

Spring August 2012

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### Repository Citation

Seal, Catherine (2012) "Power of Attorney: Convenient Contract or Dangerous Document?," *Marquette Elder's Advisor*. Vol. 11: Iss. 2, Article 5.

Available at: <https://scholarship.law.marquette.edu/elders/vol11/iss2/5>

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# POWER OF ATTORNEY: CONVENIENT CONTRACT OR DANGEROUS DOCUMENT?

Catherine Seal\*

This article will address the durable general power of attorney, tracing its evolution from general principles of agency law to the new Uniform Power of Attorney Act. The author will discuss the utility of the power of attorney as a tool to assist a senior who wishes to avail themselves of the services of an agent. From this perspective, the author will discuss fiduciary duty and fiduciary liability, common problems with the power of attorney, and proposed methods of dealing with such problems. This paper will not address actions by third parties against agents, including intervention by government agencies or criminal prosecution.

## HISTORY OF THE POWER OF ATTORNEY

What is a power of attorney? "An instrument granting someone authority to act as agent or attorney-in-fact for the grantor."<sup>1</sup> An instrument conveying authority for a fiduciary to act on behalf of a principal is a useful tool and has been recognized as such for

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1. BLACK'S LAW DICTIONARY 1209 (8th ed. 2004).

much of recorded history.

**Contract for Power of Attorney, Twelfth year of  
Artaxerxes, 452 B.C.**

Eighteen shekels of money, rent belonging to Arad-Anu-ilu-la-ilu-ipur and Shapi, sons of Arad-belanu, of \_\_\_\_\_. From the month Tebet, of the twelfth year of Artaxerxes, Bel-akhi-iddin, son of Bel-abu-akhi, shall receive eighteen shekels of money from the empowered attorney, Imsa-sharru-arda, son of Bel-iddin, on behalf of Arad-Anu-ilu-la-ilu-ipur and Shapi. He shall enter in the Temple of Sharru, into the little temple, the shrine, and shall deposit in the treasury the money, and the singer and the scribe shall receive it for the exalted divinity from the hand of Bel-akhi-iddin, son of Bel-abu-akhi, on behalf of Khuru, the slave of Arad-Anu-ilu-la-ilu-ipur, and Sharru-shu, son of Dan-ila.<sup>2</sup>

This is an early document that appears to designate Bel-akhi-iddin as agent for Arad-Anu-ilu-la-ilu-ipur and his brother Shapi, and it authorizes Bel-abu-akhi to receive funds on behalf of his principals and to distribute those funds at their direction.

A document authorizing another to act on your behalf had tremendous utility when people could not travel rapidly, could not converse by telephone to confirm transactions, and could not send documents by electronic means. A principal, when traveling, could be absent from his or her home for an extended period of time, and the ability to appoint someone to act on his or her behalf would have been extremely useful.

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2. ANCIENT HISTORY SOURCEBOOK: A COLLECTION OF CONTRACTS FROM MESOPOTAMIA, C. 2300-428 BCE, <http://www.fordham.edu/halsall/ancient/Mesopotamia-Contracts.html#Power%20of%20Attorney> (last visited Jan. 13, 2010);

This document is dated in the twelfth year of Artaxerxes. It appears that the two brothers mentioned in it wished to make provision for a slave of one of them, who was perhaps being cared for at the Temple of Sharru. One man, perhaps their tenant, was empowered to pay to another the rent of a house of theirs; he in turn was to take it to the temple and see that certain men receive it.

### COMMON LAW PRINCIPLES ONLY TOOK AGENCY SO FAR

Because the power of attorney is an instrument by which a principal designates an agent, the common law principles of agency are generally applied to the relationship between the parties. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."<sup>3</sup>

Under the common law, an agent could not act under delegation of authority unless the principal had capacity to act, as a principal could not authorize an agent to act if the principal did not have the capacity to do so.<sup>4</sup> "Just as there must be legal capacity to be an agent so there must be capacity to create a power. One who can not make a contract can not authorize another to make it for him."<sup>5</sup> Therefore, a minor could not delegate authority to an agent to contract on behalf of the minor nor could an incapacitated person.

### DURABILITY WAS A STATUTORY CREATION

Because the agency created by a power of attorney designation ceased when the principal became incapacitated, the power of attorney was an effective tool for delegation by competent principals; however, it was not the useful tool it is today. The concept of durability or the survival of the agency delegation even if the principal lost capacity to act, made the durable power of attorney the estate-planning device it is today.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Model Special Power of Attorney for Small Property Interests Act (Model Act) in 1964, stating that the purpose of the act was to:

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3. RESTATEMENT (THIRD) OF AGENCY § 101 (2006).
  4. RESTATEMENT (FIRST) OF AGENCY § 20 (1933).
  5. Warren A. Seavey, *The Rationale of Agency*, 29 YALE L. J. 859, 870 (1920).

provide a simple and inexpensive legal procedure for the assistance of persons with relatively small property interests, whose incomes were small, such as pensions or social security payments, and who, in anticipation or because of physical handicap or infirmity resulting from injury, old age, senility, blindness, disease or other related or similar causes, wish to make provision for the care of their personal or property rights or interests, or both when unable adequately to take care of their own affairs.<sup>6</sup>

The Act was designed to be a less expensive alternative to guardianship or conservatorship, allowing a principal to make a delegation of authority to an agent, where the delegation would not be revoked by the later incapacity of the principal. It is apparent from the restrictive provisions in the Model Act that the commissioners had concerns about creating a durable power of attorney:

1. A durable power had to be signed before a judge who approved the document;
2. A durable power had to state the annual income and nature and extent of property affected by the power and had to be filed with the court clerk and recorded in the real property records;
3. The Model Act had a maximum dollar value for property that could be affected by the durable power, with each enacting state free to set a value. The durable power was to terminate if the income and/or assets exceeded the maximum permissible value; and
4. The attorney in fact was required to account to the

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6. Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 7 (2001) (quoting from The Nat'l Conference of Comm's on Unif. State Laws, *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its Seventy-third Year (1964)*).

principal or the principal's legal representative if the document required accountings or if the judge who approved the power directed the attorney in fact to account, and to account upon termination of the attorney in fact's authority.<sup>7</sup>

Very few states adopted the Model Act after it was promulgated.

