Marquette Elder's Advisor

Volume 2
Issue 4 *Spring*

Article 7

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By Michele M. Hughes

Introduction

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

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

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

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

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

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

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

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

The fact that an individual's execution of a power of attorney for finances document creates an agency relationship with the agent is important in many respects in representing clients who have been financially exploited by those agents. As will be shown below, a practitioner may cite case law involving other types of agents with fiduciary obligations, such as trustees[9] 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 specified[11] or, alternatively stated, those powers that are contained in the "four corners of the document."[12] It has even been said that a power of attorney for finances document is construed more strictly than an ordinary contract, especially if the authorized agent is given broad authority over all or much of the principal's property.[13] The strict construction principal is useful to an attorney whose client's assets have been stolen by his or her chosen agent.

Gifting

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

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

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

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

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

A Petition to Review the Agent's Performance

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

Breach of Fiduciary Duty

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

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

Conversion

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

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

Fraud or Misrepresentation

Litigants successfully brought a tort cause of action for fraud against agents in both West Virginia[34] 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 brotherinlaw, 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 necessaries, are void after the filing of the guardianship petition and order for hearing with the office of the register of deeds for the county. The only exceptions are if the court determines that the ward continues to be able to enter into contracts in a limited guardianship or a guardian is not appointed.

Duress

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

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

Tortious Interference with an Expected Inheritance

Some states have adopted the Restatement (Second) of Torts Section 774B, which provides that one "who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift he would have otherwise received is subject to liability to the other for the loss of the inheritance or gift."[81] The elements of this cause of action are

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

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

Eviction

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

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

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

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

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

Conclusion

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

Endnotes

1. Frontline, National Center on Elder Abuse (NCEA) Exchange, Fall, 1997.

2. Data are taken from a national survey that identified 270 incidents of abuse. JONATHAN FEDERMAN & MEG REED, GOV'T. LAW CTR. OF ALBANY LAW SCH., ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM (1994).

3. *Id.* at 12.

4. Other examples of legal remedies also available to a principal whose agent has violated his or her duty to the principal include contract actions and remedies such as rescission of contracts, unjust enrichment, restitution, an action in equity to enforce the provisions of an express trust, or refusal to pay compensation to the agent as previously agreed to in the power of attorney document. *See generally*, 3 AM JUR 2D AGENCY § 333 (1986); RESTATEMENT (SECOND) OF AGENCY § 399 (1957).

5. For example, WIS. STAT. ch. 243 (1999) provides statutory authority for the creation of a durable power of attorney for finances. Chapter 243 is replete with references to "agent" and "agency." Under WIS. STAT. § 243.07(1)(a), a durable power of attorney is defined as "a power of attorney by which a principal designates another as his or her *agent* in writing" (emphasis added). Under WIS. STAT. § 243.10(1), the statutory form power of attorney provides that "by accepting or acting under the appointment, the agent assumes the fiduciary and other legal responsibilities of an agent." Thus, an *agency* relationship is created as a matter of law whenever a power of attorney for finances is executed.

6. Bank of Cal. v. Hoffmann, 38 N.W.2d 506, 509 (Wis. 1949).

7. King v. Bankerd, 492 A.2d 608, 611 (Md. 1985).

8. Bank of Cal., 38 N.W.2d at 509.

9. Alexopoulos v. Dakouras, 179 N.W.2d 836, 840–41 (Wis. 1970), (by analogy, the fiduciary obligation of an agent and a trustee impose similar duties). *See also* Schock v. Nash, 732 A.2d 217, 225 (Del. 1999) (the fiduciary duty principles of trust law must be applied to the relationship between principal and her attorney-in-fact, since the common-law fiduciary relationship created by a durable power of attorney is like the relationship created by a trust (citing RESTATEMENT (SECOND) OF AGENCY § 387 cmt. b (1958) and RESTATEMENT (SECOND) OF TRUSTS § 170 (1959))).

