionals from pushing to improve awareness and prevention of financial exploitation of older people. With little federal coordination and funding, most activity happens at the state level. Experts we interviewed in several states mentioned improvements in recent years in the communication among adult-protective-service workers, emergency medical personnel, police officers, prosecutors, and other workers to identify and deal with suspected crimes.

Strained state budgets challenge more progress. Some jurisdictions in California, for instance, have established dedicated courts like that of Toy White to handle the growing number of elder-abuse cases. A spokeswoman for the California Administrative Office of the Courts expressed concern about the elder courts' survival in the face of state budget cuts. In spite of a burgeoning elderly population, Maine's Legal Services for the Elderly has seen its funding remain flat over the past decade, Martin says.

In 25 states, financial institutions are required to report suspicious withdrawals from seniors' accounts and other uncharacteristic activity, according to the American Bankers Association. The ABA says it supports its member banks



Arthur Green fought back when he says his relatives tried to evict him from his home.



Judge Calleen Toy White handles about 40 financial-elder-abuse cases a month.

with education, including training that focuses on teaching employees to identify behavioral and transactional indicators that could signify financial abuse.

But a recent Government Accountability Office report found examples where bank employees missed opportunities to identify elder exploitation. Banks' misconceptions about federal privacy laws also may make them unwilling to release bank records to investigators, the report found.

On the federal level, the Consumer Financial Protection Bureau, established by the 2010 financial-reform law, houses the Office of Financial Protection for Older Americans, which works to prevent abusive and fraudulent financial practices related to seniors. Several agencies publish material on preventing and avoiding identity theft, phone scams, consumer frauds, investment cons, and other swindles for seniors and others.

But a potentially powerful federal weapon against financial elder abuse remains stuck in neutral. The Elder Justice Act, part of the 2010 health-care reform law, authorized more than \$700 million over four years for preventing and dealing with elder abuse, neglect, and exploitation, mostly by funding state adult protective-services agencies. Congress, however, has failed to fund the "discretionary" expenditure despite a sharp rise in need. According to a 2012 report by the National Association of States United for Aging and Disabilities, almost 70 percent of state adult protective-services agencies reported a rise in caseloads of up to 20 percent in the past five years; 16 percent saw rises of 20 to 30 percent.

That lack of funding could backfire. Without timely intervention, victims stand a greater chance of becoming indigent and dependent on government support. A 2012 study by the Utah Division of Aging and Adult Services, for instance, found that older financial-abuse victims in 2010 who resorted to the state's Medicaid program for their care had lost an average of \$480,000. Such victims could cost the program almost \$9 million, the study projected. "It costs victims, families, financial institutions, and the taxpayer," says Quinn at the National Adult Protective Services Association.

Protect yourself

Preventing financial exploitation by the people you know might require taking legal precautions; at the very least you'll need to have some uncomfortable conversations with friends and family. You might need to revisit plans you've made before—and create new ones.

Hire the right professionals. Engage a CPA or certified financial planner to handle such concerns as how much money you can withdraw safely from retirement funds. Hire an estate-planning attorney with elder-law expertise to write your will and power-of-attorney documents; they can also craft trusts, which can limit relatives' access to your money. A professional daily money manager can help you deal with bill-paying, insurance claims, phone calls to financial institutions, and troubleshooting. (Learn where to find professionals.)

Set up your documents. Consider carefully to whom you give power of attorney. Though legally that person is your fiduciary—charged with acting in your best interest—in practice he or she could do anything with your money, even without your knowledge. Don't assume the person closest to you will do the best job; you might be better off giving it to someone more detached and financially secure.

Experts told us that for no extra cost, the power-of-attorney document can be drawn up with limits, such as assigning a relative or friend to monitor the person with power of attorney, mandating a periodic written report of financial transactions, or assigning joint powers of attorney, which requires two signatures on every check. You can also split the chores, giving one person authority over financial matters and another control of health decisions. Have your lawyer hold the physical papers granting power of attorney, to ensure that your appointee can't prematurely present it to your investment company or bank to gain unnecessary access.

Arrange your everyday accounts. Set up direct deposit of payments such as tax refunds, pension benefits, and Social Security. As of March 1, 2013, all Social Security benefits must be paid electronically or on a debit card. (Go to ssa.gov/deposit for details.) Set up automated bill pay with your bank for your mortgage, utility bills, and other regular expenses. Have financial institutions send statements and alerts to a trusted person who has no access to any of your accounts to check for fraud.

Avoid sharing a large bank account or a credit card with another person. If you need or want someone else to pay bills for you, create a shared account and arrange to transfer only enough money each month to cover the bills. Get to know officers and tellers at your local bank or credit union. Ensure that they have an up-to-date signature card and contact information on file.