NCCUSL next tackled the issue of durability in the creation of the Uniform Probate Code (UPC).<sup>8</sup> The UPC was a major reform of the probate process that provided alternative procedures for simplified, streamlined probate of decedents' estates in many instances. The UPC also dealt with guardianship and alternatives to guardianship.

A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.<sup>9</sup>

The UPC contained none of the protections of the Model Act, including no authorization by a court, no registration of the power of attorney, and no dollar limitation on the authorization of the attorney in fact. To date, sixteen states have enacted a version of the UPC in its entirety, including Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah, while several more have

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7. *Id.* at 7-9.

8. UNIF. PROBATE CODE, Forward (1969).

9. *Id.* at § 5-501.

adopted portions of the code.<sup>10</sup>

The next drafting project regarding powers of attorney undertaken by NCCUSL was the Uniform Durable Power of Attorney Act (Durable POA Act.)<sup>11</sup> The Durable POA Act was designed as a stand alone Act for states that had not chosen to adopt the entire UPC. The language quoted above from section 5-502 of the UPC was incorporated into the Durable Power of Attorney Act.<sup>12</sup> All states now recognize some form of durable power of attorney, either by enactment of the UPC, the Durable POA Act, or a particular state statute.

#### ACCEPTANCE OF THE DURABLE POWER OF ATTORNEY AS A PLANNING TOOL FOR INCAPACITY

As the drafters of the Durable POA Act stated, the intent of a statute which authorized a power of attorney to continue to be effective even after the principal becomes unable to manage his or her financial affairs was to provide a simple way for people of more modest means to deal with their property in the same way wealthy people might use trusts and other tools.<sup>13</sup> There are a variety of advocates recommending to consumers that they should execute durable powers of attorney to avoid guardianship in the event of incapacity.<sup>14</sup> When surveyed, members of the American Bar Association's Real Property, Probate, and Trust Division reported that the majority of the responding members have prepared durable powers of attorney for their clients.<sup>15</sup> In fact, the durable power of attorney has

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10. Cornell University Law School, Uniform Probate Code Locator, <http://www.law.cornell.edu/uniform/probate.html> (last visited Mar. 31, 2010).

11. Unif. Durable Power of Att'y Act, Nat'l Conf. of Commissioners on Unif. State Laws (1979).

12. *Id.* at § 1.

13. Unif. Durable Power of Att'y Act, *supra* note 11, at Prefatory Note.

14. Jan M. Rosen, *Your Money: Power of Attorney in Illness or Injury*, NEW YORK TIMES, July 22, 1989, available at <http://www.nytimes.com/1989/07/22/business/your-money-power-of-attroney-in-illness-or-injury.html> (last visited Jan. 13, 2010); *Why Should I Assign Power of Attorney?*, CNNMoney.com, <http://money.cnn.com/magazines/moneymag/money101/lesson21/index5.html> (last visited Jan. 13, 2010).

15. David M. English & Kimberly K. Wolff, *Survey Results: Use of Durable*

become a standard part of the estate-planning package typically prepared by an attorney for a client.<sup>16</sup>

Many other sources exist that provide durable power of attorney documents for individuals as an alternative to consulting with an attorney. A quick search of the internet shows a variety of web sites offering power of attorney documents for download by the public.<sup>17</sup>

#### **AUTHORITY AND DUTIES OF THE AGENT UNDER COMMON LAW, THE UPC, AND THE DURABLE POA ACT**

Under common law agency principles, the agent had the authority conveyed by the principal and owed certain duties to the principal. Under common law, as manifested in the Restatement (Third) of Agency, the agent had authority to take those actions the principal wanted the agent to take. "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."<sup>18</sup>

Under agency law, the agent agrees to act "on the principal's behalf and subject to the principal's control."<sup>19</sup> Under agency principles, a principal could be held liable for the acts of his or her agent under the various doctrines of actual authority, apparent authority, respondeat superior, and other legal doctrines.<sup>20</sup> This presumes a competent principal, who is able to supervise and control the actions of the agent. "An agent

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*Powers*, 10 Prob. & Prop. 33 (1996).

16. *Id.*

17. See generally [http://www.expertlaw.com/library/estate\\_planning/durable\\_power\\_of\\_attorney.html](http://www.expertlaw.com/library/estate_planning/durable_power_of_attorney.html) (last visited Mar. 31, 2010) (describing attorney who offers a durable power of attorney form free for download); <http://www.ilrg.com/forms/powatrnny.html> (last visited Mar. 31, 2010) (providing a form available for download for \$9.99); <http://www.legacywriter.com/poa2.asp> (last visited Mar. 31, 2010) (providing form created by filling out interactive questionnaire for \$19.95, allegedly state specific) (last visited Mar. 31, 2010).

18. RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).

19. RESTATEMENT (THIRD) OF AGENCY § 101.

20. See RESTATEMENT (THIRD) OF AGENCY §§ 2.01-2.07.



is presumed to be supervised by the principal, who retains the ability to revoke the agency at any time. An agent therefore has a duty to obey the instructions of the principal."<sup>21</sup>

The agent, using the authority given by the principal, and acting on behalf of the principal, is required to exercise certain duties.

1. Loyalty: "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."<sup>22</sup>
2. Duty Not to Acquire a Material Benefit: "An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position."<sup>23</sup>
3. Duty Regarding Adverse Parties: "An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship."<sup>24</sup>
4. Use of Property and Confidential Information: "An agent has a duty: (1) not to use property of the principal for the agent's own purposes or those of a third party; and (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party."<sup>25</sup>
5. Duties of Care, Competence, and Diligence: "Subject to any agreement with the principal, an agent has a

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21. Boxx, *supra* note 6, at 20.

22. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

23. *Id.* at § 8.02.

24. *Id.* at § 8.03.