10. Kotsch v. Kotsch, 608 So. 2d 879 (Fla. Dist. Ct. App. 1992); *In re* Estate of Crabtree, 550 N.W.2d 168 (Iowa 1996); Mercantile Trust Co., N.A. v. Harper, 622 S.W.2d 345 (Mo. Ct. App. 1981); Whitford v. Gaskill, 460 S.E.2d 346 (N.C. Ct. App. 1995); King v. Bankerd, 492 A.2d 608 (Md. 1985).

11. Crabtree, 550 N.W.2d at 170; King, 492 A.2d at 611.

12. First Nat. Bank of Paulding Cty. v. Cooper, 312 S.E.2d 607, 608 (Ga. 1984) (holding that the clear and unambiguous purpose of the power of attorney was to serve and benefit only the grantor of the power, and there was no authorization for the agent to use such powers on his own behalf, e.g., to secure a personal loan for himself).

13. Schock, 732 A.2d at 225 (citing RESTATEMENT (SECOND) OF AGENCY § 34 cmt. h (1957)).

14. Alexopoulos, 179 N.W.2d at 836; Wis. v. Hartman, 194 N.W.2d 653, 656 (1972).

15. King, 492 A.2d at 612–13.

16. Schock, 732 A.2d at 227–28.

17. Estate of Casey v. Commissioner, 948 F.2d 895, 899 (4th Cir. 1991) (also contains an extensive discussion of gifting clauses); LeCraw v. LeCraw, 401 S.E.2d 697, 698-99 (Ga. 1991).

18. Schock, 732 A.2d at 225.

19. Bank of Cal., 38 N.W.2d at 509.

20. Schock, 732 A.2d at 225–27.

21. WIS. STAT. ch. 243 (1999).

22. King, 492 A.2d at 611.

23. Burg v. Miniature Precision Components, 319 N.W.2d 921, 924 (Wis. Ct. App. 1982).

24. General Automotive Mfg. Co. v. Singer, 120 N.W.2d 659, 663 (Wis. 1963); Bank of Cal., 38 N.W.2d at 509.

25. Hercules v. Robedeaux, Inc., 329 N.W.2d 240, 242 (Wis. Ct. App. 1982).

26. Loehrke v. Wanta Builders, Inc., 445 N.W.2d 717, 721 (Wis. Ct. App. 1989) (citing RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1965)); Burg, 319 N.W.2d at 924 (citing RESTATEMENT (SECOND) OF AGENCY § 401 (1957)).

27. Brown v. Maxey, 369 N.W.2d 677, 681 (Wis. 1985).

28. Hartford Elevator, Inc. v. Lauer, 289 N.W.2d 280, 287 (Wis. 1980).

29. Farm Credit Bank of St. Paul v. F & A Dairy, 477 N.W.2d 357, 371 (Wis. Ct. App. 1991).

30. Lucas v. Godfrey, 467 N.W.2d 180, 185 (Wis. Ct. App. 1991) (citing WILLIAM PROSSER, LAW OF TORTS 79 (4th ed. 1971); William Prosser, *The Nature of Conversion*, 42 CORNELL L.Q. 168 (1957)).

31. Production Credit Ass'n v. Equity Coop Livestock, 261 N.W.2d 127, 127 (Wis. 1978).

32. Alexopoulos, 179 N.W. 2d at 841.

33. *Id.* at 840–41.

34. Kanawha Valley Bank v. Friend, 253 S.E.2d 528 (W. Va. 1979).

35. Fletcher v. Mathew, 448 N.W.2d 576 (Neb. 1989).

36. Kanawha Valley Bank, 253 S.E.2d at 531.

37. Fletcher, 448 N.W.2d at 583.

38. *Id.* at 581.

39. *In re* Estate of Pirsch, 435 N.W.2d 317, 321 (Wis. Ct. App. 1988).

40. *Id* at 318.