Secure your home. Make sure any caregiver you're considering undergoes a background check. Don't assume that a placement agency will do a thorough one. Insist on a national, rather than a state, criminal check. To monitor in-home help, consider installing a surveillance camera if state law permits it.

Don't leave mail in an unsecured mailbox. Shred documents with identifying information. List and photograph all jewelry and valuables, so they can be traced to pawn shops if necessary. Keep small valuables in a locked drawer and photographs of them in a separate place.

Safeguarding relatives

The most important action you can take on an older relative's behalf is to make sure he or she gets out and about. Elder abuse is correlated highly with social and physical isolation. In addition to making regular and unplanned visits yourself, arrange for outings and visits with friends, neighbors, clergy, and volunteers.

Lay down the ground rules. Hold a family meeting to discuss who will look after the older relative physically and financially. If one relative will handle the bulk of the care, have an attorney draft a "personal-care agreement" that outlines how much he or she should receive for services. "It's reasonable for a family member to be paid," says Starnes, the CFP. "That'll keep a lot of caregivers out of trouble, knowing what the limits are."

Set up a limited account. If you're concerned about your relative's abilities to make financial decisions, set up a small account at a local bank for her. The account could, for instance, include a debit card and checks and have a spending limit of, say, \$300. Arrange with the bank to investigate checks written for more.

Be available. Accompany your relative to meetings with financial advisers and doctors; they can help you make plans for her protection. "Often people are nervous about having that conversation, but it doesn't have to be approached in an adversarial mind-set," Starnes says. "It can be, 'Mom, you've done such a great job, and I just want to help.'"



Protective-services professionals like Sally Smith, left, report a rise in abuse

The most important action you can take on an older relative's behalf is to make sure he or she gets out and about.

Watch for these warning signs

Be suspicious if the elderly person has a new "best friend," becomes socially isolated, never seems to be available or able to come to the phone, or is hesitant to have contact with others unless his or her caregiver is present. Also be on alert for:

- Unpaid bills when someone else has been designated to make payments.
- Missing property, large or unexplained withdrawals from bank accounts, or transfers between accounts.
- Excessively large reimbursements or "gifts" to caregivers or friends.
- New authorized signers on a person's bank account.
- Changes in banks or attorneys.
- Bank statements and canceled checks no longer coming to the person's home.
- Unfamiliar signatures on checks and other documents.
- Changes in spending patterns, such as purchases of items the senior doesn't need.
- Lack of personal amenities such as clean clothes and grooming items.
- Changes in documents such as a will or power of attorney, or a change in beneficiaries that the senior can't completely explain or comprehend.
- Excessive interest in the senior's finances by a caregiver, friend, or relative.

What would you do?

Scenario	Solution(s)
<p>You visit your father every few weeks. Recently you looked at his bank statement and saw several checks that he can't explain.</p>	<p>Did your father write the checks? If he didn't and does not know who did, he should file a police report. A common tactic of abusers is to write checks to themselves from their victim's checkbook, expecting the senior to later forget or be confused about writing the check. If your father did write the checks and doesn't recall doing so, he may have a capacity problem. If that's the case, you should have him assessed by his physician, says Roger Demers, special assistant attorney general, Rhode Island Department of Attorney General.</p>
<p>You've given your favorite nephew several loans. His requests are getting larger and more frequent. He can get very angry when challenged, so you're reluctant to say no.</p>	<p>If you have a hard time refusing his requests, get someone to assist you with your finances. Then you can tell the nephew that you are no longer handling your money and he will have to go through the other person with his requests. That takes you out of the position of having to say no and lets him know that someone else is looking over things, so he might be more likely to stop asking, suggests Sally Smith, adult protective services case manager supervisor, Franklin County (Ohio) Office on Aging.</p>
<p>Several times when you've called your aunt's home in another state, her caregiver tells you she's sleeping, or too tired, or just can't come to the phone.</p>	<p>Contact law enforcement to conduct a "well check." They will make contact with your aunt and report back to you what they find. Whenever you suspect abuse, neglect, or exploitation, immediately contact your state's abuse hotline, says Allison Bryant, statewide elder-abuse prevention coordinator for the Florida Department of Elder Affairs.</p>
<p>The woman who drives you is like a daughter. Once, when you weren't well, you gave her your ATM card to do errands for you. Now, when you ask her</p>	<p>Close that account, check to make sure that no unauthorized withdrawals have been made, and sever the relationship. If there are such withdrawals, make an</p>

where the card is, she changes the subject.

immediate police report, says Paul Greenwood, deputy district attorney in San Diego and head of the county's elder-abuse protection unit.

The woman who drives you is like a daughter. Once, when you weren't well, you gave her your ATM card to do errands for you. Now, when you ask her where the card is, she changes the subject.

Close that account, check to make sure that no unauthorized withdrawals have been made, and sever the relationship. If there are such withdrawals, make an immediate police report, says Paul Greenwood, deputy district attorney in San Diego and head of the county's elder-abuse protection unit.