25. *Id.* at § 8.05.

duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances.”<sup>26</sup>

6. Segregation, Record Keeping, and Accounting: “An agent has a duty, subject to any agreement with the principal: (1) not to deal with the principal’s property so that it appears to be the agent’s property; (2) not to mingle the principal’s property with anyone else’s; and (3) to keep and render accounts to the principal of money or other property received or paid out on the principal’s account.”<sup>27</sup>

Principles of agency law notwithstanding, in many situations when an individual executes a power of attorney, the agent is not likely to be present and not likely to receive instruction regarding the above-described duties.<sup>28</sup>

As noted by several authors, neither the UPC nor the Durable POA Act clarifies the duty of the attorney in fact to the principal under a durable power of attorney.<sup>29</sup> As Professor Boxx notes in her article, the typical attorney in fact serving under a durable power of attorney is an uncompensated family member.<sup>30</sup> This raises the question of whether to hold an unsophisticated family member who is handling the finances of an individual who can no longer manage his or her own affairs to the same standard as a trustee or a guardian.

The Model Act of 1964 had three standards for liability for the attorney in fact for the enacting state to choose among:

1. The attorney in fact would only be held liable for intentional wrongdoing or fraud;

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26. *Id.* at § 8.08.

27. *Id.* at § 8.12.

28. Boxx, *supra* note 6, at 41.

29. *Id.* at 3; Linda S. Whitton, *Durable Powers of Attorney as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 24 (2007).

30. Boxx, *supra* note 6, at 36.

2. A compensated attorney in fact would be held to the standards of other fiduciaries; or
3. Any attorney in fact would be held to the standards of other fiduciaries.<sup>31</sup>

While the Model Act offered a statutory deviation from common law agency principles, neither the UPC nor the Durable POA provided any lower standard for the liability of an attorney in fact. Therefore, we look to agency law for the standards for liability of the attorney in fact for breach of duty.

Remedies for breach of fiduciary duty—in general. An agent's breach of fiduciary duty may create several distinct bases on which the principal may recover monetary relief or receive another remedy. Under appropriate circumstances, an agent's breach or threatened breach of fiduciary duty is a basis on which the principal may receive specific nonmonetary relief through an injunction. An agent's breach of fiduciary obligation may also furnish a basis on which the principal may avoid or rescind a contract entered into with the agent or a third party.<sup>32</sup>

## PROBLEMS WITH POWERS OF ATTORNEY

The durable power of attorney was intended to be a relatively simple, inexpensive alternative to the court supervision of guardianship.<sup>33</sup> This informal alternative comes at a cost: the agent or attorney in fact is able to act without any formal supervision and, upon the incapacity of the principal, sometimes with no supervision at all.<sup>34</sup> This lack of oversight can lead to abuse by the unsupervised agent.<sup>35</sup>

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31. Boxx, *supra* note 6, at 9.

32. RESTATEMENT (THIRD) OF AGENCY § 8.01.

33. Boxx, *supra* note 6, at 1.

34. *Id.*

35. *Id.*

The primary abuse by agents is the use of the principal's property and/or income by the agent for the agent's benefit or the benefit of third parties and gifting of the principal's property to the agent, sometimes to the extent of impoverishment of the principal.<sup>36</sup> Other abuses include co-mingling of funds by the agent and lack of recordkeeping (to the extent that it can be difficult after the fact to determine the extent of the breach).<sup>37</sup>

The author serves as a public administrator and handles finances for seniors in crisis upon referral by her local Adult Protective Services Department on suspicion of financial abuse. In that role, the author has seen a number of egregious financial exploitation cases in which the agent used a durable power of attorney as a device to transfer assets from the senior to the agent. The worst cases usually fall under a common theme:

1. The agent is not related to the senior.
2. The senior has no relatives in the community.
3. If the senior has relatives who are in contact with the senior, the agent stays in contact with the relatives, assuring them that the agent is doing everything possible to look after the elderly relative.
4. The agent usually starts small with transfers from the principal to the agent using the power of attorney, and the amount and frequency escalate over time.

Several authors have discussed problems with powers of attorney in the context of financial abuse and exploitation and have proposed solutions. There is a tension between the purpose of the durable power of attorney and the various solutions that are proposed to prevent the abuses that can occur

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36. English & Wolff, *supra* note 15, at 34.

37. *Id.*

when an agent acts without any supervision or regulation.<sup>38</sup> The power of attorney is a document designed to allow an individual to avoid guardianship or conservatorship for management of his or her assets if the individual becomes unable to manage financial affairs without undergoing the expense and process of creating a trust or other vehicle for financial management.<sup>39</sup> The arrangement offers no oversight and few restrictions, other than those restrictions that might be imposed by a bank or a title insurance company based on the express language of the document or relevant state law.<sup>40</sup>

## CASE LAW SAMPLING OF PROBLEMS WITH POWERS OF ATTORNEY

### *CASES WHERE THE RIGHTS OF THIRD PARTIES WERE PROTECTED AGAINST THE INTERESTS OF THE PRINCIPAL*

In a 1994 case, when a principal sought to defend against an action for enforcement of a promissory note signed by the agent for the benefit of the agent, pledging the principal's property as security and the principal claimed that the execution of the note was not authorized, the Colorado Supreme Court was not persuaded that the principal was entitled to the relief sought.<sup>41</sup> The court cited various policy considerations in its ruling:

There are several policy reasons why it is preferable to place the risk that an agent may abuse his authority for his own benefit on the principal, rather than on the holder in due court who takes without notice of the principal-agent relationship. First, this rule increases the principal's incentive to exercise care in selecting honest and reliable agents. Second, the principal is in a better position to supervise the agent's conduct than is the holder in due course. Finally, because the principal enjoys the many benefits of the agency relationship, it is not unfair to require that it also bear the cost of its

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38. *Boxx*, *supra* note 6, at 14.

39. *Id.* at 5.

40. *Id.* at 12-14.

41. *Willey v. Mayer*, 876 P.2d 1260, 1266 (Colo. 1994).

agent's abuses of authority where they harm innocent third parties.<sup>42</sup>

The Colorado Supreme Court may be correct that the principal needs to exercise care in the selection of agent. However, in the case of a durable power of attorney that is being exercised after the principal becomes incapacitated, the principal may not be able to supervise the agent's conduct.<sup>43</sup>

In a 2006 Tennessee case involving a durable power of attorney and an action by a third party to enforce a deed of trust against the residence of the principal, the court held in favor of the third party, making the following findings:

1. The agent (son) executed the deed of trust against the principal's residence for the benefit of himself and his spouse, without the knowledge, information or consent of the principal.
2. The funds received under the promissory note were not used for the benefit of the principal.
3. The agent breached his fiduciary duty to the principal (his mother) by pledging her real estate.
4. The third party had no notice that the agent had breached his fiduciary duty.
5. The third party did not assist the agent in violating his fiduciary duty.
6. The third party was a bona fide purchaser for value and had not been unjustly enriched.<sup>44</sup>

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42. *Id.*

43. *Boxx, supra* note 6, at 19.

