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# Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard

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## PREVENTING EXPLOITATION AND PRESERVING AUTONOMY: MAKING SPRINGING POWERS OF ATTORNEY THE STANDARD

John C. Craft\*

The Uniform Power of Attorney Act was approved by the National Conference of Commissioners on Uniform State Laws in 2006.<sup>1</sup> By January of 2015, 17 jurisdictions had adopted the Act in some form.<sup>2</sup> The Act provides model legislation and an optional statutory power of attorney form.<sup>3</sup> As a default, the authority of an agent under a power of attorney is effective immediately upon the principal's execution of the document.<sup>4</sup> A principal or their attorney can draft against the default and make the power "springing" with the agent's authority being effective only upon the principal's incapacity.<sup>5</sup> The statutory form reflects the default position and requires a principal to include "special instructions" if he or she chooses to make the power springing.<sup>6</sup>

Springing powers of attorney should be the rule, not the exception. The question is not the advisability or wisdom of a particular client deciding when his or her agent's authority is to commence. The question is: Should springing authority be the default statutory position? This Article answers in the affirmative, especially given the widespread use of fill-in-the-blank power of attorney forms executed without legal counsel. This Article also recommends that statutory power of attorney forms be revised allowing principals to

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1. UNIF. POWER OF ATT'Y ACT, 8A U.L.A. 374 (2006 & Supp. 2014).
2. Legislative Fact Sheet – Power of Attorney, UNIFORMLAWS.ORG, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Power%20of%20Attorney> (last visited Apr. 18, 2015).
3. UNIF. POWER OF ATT'Y ACT, prefatory note, 8A U.L.A. 374.
4. *Id.* § 109, 8B U.L.A. 196–97.
5. *Id.*
6. *Id.* § 301, 8B U.L.A. 250–55.

make an informed choice between immediately effective and springing authority.

These reforms serve several purposes. First, springing powers of attorney may prevent an agent from financially exploiting his or her principal.<sup>7</sup> Second, springing powers of attorney preserve a principal's autonomy, control, and independent decision making until help is needed (if it is ever needed), and thus support the durable power of attorney's role as an anticipatory document.<sup>8</sup> Finally, springing effectiveness advances the goal of promoting the use of the durable power of attorney as an alternative to court-supervised guardianship.<sup>9</sup> In contrast to immediately effective powers of attorney, principals are more likely to execute springing powers as a means to avoid the need for a future guardian or conservator.<sup>10</sup>

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7. See discussion *infra* Part VII.A–B.

8. See discussion *infra* Part VI.C.

9. See discussion *infra* Part VII.A.

10. See discussion *infra* Part VII.A.

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## I. INTRODUCTION

The power of attorney has been called many things, mostly endearing: “useful tool,”<sup>11</sup> “inexpensive alternative to the court supervision of guardianship,”<sup>12</sup> “flexible[] and private,”<sup>13</sup> “promoting autonomy and choice.”<sup>14</sup> A few commentators are more cautious: “ubiquitous and powerful,”<sup>15</sup> “deceptively simple.”<sup>16</sup> The power of attorney has also been called a “license to steal.”<sup>17</sup> “Durable power of attorney agreements often grant agents an enormous amount of power, including power to sell an elderly person’s home and other assets, to make investments, to cancel insurance policies or name new beneficiaries, and even to empty bank accounts.”<sup>18</sup> Moreover, agents under powers of attorney operate with “vast, largely unsupervised discretion.”<sup>19</sup> An agent with a power of attorney “not provably void can take over the principal’s very life.”<sup>20</sup> And “in the hands of the wrong agent, a durable power of attorney creates enormous potential for abuse.”<sup>21</sup>

A power of attorney is “an instrument granting someone authority to act as agent or attorney-in-fact for the grantor.”<sup>22</sup> This Article discusses financial powers of attorney—those that give an agent the power to conduct financial transactions on behalf of another individual. At common law, applying agency principles, the