Your brother lives with your mother. He doesn't have a job, and he doesn't pay rent. When he drinks, he is mean to your mother. You think that she's been giving him money and that she is afraid of him.

Ask her whether you can take control over her funds so that you are the go-to person if he has questions about her money, says Debra G. Speyer, elder-law attorney in Philadelphia.

Talk to her when he isn't around. Unfortunately, if she's been enabling him his whole life, chances are you're not going to get her to stop, says Sally Smith, adult protective services case manager supervisor, Franklin County (Ohio) Office on Aging.

If there are signs of physical abuse, involve the police, says Martha Crippen, elder-abuse investigator, Rhode Island Department of Attorney General.

Your brother, who has power of attorney for your father with Alzheimer's disease, won't let you look at your father's accounts. But recently your brother bought a fancy car, and you're suspicious.

The fancy car might be a red herring, but it might indicate that your brother is taking your dad's funds. Does your father have any capacity to discuss this with him? Perhaps a meeting with the three of you discussing this might help. If all else fails, you could go to court and request an independent conservator or guardian over your dad because of his dementia and request that the power of attorney be voided because of your brother's improprieties, says Debra G. Speyer, elder-law attorney in Philadelphia.

Where to turn for information and help

Consumer Financial Protection Bureau's Office of Financial Protection for Older Americans receives and investigates consumer fraud complaints specifically related to mortgages, credit cards, banks, loans, and more.

Eldercare Locator (800-677-1116) refers and connects callers to local services in their communities, including meal and transport services, home care, support services, services for caregivers, and others.

National Academy of Elder Law Attorneys (703-942-5711) offers a search for lawyers specializing in durable powers of attorney, conservatorship, estate planning, elder abuse, and other concerns.

National Adult Protective Services Association provides a national map with links to abuse-reporting hotlines by state.

National Center on Elder Abuse has links to additional state directories of help lines, hotlines and elder-abuse prevention resources in all 50 states and the District of Columbia.

AARP Money Management Program pairs seniors of limited resources or people with disabilities with trained money-management volunteers. One service helps seniors who remain in control of their finances to balance their checkbooks and pay bills; the other focuses on those deemed incapable of handling their own funds. The program is offered in 21 states and the District of Columbia, though availability varies.

American Association of Daily Money Managers has members nationwide who can assist seniors with bill-paying, banking, insurance paperwork, and organizing records in preparation for income-tax filing, among other tasks.

National Association of Professional Geriatric Care Managers includes professionals who can facilitate aspects of seniors' lives, including monitoring home-care workers, managing medical appointments, and identifying potential exploitation risks, among other services. Some geriatric-care managers can also pay bills and handle paperwork.

AARP's Scams and Fraud page offers information on the latest frauds against older people.

Better Business Bureau Scam Stopper has information on common scams and instructions on reporting a scam. You can sign up for scam alerts on the site.



Financial Abuse

Elder financial abuse spans a broad spectrum of conduct, including:

- Taking money or property
- Forging an older person's signature
- Getting an older person to sign a deed, will, or power of attorney through deception, coercion, or undue influence
- Using the older person's property or possessions without permission
- Promising lifelong care in exchange for money or property and not following through on the promise
- Confidence crimes ("cons") are the use of deception to gain victims' confidence
- Scams are fraudulent or deceptive acts
- Fraud is the use of deception, trickery, false pretence, or dishonest acts or statements for financial gain
- Telemarketing scams. Perpetrators call victims and use deception, scare tactics, or exaggerated claims to get them to send money. They may also make charges against victims' credit cards without authorization

Who are the perpetrators?

Family members, including sons, daughters, grandchildren, or spouses. They may:

- Have substance abuse, gambling, or financial problems
- Stand to inherit and feel justified in taking what they believe is "almost" or "rightfully" theirs
- Fear that their older family member will get sick and use up their savings, depriving the abuser of an inheritance
- Have had a negative relationship with the older person and feel a sense of "entitlement"
- Have negative feelings toward siblings or other family members whom they want to prevent from acquiring or inheriting the older person's assets

Predatory individuals who seek out vulnerable seniors with the intent of exploiting them. They may:

- Profess to love the older person ("sweetheart scams")
- Seek employment as personal care attendants, counselors, etc. to gain access

- Identify vulnerable persons by driving through neighborhoods (to find persons who are alone and isolated) or contact recently widowed persons they find through newspaper death announcements
- Move from community to community to avoid being apprehended (transient criminals)

Unscrupulous professionals or businesspersons, or persons posing as such. They may:

- Overcharge for services or products
- Use deceptive or unfair business practices
- Use their positions of trust or respect to gain compliance

Who is at risk?