44. *Hindman v. Moore*, No. E2005-01287-COA-R3-CV, 2, 2006 WL 1408394, 2. (Tenn. Ct. App. 2006).

In the Tennessee case, just as in the Colorado case, the court found in favor of the innocent third party despite claims by the principal of breach of fiduciary duty. In both cases, the agent pledged assets belonging to the principal in transactions that were done for the benefit of the agent, thereby breaching the duty of loyalty, the duty not to use the principal's property for the agent's benefit, and the duty not to acquire a material benefit.<sup>45</sup> Because courts may not protect the principal in actions by third parties involving assets pledged by rogue agents, selection of a trustworthy agent is critical.

#### *CASES WHERE AN AGENT CHANGED THE PRINCIPAL'S TESTAMENTARY PLAN*

In some instances, while there are no claims against the agent for transfer of assets during the lifetime of the principal, the agent is found to have made changes to the principal's testamentary plan, with the changes benefiting the agent.

In a 2006 case from South Dakota, a distant family member and her husband befriended the principal.<sup>46</sup> Upon the principal expressing concerns that his current agent was not trustworthy, the husband made arrangements for the principal to meet with an attorney to execute a new power of attorney.<sup>47</sup> The principal appointed the family member and her husband as agents.<sup>48</sup> The power of attorney limited gifting to the annual exclusion limit under the Internal Revenue Code and did not authorize self-dealing.<sup>49</sup>

Approximately ten months after the power of attorney was executed, the husband-agent changed the pay on death ("POD") beneficiary designations on the certificates of deposit from various family members originally designated by the principal

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45. RESTATEMENT (THIRD) OF AGENCY §§ 8.01, 8.02, 8.08; *Willey*, 876 P.2d at 1260; *Hindman*, WL 1408394 at ¶ 5.

46. *Bienash v. Moller*, 721 N.W.2d 431, 432 (S.D. 2006).

47. *Id.*

48. *Id.*

49. *Id.* at 432-33.

into the names of the two agents.<sup>50</sup> When challenged by the bank, the husband-agent produced a written authorization, allegedly signed by the principal, authorizing the change.<sup>51</sup> The court, in its opinion, notes that in the "authorization," the principal's first and last names were misspelled and also notes that the authorization, while permitting the change, does not expressly permit self-dealing by the agent but only stated as follows:

I, Kenneth Duebendorfer, wish to notify the State Bank of Alcester that I am fully aware of the changes to be made on the CD's that I have at the State Bank of Alcester by my Power of Attorney, Randall R. Moller. We have discussed these changes and I authorize Randy Moller to make them on my behalf.<sup>52</sup>

The principal died three months later and the original named beneficiaries against the agents brought an action.<sup>53</sup> The court granted summary judgment in favor of the beneficiaries, holding that the written authorization did not override the express language in the power of attorney, which did not permit self-dealing.<sup>54</sup> While the court found that this was a case of first impression for South Dakota, the court found that case law in various states supported the holding.<sup>55</sup>

In another case involving sale by agents of real property owned by a principal under power of attorney, where property was specifically devised in the principal's will to her stepson, the Tennessee Supreme Court in 2007 reversed an appellate court decision and reinstated the trial court's dismissal of the stepson's claims against the agents for fraud and constructive trust.<sup>56</sup> The agents were the principal's children and the remainder beneficiaries under her will.<sup>57</sup> The principal resided in a skilled

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50. *Id.* at 433.

51. *Id.*

52. *Id.* at 437.

53. *Id.* at 433.

54. *Id.*

55. *Id.* at 435-37.

56. *Stewart v. Sewell*, 215 S.W.3d 815, 817 (Tenn. 2007).

57. *Id.* at 818.



nursing facility for the last fifteen months of her life.<sup>58</sup> The agents, using a power of attorney which contained authorization to sell real property, sold a portion of the real property devised to the stepson and placed the funds into a joint account, titled in the names of the agents and the principal.<sup>59</sup> The funds in the account were used for the principal's benefit until her death.<sup>60</sup> Upon her death, just over half of the funds from the sale of the property remained.<sup>61</sup> The funds were distributed to the agents, who were also the residuary devisees under the principal's will.<sup>62</sup>

The court noted the dangers of agents conducting business on behalf of the principal without a full understanding of the legal consequences of their actions.<sup>63</sup> The court found that the intent of the account, opened by one of the agents, was to provide access to the funds by any of the three (the principal and her two agents) for the benefit of the principal.<sup>64</sup> The court held that the doctrine of ademption by extinction applied to the specific devisee of real property.<sup>65</sup> The court noted that a specific provision of the UPC as enacted by Tennessee would have applied but for the fact that the statute was not in effect in Tennessee until 2004 and the principal in this case died in 1998. The new provision under Tennessee law states:

(b) If specifically devised or bequeathed property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, . . . the specific devisee has the right to a general pecuniary devise equal to the net sale price . . . .<sup>66</sup>

If the case had been decided after the enactment of the

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58. *Id.*

59. *Id.*

60. *Id.* at 820.

61. *Id.*

62. *Id.* at 819.

63. *Id.* at 823.

64. *Id.* at 822-24.

65. *Id.* at 824-25.

66. TENN. CODE ANN. § 32-3-111(b) (2007).

above provision, the result likely would have been different. However, the court noted that the real property was the only asset owned by the principal, and sale was necessary in order to have funds for the cost of her care.<sup>67</sup>

The cases above regarding alteration of the principal's testamentary plan illustrate two issues. In the first example, the agent altered the principal's testamentary plan through a deliberate act with the purpose of benefiting the agent upon the principal's death. In the second example, the court found that the reason for the sale of the asset was to provide funds for the benefit of the principal and not to benefit the agent. Guidance to agents regarding their responsibilities with respect to the principal's testamentary plan will assist with cases that fall into the second example but not the first.