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11. Catherine Seal, *Power of Attorney: Convenient Contract or Dangerous Document?*, 11 MARQ. ELDER’S ADVISOR 307, 309 (2010).
  12. *Id.* at 316.
  13. *Why States Should Adopt UPOAA*, UNIFORMLAWS.ORG, [http://uniformlaws.org/Narrative.aspx?title=Why States Should Adopt UPOAA](http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPOAA) (last visited Apr. 18, 2015).
  14. Lori A. Stiegel & Ellen VanCleave Klem, *Power of Attorney Abuse: What States Can Do About It*, AARP PUB. POL’Y INST. 5 (Nov. 2008), available at [http://assets.aarp.org/rgcenter/consume/2008\\_17\\_poa.pdf](http://assets.aarp.org/rgcenter/consume/2008_17_poa.pdf).
  15. Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 1 (2006).
  16. Karen E. Boxx, *The Durable Power of Attorney’s Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 1 (2001).
  17. Stiegel & Klem, *supra* note 14, at 5.
  18. Jennifer L. Rhein, Note, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 ELDER L. J. 165, 168 (2009) (citing *Russ ex rel. Schwartz v. Russ*, 734 N.W.2d 874, 888 (Wis. 2007) (Abrahamson, C.J., concurring)).
  19. Kohn, *supra* note 15, at 17–19, 22; see also Boxx, *supra* note 16, at 2 (stating that the use of durable powers of attorney “escapes most court proceedings”).
  20. Marie A. Failing, *The Paradox in Madness: Vulnerability Confronts the Law*, 1 MENTAL HEALTH L. & POL’Y J. 127, 135 (2012).
  21. Rhein, *supra* note 18, at 167.
  22. BLACK’S LAW DICTIONARY 1209 (8th ed. 2004).

authority of an agent under a power of attorney terminated upon the grantor's (principal's) incapacity or death.<sup>23</sup> The rationale was that a person who could not make a contract himself could "not authorize another to make it for him."<sup>24</sup> Therefore, "an agent could not act under delegation of authority unless the principal had capacity to act."<sup>25</sup> In 1954, Virginia statutorily revoked the common law presumption that when a principal became incapacitated his or her power of attorney automatically terminated.<sup>26</sup> The concept of durability was born.<sup>27</sup> A "durable" power of attorney is a "power of attorney that remains in effect during the grantor's incompetency."<sup>28</sup>

Durable powers of attorney are advance-planning tools.<sup>29</sup> They are anticipatory in nature.<sup>30</sup> Common law powers of attorney "were of little use in planning for incapacity" because "[t]hey ceased to be effective when the principal became incompetent."<sup>31</sup> Durable powers of attorney were developed "specifically to survive incapacity" and avoid the costly, time-consuming, often complicated, and burdensome need to petition for guardianship or conservatorship and the resulting court supervision over an incapacitated person's affairs.<sup>32</sup> "The concept of durability," enabling an agent to act if the principal loses the capacity to act, "made the durable power of attorney the estate-planning device it is today."<sup>33</sup>

Durable powers of attorney have become a standard component of estate planning packages prepared by lawyers.<sup>34</sup> Studies indicate that durable powers of attorney are "increasingly prevalent among senior[s]."<sup>35</sup> They are an enticing planning instrument for seniors "who wish to protect their independence but anticipate the possibility of future decline in their mental or physical capacities."<sup>36</sup>

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23. Boxx, *supra* note 16, at 4–5.

24. Warren A. Seavey, *The Rationale of Agency*, 29 YALE L. J. 859, 870 (1920).

25. Seal, *supra* note 11, at 309.

26. See Boxx, *supra* note 16, at 4–6.

27. See *id.* at 6–7, 10–12.

28. BLACK'S LAW DICTIONARY 1210 (8th ed. 2004).

29. See Kohn, *supra* note 15, at 1–3.

30. See UNIF. PROBATE CODE § 5-501 prefatory note, 5 U.L.A. 3 (amended 1987) (stating the original purpose for durable powers of attorney was "to assist persons interested in establishing non-court regimes for the management of their affairs *in the event of later incompetency or disability*") (emphasis added).

31. Kohn, *supra* note 15, at 5–6.

32. *Id.* at 6; Failingler, *supra* note 20, at 133.

33. Seal, *supra* note 11, at 309.

34. David M. English & Kimberly K. Wolff, *Survey Results: Use of Durable Powers*, 10 PROB. & PROP. 33, 33 (1996).

35. Kohn, *supra* note 15, at 3.

36. *Id.* at 2.