The following conditions or factors increase an older person's risk of being victimized:

- Isolation
- Loneliness
- Recent losses
- Physical or mental disabilities
- Lack of familiarity with financial matters
- Have family members who are unemployed and/or have substance abusers problems

Why are the elderly attractive targets?

- Persons over the age of 50 control over 70% of the nation's wealth
- Many seniors do not realize the value of their assets (particularly homes that have appreciated markedly)
- The elderly are likely to have disabilities that make them dependent on others for help. These "helpers" may have access to homes and assets, and may exercise significant influence over the older person
- They may have predictable patterns (e.g. because older people are likely to receive monthly checks, abusers can predict when an older people will have money on hand or need to go to the bank)
- Severely impaired individuals are also less likely to take action against their abusers as a result of illness or embarrassment
- Abusers may assume that frail victims will not survive long enough to follow through on legal interventions, or that they will not make convincing witnesses
- Some older people are unsophisticated about financial matters
- Advances in technology have made managing finances more complicated

What are the indicators?

Indicators are signs or clues that abuse has occurred. Some of the indicators listed below can be explained by other causes or factors and no single indicator can be taken as conclusive proof. Rather, one should look for patterns or clusters of indicators that suggest a problem.

- Unpaid bills, eviction notices, or notices to discontinue utilities

- Withdrawals from bank accounts or transfers between accounts that the older person cannot explain
- Bank statements and canceled checks no longer come to the elder's home
- New "best friends"
- Legal documents, such as powers of attorney, which the older person didn't understand at the time he or she signed them
- Unusual activity in the older person's bank accounts including large, unexplained withdrawals, frequent transfers between accounts, or ATM withdrawals
- The care of the elder is not commensurate with the size of his/her estate
- A caregiver expresses excessive interest in the amount of money being spent on the older person
- Belongings or property are missing
- Suspicious signatures on checks or other documents
- Absence of documentation about financial arrangements
- Implausible explanations given about the elderly person's finances by the elder or the caregiver
- The elder is unaware of or does not understand financial arrangements that have been made for him or her

How can I learn more?

Nerenberg, L. (1999). Forgotten victims of elder financial crime and abuse: A report and recommendations. Produced by the Goldman Institute on Aging for the National Center on Aging (NCEA), this report summarized four roundtable discussions sponsored by NCEA, which focused on four components of the legal system: the state and criminal justice system, federal investigative and regulatory agencies, the civil legal system, and the victim witness assistance network. Professionals from each system described challenges they face in handling financial abuse cases and made recommendations for improving each system's response. To view, [click here](#) to download it from the NCEA web site.

Volume 12 Number 2 (2000) of the Journal of Elder Abuse & Neglect is devoted to elder financial abuse. For more information about JEAN and a listing of articles in the issue, [click here](#).

A/PACT: Aging Parents and Children Together. Produced by the American Association of Retired Persons (AARP) and the Federal Trade Commission (FTC), this consumer education series includes 10 1-3 page articles focusing on consumer fraud, daily money management, alternatives to guardianship, etc. Contact the [AARP](#) for more information.



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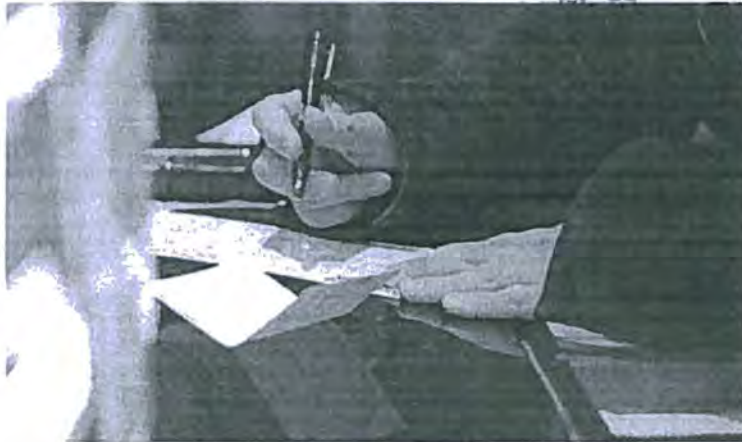
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Financial Exploitation Of Elderly Difficult To Detect

By Matt Bach mattbach@americanuniversity.edu
May 8, 2013

Media player controls: PLAY, 18:11, and social media sharing icons for Facebook, Twitter, and YouTube.



Flickr / David Goehring <http://www.flickr.com/photos/curbonye/2201271278/>

Banks in the state of Maryland are now required to report suspected financial abuse of senior citizens

Rosetta Skipper met a woman at St. Luke's Catholic Church along East Capitol Street in southeast D.C. in 2007. Skipper's husband had died five years earlier; they had no children, and she lived alone in her northeast D.C. home. Her closest family was in New York City.

Skipper had Alzheimer's disease, and was briefly hospitalized in 2007, as her health worsened. That's when the woman at the church took control of her life and moved Skipper into her own home.