#### *INTERVIVOS GIFTS BY AGENT*

One of the frequent themes in cases involving breach of fiduciary duty by an agent is the agent who makes gifts of the principal's property either to the agent or to another individual, often a family member of the agent.

In one such case in North Carolina from 2006, the principal's will, executed in December 2002, contained a specific devise of a 9.82-acre tract of real property to the plaintiff and her children.<sup>68</sup> In September 2003, the principal executed a power of attorney designating the first defendant as his agent.<sup>69</sup> Four days after being designated agent, the defendant quitclaimed the tract of land that was devised to the plaintiff under the principal's will to the agent's father.<sup>70</sup> The next day, the principal died.<sup>71</sup> The deed was recorded one week after the principal's death and no real estate excise stamps were affixed to the recorded deed to indicate that any consideration was paid

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67. *Stewart*, 215 S.W.3d at 825.

68. *Mason v. Coston*, 2006 WL 2947529, 1 (N.C. Ct. App. Oct. 17, 2006).

69. *Id.*

70. *Id.*

71. *Id.*

for the transfer.<sup>72</sup> The plaintiff brought claims of breach of fiduciary duty, fraud, constructive fraud, and civil conspiracy against the defendant and her father, as well as a claim for declaratory judgment deeming the deed void.<sup>73</sup> The trial court granted summary judgment on behalf of the plaintiff on the claims of breach of fiduciary duty and declaratory judgment.<sup>74</sup>

The appellate court heard the defendant's appeal in which defendant contended that there were genuine issues of material fact as to whether the deed was supported by valuable consideration.<sup>75</sup> The court held that the power of attorney did not contain authorization for gifting, and where the record revealed that the alleged consideration for the quitclaim deed was ten dollars and the past performance of services by the grantee, this did not convert the gift into a transfer for value.<sup>76</sup> The defendants also contended that there were genuine issues of material fact as to whether the defendant-agent breached her fiduciary duties as attorney in fact.<sup>77</sup> The appellate court held that a gift of the principal's property by the attorney in fact is in violation of the duty to act in the best interest of the principal.<sup>78</sup>

In a New York case from 2008 involving *intervivos* transfers by the agent to himself, using a power of attorney drafted by the agent, and containing an exoneration clause stating that the agent "shall not incur any liability to me, my estate, my heirs, successors or assigns or anyone else for acting or refraining to act under this document," the agent, who was a tenant residing in the principal's two-family dwelling, drafted the power of attorney by downloading a form from the internet.<sup>79</sup> The agent added certain special powers to the form document, including the authority to make gifts of the ninety-eight-year-old

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 2.

76. *Id.* at 3.

77. *Id.*

78. *Id.*

79. *In re Mueller*, 853 N.Y.S.2d 245, 248 (N.Y. Sur. 2008).

principal's property without liability.<sup>80</sup>

Within three months of execution of the power of attorney, the agent had transferred all of the liquid assets and had executed a lifetime tenancy agreement on behalf of himself as tenant and on behalf of the principal as agent.<sup>81</sup> The agreement granted the agent, his mother, and another individual a lifetime tenancy in the principal's real property.<sup>82</sup>

The court ruled that the exoneration clause was against public policy and a violation of the duties of loyalty and fair dealing. The court found that the agent had failed to present "any evidence that the decedent derived even a scintilla of benefit from his transfers."<sup>83</sup>

Respondent's use of the POA is a classic example of how such an instrument may be abused by an attorney-in-fact for his own benefit. At his deposition respondent admitted that he had transferred to himself and his mother virtually all of the decedent's liquid assets and secured a life tenancy in the real property. He used the decedent's assets to pay off his personal credit card debts, to purchase a computer, clothes, CD's, DVDs, whiskey and fund his Pay Pal accounts. According to the respondents he does not have any records because after his review of decedent's bank statement he got rid of them.<sup>84</sup>

The author knows of a number of cases involving Medicaid planning by agents under power of attorney by adult children of a principal with the assistance of "Medicaid planners" prior to the enactment of the Deficit Reduction Act of 2005. The purpose of the planning was to transfer the wealth of the principal to the agent and/or others in order to qualify the principal for eligibility for Medicaid assistance. The author wonders how the transfers made by agents in such circumstances, transfers that were intended to result in the impoverishment of the senior for

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 250.

84. *Id.* at 249.

the benefit of third parties, would have fared under an analysis of benefit to principal.

In a 2007 Maryland case involving an *inter vivos* gift by the agent under power of attorney, the personal representative of the principal's estate sought to impose a constructive trust on the principal's residence, which the agent conveyed to herself two days before the principal's death.<sup>85</sup> The principal had four children and his will made nearly equal distribution to each of his children.<sup>86</sup> He did provide in a codicil to the will that the agent could reside in the residence for three years after his death.<sup>87</sup> The court noted that the agent had resided in the residence most of her life, even after marrying and having children of her own, caring for her parents as they aged (the record notes that the principal was wheelchair bound and the agent was the primary caregiver for seven months prior to his death).<sup>88</sup> The residence was determined to be worth \$630,000 and the total estate was valued at just over \$740,000.<sup>89</sup>

The court found that there was a confidential relationship between the agent and the principal, which shifted the burden to the agent to show the reasonableness of a transfer for no value when the power of attorney did not contain authority to gift.<sup>90</sup> The appellate court upheld the prior ruling imposing a constructive trust.<sup>91</sup>

In a 2007 Missouri case involving beneficiary designations by an agent, the agent under power of attorney placed POD beneficiary designations naming herself as beneficiary on the principal's financial accounts.<sup>92</sup> The principal had two children, a son and a daughter, and the daughter was the agent.<sup>93</sup> The

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85. *Figgin v. Cochrane*, 920 A.2d 572, 574 (Md. App. 2007).

86. *Id.* at 573-74.

87. *Id.* at 575.

88. *Id.* at 574.

89. *Id.* at 573.

90. *Id.* at 580.

91. *Id.* at 585.

92. *Antrim v. Wolken*, 228 S.W.3d 50, 51 (Mo. App. 2007).