41. Alexopoulos, 179 N.W.2d at 841.

42. First Nat. Bank of Appleton v. Nennig, 285 N.W.2d 614, 625 (Wis. 1979); Singer v. Jones, 496 N.W.2d 156, 158 (Wis. Ct. App. 1992).

43. Wilharms v. Wilharms, 287 N.W.2d 779, 783 (1980).

44. 570 N.W. 2d 910, 911 (Wis. Ct. App.1997).

45. *Id.* at 915.

46. *In re* Estate of Fliss, 557 N.W.2d 255, 256 (Wis. Ct. App. 1996).

47. *Id.* at 260.

48. *In re* Estate of Lienemann, 382 N.W.2d 595, 601 (Neb. 1986).

49. Pirsch, 435 N.W.2d at 319; *In re* Erlien, 527 N.W.2d 389, 395 (Wis. Ct. App. 1994).

50. *In re* Guardianship and Estate of P.A.H., 340 N.W.2d 577, 580 (Wis. Ct. App. 1983).

51. *Id.* at 581.

52. *In re* Knierim's Will, 68 N.W.2d 545, 548 (Wis. 1955).

53. *In re* Larsen's Estate, 96 N.W.2d 489, 492 (Wis. 1959).

54. *In re* Estate of Fechter, 277 N.W.2d 143, 154 (Wis. 1979).

55. First Nat. Bank of Appleton, 285 N.W.2d at 623.

56. Fincher v. Baker, 709 So.2d 1, 5 (Ala. Civ. App. 1996); *In re* Estate of Ambers, 477 N.W.2d 218, 221 (N. D. 1991).

57. Rea v. Paulson, 887 P.2d 355, 357 (Or. Ct. App. 1994).

58. *Id.* at 358.

59. *Id.*

60. *Id.* at 357–58.

61. *Id.*

62. Deason v. Gutzler, 622 N.E.2d 1276, 1282 (Ill. App. Ct. 1993).

63. White v. Raines, 574 N.E.2d 272, 280 (Ill. App. Ct. 1991).

64. Christensen v. Britton, 784 P.2d 908, 910 (Mont. 1989).

65. *In re* Faulks' Will, 17 N.W.2d 423, 439 (Wis. 1945).

66. *In re* Estate of Vorel, 312 N.W.2d 850, 853 (Wis. Ct. App. 1981); *In re* Friedli, 473 N.W.2d 604, 606 (Wis. Ct. App. 1991).

67. Hauer v. Union State Bank of Wautoma, 532 N.W.2d 456, 460–61 (Wis. Ct. App. 1995).

68. First Nat. Bank of Appleton, 285 N.W.2d at 620.

69. *Id.* at 622.

70. Hauer, 523 N.W.2d at 461 (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 15(1)(a), 15 cmt. c (1979)).

71. *Id.* at 462.

72. *Id.*

73. *Id.* at 463.

74. *Id.* at 464.

75. *See, e.g.*, Wurtz v. Fleischman, 293 N.W.2d 155, 160 (Wis. 1980) (where a claim for economic duress was held to be a cause of action for intentional tort).

76. Price v. Bank of Poynette, 128 N.W. 895, 898 (Wis. 1910).

77. Stillwell v. Linda, 329 N.W.2d 257, 258 (Wis. Ct. App. 1982).

78. *Id.*

79. 44 AM. JUR. 2D INSURANCE § 1762 (1982); 43 AM. JUR. 2D INSURANCE § 811 (1982) (discussing duress and undue influence in connection with an assignment or change in beneficiary).

80. 23 AM JUR 2D DEEDS §§ 203–12 (discussing the validity of deeds as affected by duress or undue influence).

81. Harris v. Kritzik, 480 N.W.2d 514, 517 (Wis. Ct. App. 1992).

82. *E.g.*, WIS. STAT. § 704.02(5) (1999).

83. I.R.C. § 165.

84. Solomon v. Commissioner., T.C.M. 1978-41 (supplemented at T.C.M. 1978-105).