"She had somehow gotten power of attorney done," says Stephen Skipper Jr., Rosetta's great nephew. "We don't know how she did. As soon as my aunt got home from the hospital, it only seemed like two weeks later this lady — who no one had ever met — was now her caretaker and power of attorney over everything."

Financial exploitation of seniors is a problem that's estimated to cost nearly \$3 billion per year. Now, some states — including Maryland — are trying to put a stop to that abuse. But this type of exploitation is difficult to spot.

Skipper Jr. is able to speak about what happened to Rosetta, unlike his father and the woman from the church, both of who signed a confidentiality agreement after the case almost went to a probate court. Skipper's father was the beneficiary in his aunt's will and the one

WHAT TO GET FROM

- [Contact information for Adult Protective Services](http://www.aphsnews/13/05/08/elder_abuse_who_to_contact)
- [Contact information for the Ombudsman's office](http://www.ombudsman.org/ombudsman/whatsthejob.cfm)
- [Warning Signs Of Elder Abuse](http://www.aphsnews.com/3/documents/urgent_memo_050813_1130808info@apts.net/www.apsa-ams1.pdf)

AGING AND ABUSE SERIES

- [Part 1: Elderly Couple's Tale Of Abuse Not So Uncommon](http://www.aphsnews/13/05/03/elder_abuse_bond_burg_in_firm_hill_quest-1)
- [Part 2: Adult Protective Services Fight Against Elder Abuse](http://www.aphsnews/13/05/07/elder_abuse_bond_burg_in_firm_hill_quest-1)
- [Part 3: Tackling Nursing Home Complaints With Ombudsman Programs](http://www.aphsnews/13/05/07/elder_abuse_bond_burg_in_firm_hill_quest-1)
- [Part 4: Financial Exploitation Of Elderly Difficult To Detect](http://www.aphsnews/13/05/07/elder_abuse_bond_burg_in_firm_hill_quest-1)
- [Part 5: House Calls A Better Option For Some Elderly](http://www.aphsnews/13/05/07/elder_abuse_bond_burg_in_firm_hill_quest-1)
- [Read the entire series: Aging and Abuse](http://www.aphsnews/13/05/07/elder_abuse_bond_burg_in_firm_hill_quest-1)

who kept tabs on her. But in 2007, he started having health issues of his own and was unable to check in with his aunt with any frequency.

Rosetta Skipper died in 2011. Because she was a former Pentagon employee, an obituary was written about her in the *Washington Post* weeks later. That's how her family found out she died.

Dealing with an empty bank account

"We lost Aunt Rosetta and didn't even know it," says Skipper Jr. "And this woman didn't have the respect to call and tell us. She tried to tell my father once 'Oh I tried to reach you but couldn't find your number.' My father has had the same job for 30 years. His number hasn't changed in the last 40 years."

When her family went to claim her estate, they found Rosetta Skipper's bank accounts were mostly empty. There was her house, but the woman had changed the will to ensure it ended up in her hands upon Skipper's death. Having power of attorney allowed her to do that. She had also paid herself a weekly fee, claiming it was for the costs of being Skipper's caregiver. It started at \$750 a week, and by the time of Skipper's death, it was over \$2,500 a week. Skipper Jr. says that ended up being her undoing when the lawyers got involved.

If this case had occurred in Maryland, it almost certainly would have been referred for criminal investigation... D.C. is just not as aggressive on this issue.

Extended interview: Maryland Del. Ben Kramer (D-Montgomery County) explains his bill, that was deferred for study this summer, on registered sex offenders in nursing homes.



"The minute we asked for her tax returns, they wanted to settle," he says.

Skipper Jr. believes the woman hadn't been reporting those payments to the IRS. The family got the house back, but could only sell it at half its value. The hundreds of thousands the woman spent on things such as improvements to her house, cars, high-end clothes, and Redskins and Nationals tickets — all that money was gone.

"If this case had occurred in Maryland, it almost certainly would have been referred for criminal investigation," says Ron Landsman, one of the attorneys for the Skipper family. "That might have led to criminal sanctions. D.C. is just not as aggressive on this issue."

Implementing tougher laws to prevent abuse

According to Maryland Del. Ben Kramer, 70 percent of the wealth in this country is in the hands of the over-55 population.

"That is a statistic that is not lost on the con artists and the scammers."

Kramer, a Democrat from Montgomery County, has sponsored several bills on elder abuse that have passed the General Assembly. One, which he says is the only such law in the country, allows prosecutors to charge someone for using "undue influence" to get anyone over age 68 to sign over their assets.

"For instance, a caregiver who is taking care of an elderly person, would start to tell them 'Look, if you want me to keep going to the grocery store, or if you want me to get your dry cleaning, you're going to have to sign over the title to your car to me,'" says Kramer.