93. *Id.*

beneficiary designation caused the principal's entire estate to pass to the agent.<sup>94</sup> While the power of attorney permitted gifting, it was silent as to the authority of the agent to gift to herself.<sup>95</sup> The trial court held, and the appellate court affirmed, that this designation was a breach of the agent's fiduciary duty.<sup>96</sup>

#### ***USE OF PRINCIPAL'S PROPERTY FOR AGENT'S BENEFIT***

When an agent family member who was providing care for the principal in his home used the principal's funds from a joint checking account established prior to the execution of the power of attorney for the agent's own use, the Wisconsin Supreme Court held the following in a 2007 opinion:

1. The establishment of the joint account six years prior to the execution of the power of attorney created a presumption of donative intent.
2. When the agent transferred funds deposited by the principal into the joint account for his own use, a presumption of fraud was created.
3. In a situation of conflicting and inconsistent presumptions of fraud and donative intent, the trial court was free to make its own determination based on the facts and the credibility of the witnesses.
4. Extrinsic evidence may be admissible to determine the intent of the parties when conflicting and inconsistent presumptions of fraud and donative intent exist.
5. Evidence supported the trial court's conclusion that

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94. *Id.*

95. *Id.* at 53.

96. *Id.* at 51.

the agent did not breach his fiduciary duty.<sup>97</sup>

In this case, the son and mother had established a joint checking account six years before the execution of the power of attorney.<sup>98</sup> The power of attorney was procured and executed without the assistance of legal counsel.<sup>99</sup> The principal did not authorize the agent to be compensated for his services or to make gifts of the principal's property.<sup>100</sup> Two years later, the principal was admitted to a hospital and then to a skilled nursing facility.<sup>101</sup> Eventually, a guardian was appointed, and the power of attorney was terminated.<sup>102</sup> The guardian filed suit against the agent, seeking to recover funds deposited by the principal in the joint checking account and withdrawn by the agent for the agent's use.<sup>103</sup> The appellate court appears to have relied heavily in its opinion on the findings of fact of the trial court. The case presents a number of interesting issues regarding the nature of the funds in a joint bank account when the funds were deposited by the principal and used by the agent without gifting authority.

The Chief Justice of the Wisconsin Supreme Court notes the following issues in a thoughtful concurring opinion:

1. The power of attorney is a useful device that enhances the autonomy of the principal, by allowing him or her to designate a particular agent to assist the principal if and when such assistance is needed.
2. The use of powers of attorney is increasing.
3. There are reported cases of abuse by agents who engage in self-dealing or make improper gifts.

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97. *Russ v. Russ*, 734 N.W.2d 874, 878 (Wis. 2007).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 879.

102. *Id.*

103. *Id.*

4. There is little guidance to agents about the fiduciary role they assume by acting under the power of attorney.
5. Litigation in this area is too infrequent and too fact specific to provide sufficient guidance regarding the role of the agent.<sup>104</sup>

She ended her opinion with a call for a legislative solution to the problem.<sup>105</sup>

### CALLS FOR GREATER PROTECTION FOR PRINCIPALS

#### CHOICE OF AGENT

There is one overarching theme for prevention of fiduciary abuse by an agent under power of attorney: care and selection in the choice of agent. The tension is between preserving the right of individuals to designate an agent to assist them with their affairs and protecting the interests of the state, which is likely to bear the cost of caring for the impoverished principal after his or her assets have been converted to use by the agent.

One would question whether the Colorado Supreme Court's policy argument that the actions of the rogue agent should be borne by the principal and not by the third party is always the sound result.<sup>106</sup> It may be that there are some third parties who cannot claim to be bona fide purchasers or innocent third parties. If the facts of the case should have placed the third party on inquiry notice that the agent may not have the authority claimed, perhaps the third party should not receive such protection.

Although a great deal of advice is given to individuals to

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104. *Id.* at 888-89 (Abrahamson, J., concurring).

105. *Id.* at 892.

106. *Willey*, 876 P.2d at 1266.



have a will or a trust and to have financial and medical powers of attorney in place, the author is not aware of such concentration in advice in the selection of an agent. Professor Whitton states that the most obvious planning strategy that the principal can undertake is careful selection of a trustworthy agent.<sup>107</sup>

A frequent debate among estate planning practitioners regards the merits of executing an immediately effective power of attorney versus a springing power of attorney, which would only be effective upon a certain condition, such as the incapacity of the principal.<sup>108</sup> One of the merits of the springing power as claimed by practitioners is that it provides more protection against abuse.<sup>109</sup> This argument rings false. If I cannot trust my agent now, while I am capable of supervising his or her actions and making my wishes known, why would I impart that trust when I am likely to be unable to supervise the agent? Professor Whitton also points out another defect of the springing power, which is the loss of opportunity for the principal to work with the agent at a time when the principal is capable of providing specific direction and guidance to the agent.<sup>110</sup> In order to accomplish the goals and objectives of the principal, it is important for the agent to have some understanding of the principal's property, estate plan, and expectations.

#### *OTHER DRAFTING SOLUTIONS*

Professor Whitton recommends that principals carefully consider how much authority to give an agent.<sup>111</sup> She advises caution, particularly regarding powers that have the potential to dissipate the principal's property or alter the principal's estate plan.<sup>112</sup> From the case law cited above, it is clear that powers

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107. Whitton, *supra* note 29, at 17.

108. *Id.* at 19.

109. *Id.* at 21-22.

110. *Id.*

111. *Id.* at 24.

112. *Id.* at 18.

that permit the agent to do either are subject to abuse. Professor Whitton also advises the principal to consider whether the authority a principal might grant to his or her original agent may be broader than the authority appropriate for a successor agent, noting that the authority a principal might give to a spouse is likely to be broader than the authority granted to an adult child.<sup>113</sup>

### MONITORING OF AGENT

Various plans for monitoring agents have been suggested. Professor Dessin suggests that agents should be required to register the power of attorney in the same court that oversees guardianships in the jurisdiction where the principal resides.<sup>114</sup> However, in a recent report on guardianship monitoring, the American Bar Association Commission on Law and Aging found that verification of guardian reports is lacking in many jurisdictions.<sup>115</sup> Registration of a power of attorney is not going to provide oversight of the agent.<sup>116</sup> The question is whether the formality of a registration requirement before exercise of authority would deter the rogue agent, like the tenant who drafted the power of attorney for his ninety-eight-year-old landlady.