A durable power of attorney can be effective either when it is signed by the principal (“immediately effective”) or upon the occurrence of a certain event (“springing” or “standby”).<sup>37</sup> With an immediately effective durable power of attorney, an agent is authorized to act under the power of attorney as soon as it is executed by the principal, and the agent’s authority remains effective even if the principal becomes incapacitated.<sup>38</sup> A typical springing power of attorney “does not activate until the principal becomes incompetent.”<sup>39</sup> Thus, an agent’s authority under a springing power of attorney becomes effective only if the principal becomes incapacitated. A springing power is “designed to allow the principal to retain control over his/her affairs so long as s/he is competent and to delay the grant of authority given to [an agent] until absolutely necessary.”<sup>40</sup>

## II. ELDER FINANCIAL EXPLOITATION

Power of attorney abuse, discussed later in Section III of this Article, is a type of elder financial exploitation. Elder financial exploitation is broadly defined as “the illegal or improper use of an older person’s or vulnerable adult’s funds, property, or assets.”<sup>41</sup> Examples of elder financial exploitation include: “cashing an older/vulnerable person’s checks without authorization or permission; forging [an older] person’s signature; misusing or stealing [an older] person’s money or possessions; coercing or deceiving [an older] person into signing [a legal] document”; and improperly using a “conservatorship, guardianship, or power of attorney.”<sup>42</sup> Elder

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37. *Id.* at 4; see also Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 577 (1996) (framing immediate and springing authority as the two approaches to durability).

38. Dessin, *supra* note 37, at 577.

39. Matthew A. Christiansen, *Unconscionable: Financial Exploitation of Elderly Persons with Dementia*, 9 MARQ. ELDER’S ADVISOR 383, 403 (2008).

40. Jonathan Federman & Meg Reed, *Abuse and the Durable Power of Attorney: Options for Reform*, GOV’T L. CTR. OF ALBANY L. SCH., Mar. 1994, at 15, available at <http://www.albanylaw.edu/glc/publications/glo/Documents/Abuse%20and%20the%20Durable%20Power%20of%20Attorney%20-%20Options%20for%20Reform.pdf>.

41. Pamela B. Teaster et al., *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older*, NAT’L CTR. ON ELDER ABUSE 10 (Feb. 2006), [http://www.ncea.aoa.gov/Resources/Publication/docs/2-14-06\\_FINAL\\_60\\_REPORT.pdf](http://www.ncea.aoa.gov/Resources/Publication/docs/2-14-06_FINAL_60_REPORT.pdf).

42. *Id.*



financial abuse is a growing national concern.<sup>43</sup> It has been called the “Crime of the 21st Century”<sup>44</sup> and an “epidemic.”<sup>45</sup> Before discussing power of attorney abuse specifically, this Section outlines the current landscape of elder financial exploitation.

#### A. *Prevalence of Elder Financial Exploitation*

Definitive national data on the incidence and prevalence of elder abuse is in short supply, due mainly to a lack of funding to support research.<sup>46</sup> “Estimates of [the prevalence of elder abuse] have been based on sample surveys in local areas and projected to the total U.S. population.”<sup>47</sup> In one study, the National Center on Elder Abuse (NCEA) collected data from the 2003 fiscal year from Adult Protective Services (APS) in all fifty states.<sup>48</sup> The data showed an increase in reported cases of abuse of nearly 20 percent from 2000.<sup>49</sup> An analysis of complaints made in 19 states showed that 20.8 percent of investigated reports involved financial exploitation of persons age 60 or older (14.7 percent of those reports were substantiated),<sup>50</sup> making financial exploitation of the elderly the third most common form of elder abuse.<sup>51</sup>

The pervasiveness of elder financial exploitation is also difficult to determine because it often goes unreported.<sup>52</sup> Numerous studies have been conducted attempting to estimate the number of cases never reported to authorities.<sup>53</sup> In 2005, the NCEA provided estimates that only 1 out of every 25 financial exploitation cases was being reported, suggesting that there are at least 5 million victims subject to

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43. See Tim Devaney, *Elder Financial Abuse Described as ‘Epidemic,’* WASH. TIMES (Aug. 15, 2012), <http://www.washingtontimes.com/news/2012/aug/15/elder-financial-abuse-described-as-epidemic/>.

44. Kathy Black & Kathleen Houseweart, *Guests: Fight Elder Financial Abuse*, HERALD-TRIBUNE (Oct. 3, 2012, 1:00 AM), <http://www.heraldtribune.com/article/20121003/COLUMNIST/310039999>.

45. Devaney, *supra* note 43 (quoting Mark Lachs, Professor of Medicine at Weill Cornell Medical College and Director of Geriatrics at New York-Presbyterian Healthcare System).