Another bill deals with banks, and just went into effect last October.

"Banks in the state of Maryland are now required to report suspected financial abuse of senior citizens," says Kramer. "And they are now mandated to train all of their employees to look for this kind of financial abuse."

Sandy Spring Bank had been doing this on a voluntary basis since 2002. Frank Moran is the director of corporate security for the bank.

"Anything that is out of the ordinary are red flags that they should be looking for," says Moran. "Are they adding people to their account that aren't relatives? Are they seeing checks coming across that are signed by the client, but the actual body of the check — make payable to and the amount — are in a different handwriting?"

The bank's branch staff was trained before the new law went into effect last October. With all Sandy Spring employees now taught to look for those red flags, suspected financial exploitation cases have skyrocketed. In the past six months, Sandy Spring banks have reported more cases than they had the prior 10 years.

John Sadowski, Sandy Spring's chief information officer, says a lot of those come through the bank's call center.

"If you Google your own name, you'd be surprised what's known about you online already," says Sadowski. "Bad guys can take pieces of information that's publicly available, and then call our call center and try to get additional pieces of information. I've sat in on the call center, and they'll be people struggling, saying 'My mom was married three times before and her maiden name was... umm,' trying to get the rep to fill in the blank for them."

But even with this new focus, financial exploitation is still difficult to spot, especially if it's a family member doing it. Sadowski admits there is little their bank or any bank can do to stop that.

The importance of the power of attorney

Stephen Skipper Jr. knows this all too well, and not just because of what happened to his great aunt. He's a branch manager of a credit union in New York City. In his family's case, he knows there was next to nothing banks could

70 percent
of the wealth in this country is in the hands of the over-55 population

have done once the woman from the church got his great aunt to give her power of attorney. He does wish the banks had alerted them about the changes in spending once the woman started using the accounts.

"Checks written to replace windows in her house, payments on cars, payments on electricity bills, frivolous shopping at Nordstrom's and Saks Fifth Avenue." Skipper Jr. says "Something that an 87-year-old woman wouldn't do."

And while he is able to speak openly about what happened, Skipper still gets emotional when he thinks of his great aunt and uncle, whom he visited often in D.C. when he worked for the United Nations.

"When my uncle first died, my father asked my Aunt Rosetta, 'do you want to come live with us?' And she said 'no, I'm okay. I want to stay in D.C.' When you're married over 50 years, and you have no children, it's just you and that person. And it seems like when this lady came in, she just took everything they worked on for 50 years."

13/05/08/financial-exploitation-of-elderly-difficult-to-detect

NPR

Hashtag Slows Stereotypes Of Black Sexuality

(/programs/tell-me-more/13/12/16/fasttailedgirls/13/12/16/when-craft-beer-goes-global-lead-kansas-brewerys-tale)two_year_budget)

#FastTailedGirls on Twitter is raising questions about stereotypes when it comes to black sexuality and how those misconceptions can affect young girls. Host Michal Martin talks with Miki Kendall, who started the hashtag, along with The Roots's Kali Uchis and Salon's Prachi Gupta.

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When Craft Beer Goes Global: A Kansas City Brewery's Tale

(/programs/morning_edition/13/12/15/when-craft-beer-goes-global-lead-kansas-brewerys-tale)

Boulevard Brewing has become a Kansas City staple since its founding in the 1980s. It has many loyal local fans -- and soon, a new international owner. Duval The deal says a lot about how the world now values a product made with a firm sense of place.

13/05/08/financial-exploitation-of-elderly-difficult-to-detect

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McDonnell To Present Final Two-Year Budget

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Virginia Gov. Bob McDonnell is preparing to present his last two-year state budget proposal to Virginia lawmakers.

13/05/08/financial-exploitation-of-elderly-difficult-to-detect

NPR

Exploring Economic Inequality From Heart Of The Tech Boom

(/news/13/12/16/exploring_economic_inequality_from_heart_of_the_tech_boom)

Something strange is going on in the San Francisco Bay area: while the tech boom is leading to an economic recovery, the ultra-rich are getting richer as many other Silicon Valley residents are slipping into poverty.

13/05/08/financial-exploitation-of-elderly-difficult-to-detect

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Comments for this thread are now closed.

1 comment

Best +



Linda Kincaid

These stories are so common. In California, Carol Hahn saved her entire life. By age 74, she had a comfortable \$1M to see her through retirement.

That money is now in the hands of a former step-granddaughter. After Hahn developed dementia, the step-granddaughter coerced Hahn to sign over everything. The step-granddaughter hid Hahn from her family, and kept her isolated for fifteen months. The San Bernardino County DA responded, "There is nothing out of the ordinary." He refused to investigate.

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Man Charged With Exploiting 93-Year-Old Mother

According to the Pasco County Sheriff's Office, he used her Social Security checks for his own "frivolous expenditures."