Professor Dessin also suggests that the agent should be required to file annual accountings with the court once the principal becomes incompetent and also upon the death of the agent.<sup>117</sup> Professor Dessin proposes that the court could train agents or provide advice on particular transactions.<sup>118</sup> As a practitioner, I note that court employees in state courts are generally prohibited from providing legal advice to parties and

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113. *Id.* at 19.

114. Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution the Problem?*, 34 MCGEORGE L. REV. 267, 317 (2003).

115. Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STET. L. REV. 143, 163-64 (2007).

116. *Id.* at 161-163

117. Dessin, *supra* note 114, at 317.

118. *Id.*

state court budgets, in addition to having insufficient funds to effectively monitor guardianship and conservatorship cases, and are not likely to embrace the added review and monitoring of agent accountings. Such review and even training could be provided with sufficient funding, but the funding mechanism would most likely be fees imposed upon the principal, thus removing the inexpensive and easy to use advantages of the power of attorney.

Professor Whitton suggests having the principal name a third party who has authority to request accountings from the agent and who may have a right to revoke the agent's authority or to name successor agents.<sup>119</sup> The author frequently designates an individual who is entitled to receive annual accountings, and has on occasion named an individual with authority to revoke an agent's authority in favor of a successor. This party serves in a function similar to a trust protector. The difficulty, as Professor Whitton notes, is in finding an appropriate individual to serve in this role.<sup>120</sup>

#### *LEGISLATIVE PROPOSALS INVOLVING PRINCIPAL AND AGENT*

Julia Bueno proposes a number of legislative proposals in an article in the National Academy of Elder Law Attorneys (NAELA) Journal, many of which are quite practical.<sup>121</sup>

#### WITNESSING REQUIREMENTS

Bueno found that more than half the states analyzed had no execution requirements, while requiring both notarization of the principal's signature and witnessing make forgery more difficult and less prone to fraud.<sup>122</sup> The author is not certain that these requirements would result in greater protection, having seen

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119. *Id.*

120. Whitton, *supra* note 29, at 17.

121. Julia Calvo Bueno, *Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly*, 16 NAELA J. 20, 20 (2003).

122. *Id.* at 21.

questionable notarization on several occasions by traveling notaries.

#### DISCLOSURE REQUIREMENTS

Bueno discusses mandatory statutory disclosure statements, which notify the principal of his or her rights and the risks of signing a power of attorney.<sup>123</sup> While disclosure language may provide some information, the author queries whether the principal is likely to read and understand such a statement at the time the document is presented for execution. While this is likely when the principal's legal counsel drafts the power of attorney, if the agent from other sources without legal counsel procures the power of attorney, it is unclear how much protection mandatory disclosure language would provide.

However, an acknowledgment statement defining the agent's responsibilities that must be executed by the agent, which Bueno also proposes, would be a useful document in a later action against the agent, and the author is highly in favor of requiring such mandatory statements to be executed by an agent before acceptance of the agency by any third party.<sup>124</sup> One of the common defenses by the agent in a later action is that the agent did not realize he was supposed to keep records or did not know he was prohibited from certain actions.

#### DEFINED AGENT DUTIES

The problem of poorly-defined agent duties, as Bueno states,<sup>125</sup> is apparent from the case law cited above, from a review of the work of authors cited herein, and from a review of the statutes regarding powers of attorney, which are for the most part silent regarding agent duties. Any legislative enactment which can provide the rules for agents would be helpful, both for agents who are attempting to act in the best interests of the

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123. *Id.* at 22.

124. *Id.*

125. *Id.* at 23.

principal and for those who are observing the agent in action and wondering if the agent is acting appropriately.

#### GIFT GIVING AUTHORITY

Bueno discusses clarity regarding gift-giving authority.<sup>126</sup> The author, in her capacity as a public administrator, frequently reviews gifts made by agents in circumstances where the power of attorney is silent, and even in circumstances where the power of attorney expressly prohibits gifting by agent or prohibits gifting by agent to himself or herself. In the instances of parental impoverishment by adult children in the context of Medicaid planning, such gifting by agents was routine.<sup>127</sup> Does this create a culture where parties believe that it is appropriate for agents to impoverish a principal? A bright line rule regarding agent authority to gift when the document is silent is appropriate, as well as guidelines for gifting if the gift, when authorized, would result in impoverishment of the principal.

#### AFFIDAVIT FROM PHYSICIAN

Bueno discusses springing provisions, which require a statement from a physician before the agent can act under the power of attorney.<sup>128</sup> The author believes such a requirement does nothing to add to protection of the principal and can make it difficult for the agent to act if the physician is unwilling to discuss the principal's medical condition without authorization as required under the Health Insurance Portability and Accountability Act (HIPAA).<sup>129</sup> In such circumstances, the agent can be placed in a predicament where he or she cannot obtain the necessary affidavit without the necessary HIPAA authorization (which authorization may be contained within the

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126. *Id.*

127. *Id.*

128. *Id.* at 24.

129. Health Ins. Portability and Accountability Act, Pub. Law No. 104 § 191, 110 Stat. 1936; Privacy of Individually Identifiable Health Information, 45 C.F.R. § 164.501 (2009).

document which cannot spring into effectiveness without the affidavit).

### UNIFORM POWER OF ATTORNEY ACT

The latest drafting project involving powers of attorney from NCCUSL, now known as the Uniform Law Commission (“ULC,”) is the Power of Attorney Act (“POA Act.”)<sup>130</sup> According to the Prefatory Note to the POA Act, the purpose for enactment of new power of attorney legislation was to offer uniformity regarding topics on which state statutes diverged, including activation of contingent powers, the authority to make gifts, and standards for agent conduct and liability.<sup>131</sup> Other topics about which states had legislated, although not necessarily in a divergent manner, included restrictions on authority that has the potential to dissipate a principal’s property or alter a principal’s estate plan.<sup>132</sup>

### DURABILITY

The POA Act specifically states that a power of attorney is durable unless it states otherwise, which is a reversal of the prior Durable POA Act’s requirement that the document specify durability in order to be durable.<sup>133</sup> It was not uncommon for a power of attorney to be executed by a principal for the purpose of planning for incapacity, only to find that the “magic language” stating durability was not in the document, rendering it useless at the point it was most needed. The POA Act makes the durable power of attorney the default and requires instead that the document specifically state if the intent is not to create an agency that survives the incapacity of the principal.<sup>134</sup>

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130. Unif. Power of Attorney Act, Nat’l Conf. of Commissioners on Unif. State Laws (2006).

131. *Id.*

132. *Id.* at Prefatory Note.

133. Unif. Durable Power of Att’y Act, *supra* note 11 at § 104.

134. *Id.*

### SPRINGING POWERS

While the POA Act does not resolve the debate regarding whether a contingent power of attorney is a better choice, it does remove one of the roadblocks to activation of a springing power of attorney, which becomes effective upon disability of the principal.

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, [as amended], and applicable regulations, to obtain access to the principal's health-care information and communicate with the principal's health-care provider.<sup>135</sup>

This HIPAA release contained with the statute should enable the agent to obtain the necessary documentation regarding the principal's incapacity. Without such a release, it is possible that an agent might find it necessary to seek a court order regarding the individual's incapacity.

### GIFTING

The POA Act specifically states that gifting is prohibited unless the principal specifically authorizes it.<sup>136</sup> The Act further states that an authorization for gifting does not include gifts to agent or any individual whom the agent owes a legal obligation of support without specific authorization.<sup>137</sup> Finally, the Act has default restrictions on gifting, including a provision which only allows gifting to the extent of the annual Internal Revenue gift tax exclusion amount and the following express guidance on gifting:

(c) An agent may make a gift of the principal's property

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135. *Id.* at § 109.

136. *Id.* at § 201(a)(2).

137. *Id.* at § 201(b).

only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:

- (1) the value and nature of the principal's property;
- (2) the principal's foreseeable obligations and need for maintenance;
- (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;
- (4) eligibility for a benefit, a program, or assistance under a statute or regulation; and
- (5) the principal's personal history of making or joining in making gifts.<sup>138</sup>

These are all default provisions and a principal can authorize gifting beyond the scope provided in the Act. However, when the document is silent, these rules would apply in analyzing the appropriateness of the gift.

### ***DUTIES OF AGENTS***

The Act clarifies one of the significant issues raised in this paper: the lack of standards regarding the duty of an agent under power of attorney. The Act clarifies certain duties that cannot be excused by drafting different provisions within the document, as follows:

- (a) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:
  - (1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
  - (2) act in good faith; and
  - (3) act only within the scope of authority granted in the power of attorney.<sup>139</sup>

In the comments to the section cited above, the drafters note that the requirement to act in accordance with the principal's reasonable expectations if known, and if not known, to act in the

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138. *Id.* at § 217(c).

139. *Id.* at § 114(a).



best interests, is discussed as incorporating a policy preference for "substituted judgment" over "best interests" by requiring the agent to determine what decision the principal would have made, were the principal capable.<sup>140</sup>

The act contains other standards, which are the default standards, and which can be altered by the principal:

(b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

- (1) act loyally for the principal's benefit;
- (2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
- (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and
- (6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
  - (A) the value and nature of the principal's property;
  - (B) the principal's foreseeable obligations and need for maintenance;
  - (C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
  - (D) eligibility for a benefit, a program, or assistance under a statute or regulation.<sup>141</sup>

This section appears to provide the guidance to agents that has been lacking in the past. When moving from the concept of non-durability and principals who had the ability to supervise the actions of their agents, to durable powers and agents who act on behalf of principals who lack the capacity to supervise their

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140. *Id.* at Comments to § 114; *Russ*, 734 N.W.2d at 877.

141. Unif. Durable Power of Att'y Act, *supra* note 11 at § 114(b).

actions, the failure to provide standards as clearly as stated in the POA Act have likely led to some of the problems and abuses noted. It remains to be seen whether providing standards will reduce problems or will simply make it easier to prevail against agents in later actions for breach of duty.

### *LIABILITY OF AGENTS*

The Act provides that if the agent follows certain standards, he will not be liable:

(c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(d) An agent that 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 an individual or conflicting interest in relation to the property or affairs of the principal.

....

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.<sup>142</sup>

The Act does not contain a prohibition against self-dealing, and it authorizes the agent to take actions that benefit the agent, provided the agent acts in the best interests of the principal.<sup>143</sup> In cases involving family member agents, this departure from the prohibition against self-dealing is appropriate, as noted in the comments to the section.<sup>144</sup>

### *EXONERATION OF AGENT*

The Act permits exoneration of an agent, except when the exoneration clause in the document:

(1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power

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142. *Id.* at § 114.

143. *Id.*

144. *Id.* at Comments to § 114.

of attorney or the best interest of the principal; or  
(2) was inserted as a result of an abuse of a confidential  
or fiduciary relationship with the principal.<sup>145</sup>

The comments to the Act regarding exoneration clauses state that such clauses should be the exception and not the rule, but that there may be situations where the parties feel the need to protect the agent, such as in contentious family situations.<sup>146</sup>

## CONCLUSION

The durable power of attorney has become a useful planning device for individuals who seek to delegate authority to conduct their financial affairs in the event they are no longer able to do so. Unfortunately, an individual who lacks the ability to handle his financial affairs can be extremely vulnerable to impoverishment by a rogue agent. Further, the informal nature of the relationship can lead to misunderstanding by the agent regarding his or her responsibilities to the principal.

When the concept of a durable power of attorney was first introduced in the Model Act in 1964, the drafters provided protection to compensate for the inability of a principal with diminished capacity to supervise his or her agent.<sup>147</sup> However, the Model Act did not gain wide acceptance. The UPC and the Durable POA Act did not incorporate the protections contained in the Model Act.<sup>148</sup> As the case law demonstrates, common law principles have not been especially helpful in providing meaningful guidance to agents or protection to principals.

The POA Act may provide some of the assistance needed to address this problem. However, there is no sure way to protect an individual with diminished capacity from financial abuse, and many of the proposed solutions would add significant, unnecessary formality and cost in the many situations where a power of attorney is used without any issues arising regarding

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145. *Id.* at § 115.

146. *Id.* at Comments to § 115.

147. *Boxx, supra* note 6, at 7.

148. *Id.* at 10.

agent conduct.

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