Posted by Keli Sipperley , March 17, 2012 at 03:07 AM



He would have used his mother's Social Security money to pay for home care.

Instead, the Pasco County Sheriff's Office says, William Hamilton of Holiday used the funds for "frivolous expenditures," according to a complaint affidavit.

According to an incident report, Hamilton was given power of attorney when the health of his mother, Catherine Christensen, began to decline.

When she was admitted to Southern Pines nursing home, 6140 Congress St. in New Port Richey, Christensen, then 91, had suffered from a stroke, heart attack, depression and hallucination disorders, the affidavit stated.

According to the affidavit, Hamilton did not pay Southern Pines for the time period between April and November of 2010, "shorting the nursing home \$7,343."

During a non-custodial interview in November 2010, Hamilton said he used his mother's Social Security money to pay for the property taxes on her home, the affidavit stated.

A records search revealed that the taxes on Christensen's home had not been paid "for years," the report stated.

The case was assigned to the sheriff's economic crimes unit, and "an investigation into (Hamilton's) bank account shows cash deposits and frivolous expenditures during the time period in question, expenditures beyond his obvious personal monthly income," according to the affidavit.

Hamilton used some of the money to patronize local gay bars, take a trip to Wisconsin, purchase food at restaurants and pay for satellite radio, among other things, Pasco County Sheriff spokesman Kevin Doll said in an email.

Hamilton, 65, of 3306 Briar Cliff Drive, was arrested Thursday, March 15, and charged with exploitation of an elderly person. He is being held at the Land O' Lakes jail on \$5,000 bond.

From the Web

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MarketWatch

THE WALL STREET JOURNAL

Elizabeth O'Brien's Retire Well

March 19, 2013, 7:02 a.m. EDT



Power of attorney: It's easily abused

How to protect ailing relatives from fraud and abuse



By Elizabeth O'Brien

It's a standard part of estate planning. It's also, according to experts on elder fraud, a license to steal. It's the power of attorney, a legal instrument designed to give a trusted individual the authority to handle financial or health matters for the person creating it.

As their own parents grow older—and, in many cases, lose the capacity to make their own financial and medical decisions—growing numbers of baby boomers are beginning to wrestle with the intricacies and pitfalls of the power of attorney. And of course, the day may not be too far off when they themselves may have to trust someone else with those powers. "They have great value and opportunity to misuse," said Randy Thomas, a former police officer in Columbia, South Carolina who lectures nationally on elder financial abuse.

The MetLife Mature Market Institute estimates that older Americans lose at least \$2.9 billion annually from financial abuse of all kinds. And experts expect that amount to grow as the baby boomers age. The Administration on Aging has designated 2013 as the "Year of Elder Abuse Prevention" to raise awareness of all types of abuse at the national, state and local levels.

Statistics on power of attorney abuse are hard to come by, but experts recognize it as a prevalent problem. Some kinds of power of attorney grant their holders far-reaching authority over the affairs of people who are physically or mentally unable to conduct their own business. The [Government Accountability Office released a report last November on elder financial exploitation](#) which listed power of attorney agents as one category of potential abuser whose actions can be particularly challenging to prevent.

TAXES



How to slash your tax bill in retirement

Big tax bills can devastate your retirement savings. MarketWatch's Robert Powell and Andrea Coombes talk about strategies to employ before and during retirement to lower your taxes. [How to save your Social Security benefits](#)
[Should retirement savers play this market?](#)

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Indeed, family members, friends, and neighbors are the culprits in 34% of elder financial abuse cases, according to a study by MetLife. Yet much of the education on senior financial exploitation centers on scams perpetrated by strangers. "We've got them so scared of answering the phone or going online, when the majority of the assets are going out the back door by a trusted niece," Thomas said. And the vehicle that often enables this, Thomas said, is the power of attorney.

Here's what that can look like. A friendly neighbor offers to go pick up an elderly couple's license plates. He has them sign a specific power of attorney for that sole purpose, printed from an automobile-club website. He takes that to the bank and uses it to withdraw money from the couple's account. (That's an actual scenario that came before Thomas A. Swift, probate judge in Trumbull County, Ohio; the bank returned the money, because the teller should have but failed to notice the limited nature of the power of attorney.)

Pamela Glasner, a filmmaker who lives in central Connecticut, experienced a more devastating scenario when a man from her parents' Florida synagogue gained the couple's confidence a few years ago. Glasner's father, who had Alzheimer's disease, had moved into a nursing home, and her mother lived alone and visited him daily. The man, who represented himself to nursing-home staff as the couple's son, had Glasner's father sign a power of attorney form that he then used to access their money and transfer their house into his name. The fraudster also had Glasner's mother rewrite her will, naming him a beneficiary. "By the time we found out about it," Glasner said, "all of our accounts were zeroed out." Glasner turned her experience and that of others into a 2012 documentary, "Last Will and Embezzlement."

Finding a trusted 'agent'

When used properly, the power of attorney can assure that a trusted person is handling your financial affairs, or making health-care decisions for you, when you're not mentally or physically capable of doing

this yourself. Many lawyers include powers of attorney as part of a standard estate plan (some recommend separate documents for financial affairs and health-care, while others create one document to address both).

Estate plans usually involve what's known as a "durable" power of attorney. These allow the trusted individual—legally, the "agent"—to retain power of attorney even when the person who created the document—the "principal"—has become incapacitated. A general power of attorney expires when the principal has lost capacity; these are usually limited to a certain transaction, such as a real estate closing or the license-plate example above. All powers of attorney expire when the principal dies.

It's important that people create a power of attorney when they're still in full command of their faculties. If you fail to designate someone to handle your affairs, and you become unable to take care of them yourself, then your family will likely have to go to court and establish what most states call a conservatorship or guardianship. (This holds true even for spouses; unless an account is held in both names, one spouse won't have access to another's funds without a power of attorney.) Guardianship can be a costly and complicated process, and there's no guarantee the judge will choose as your guardian the person who you would've picked.

Powers of attorney should be customized to each individual's wishes and situation. When crafting the document, some people might decide not to allow their agent to make gifts on their behalf. Others might decide they want to add a second agent or at least allow someone else to review the actions of the first agent. Then again, "If you get to the point where you need that level of review, you're probably naming the wrong person," said Michael A. Dribin, a partner in Miami with law firm Harper Meyer LLP. People should consult a lawyer to ensure their power of attorney will be accepted everywhere they need it to be, experts say, especially if they have property in more than one state, as the laws governing power of attorney vary by state.

Powers of attorney are vulnerable to abuse in part because they're not routinely tracked by the court system. Anyone can print a template from the Internet and put that in front of an older person to sign. Once a new power of attorney is signed, that document supersedes the old power of attorney if it addresses the same issues. Yet since these forms aren't tracked in a central repository, the old agent isn't notified of the change. Most states require witnesses, including a notary public, to the signing, but this intended safeguard can be sidestepped if witnesses are inattentive or, worse, collude with the abuser.

A mentally competent person can revoke power of attorney at any time if she notices the document being abused. Yet if the principal's mental state is in question, the courts are often called on to determine whether she understood what was happening when she signed the power of attorney. This happens during a "proceeding to determine capacity." This kind of retrospective analysis of an older person with some cognitive decline can be very complex, even for experts, said Dr. Gary Small, director of the division of geriatric psychiatry at the Semel Institute for Neuroscience and Human Behavior at UCLA, and the author of *The Alzheimer's Prevention Program*.

Taking steps against abuse

While there's no fail-safe way to prevent power of attorney abuse, people can take steps to protect themselves and their loved ones. The most important preventative measure is for people to name an agent they trust completely, experts say. Once the decision is made, revisit it every few years, Dribin said: The family member who seemed like the perfect candidate might seem less so if he is in the midst of a divorce, for example, with fresh financial woes.

Once you've established your power of attorney, or helped an older relative do so, notify the relevant financial institutions in writing and ask them to alert you to any changes in the account, Swift said. This serves two purposes, experts say: It can alert you to potential abuse, and it can also ensure that your financial institution will honor the document. Some financial institutions will only honor their own power of attorney documents, generated by their lawyers, and state law on the issue varies.

People serving as agents for their parents or older relatives should watch for potential abuse once their loved one has become incapacitated. Monitor bank accounts for any suspicious activity. You might also consider freezing your relative's credit report to make it more difficult for fraudsters to take out loans in his or her name, said John Ulzheimer, president of consumer education at SmartCredit.com, a credit monitoring and education firm, who recently froze the reports of his 85-year-old mother-in-law for her protection. To do this, you register with each of the three credit bureaus—Equifax, TransUnion and Experian—and pay a nominal fee. You can always go back in and "thaw" the account if your relative needs to apply for credit.

If you realize someone has used a power of attorney to take advantage of your loved one, consider requesting a proceeding to determine capacity in the local court where he or she lives, Dribin said. In some states, this request legally suspends the ability of an agent to use the power of attorney, since the principal's mental capacity is under question. As an extra measure, send a written notice to all financial institutions where your loved one has accounts—banks, brokerage houses and insurance firms—letting them know that the power of attorney has been suspended.

No one likes to think about becoming reliant on others. But establishing a power of attorney, and taking steps to protect it, can lessen the burden of caregiving for your loved ones down the road. No matter how many crossword puzzles we may do, everyone experiences some degree of cognitive decline as part of the natural aging process, said Michael Finke, a professor of personal financial planning at Texas Tech University. "It may be healthier to plan for it than to try to prevent it."

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