46. NAT’L RESEARCH COUNCIL, *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* 1–2 (Richard J. Bonnie & Robert B. Wallace eds., 2003).

47. *Id.* at 2.

48. Teaster et al., *supra* note 41, at 5.

49. *Id.*

50. *Id.* at 18.

51. *Id.* at 5–6.

52. See *Fact Sheet: Elder Abuse Prevalence and Incidence*, NAT’L CTR. ON ELDER ABUSE (2005), <http://www.ncea.aoa.gov/Resources/Publication/docs/FinalStatistics050331.pdf>.

53. See *id.*

financial abuse every year.<sup>54</sup> In 2010, a survey conducted by the Investor Protection Trust suggested that “[m]ore than 7.3 million older Americans – one out of every five citizens over the age of 65 –” have been victims of financial abuse.<sup>55</sup> The number of victims could be even higher than that if a recent New York study is accurate.<sup>56</sup> In that 2011 study, “4,156 older New Yorkers or their proxies [were] interviewed directly and 292 agencies reported on documented cases” of elder abuse.<sup>57</sup> The findings suggest that a mere 1 out of 44 cases of elder financial exploitation is reported to authorities.<sup>58</sup>

Victims of elder abuse or financial exploitation may not report the abuse for several reasons. They may desire to keep the abuse or exploitation private in order to avoid embarrassment, especially if they have been betrayed by those persons who are closest to them.<sup>59</sup> Moreover, victims who are suffering from memory loss or deteriorating mental capacity are less likely to speak out and report the abuse.<sup>60</sup>

### *B. Societal Cost of Elder Financial Exploitation*

One consequence of elder financial exploitation is a substantial, societal monetary cost. In 2010, researchers conducted an in-depth examination of 80 elder financial exploitation cases investigated by Adult Protective Services in Utah.<sup>61</sup> They estimated that Utah seniors, businesses, and government lost more than \$7 million dollars in 2010 as a result of the financial exploitation.<sup>62</sup> The average loss

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54. *Id.*

55. *Survey: 1 out of 5 Older Americans are Financially Swindle Victims, Many Adult Children Worry about Parents' Ability to Handle Finances*, INVESTOR PROTECTION TRUST 1 (June 15, 2010), [http://www.investorprotection.org/downloads/EIFFE\\_Press\\_Release.pdf](http://www.investorprotection.org/downloads/EIFFE_Press_Release.pdf).

56. *See Under the Radar: New York State Elder Abuse Prevalence Study*, N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVICES 2 (May 2011), <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%201%20final%20report.pdf>.

57. *Id.* at 1.

58. *See id.* at 3.

59. Jane A. Black, Note, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289, 294–95 (2008).

60. *Id.* at 295.

61. Jilene Gunther, *The 2010 Utah Cost of Financial Exploitation*, NAT'L LEGAL RES. CTR. 2 (2010), available at [http://www.nlrc.aoa.gov/NLRC/Docs/2010\\_Cost\\_of\\_FE\\_5\\_24\\_LE.pdf](http://www.nlrc.aoa.gov/NLRC/Docs/2010_Cost_of_FE_5_24_LE.pdf).

62. *Id.*

per Utah victim was estimated to be \$85,253.<sup>63</sup> Nationally, a 2011 MetLife study estimated the total annual loss by elders subject to financial abuse to be \$2.9 billion dollars.<sup>64</sup> That finding represents a 12% increase from the \$2.6 billion MetLife estimated in 2008.<sup>65</sup>

Elder financial exploitation can also cause emotional, health, and quality of life consequences for the victim.<sup>66</sup> The biggest threat to an elderly person is not the “unscrupulous financial expert, scam artist, or morally hollow caregiver.”<sup>67</sup> Statistics indicate that the biggest threat appears to be the person’s family (children, grandchildren, siblings, nieces, and nephews).<sup>68</sup> Because of the close relationships involved, victims often suffer heightened feelings of betrayal.<sup>69</sup> Moreover, financial exploitation can cause the elderly person to suffer irreparable and devastating harm.<sup>70</sup> Indeed, the abuse often causes “a permanent decline in [the senior’s] standard of living.”<sup>71</sup> And, victims of elder abuse, neglect, and financial exploitation are three times more likely to die at an earlier age than elders who were not victims of abuse.<sup>72</sup>

### III. POWER OF ATTORNEY ABUSE

Modern powers of attorney are most often given with little supervision.<sup>73</sup> The first effort at a uniform power of attorney law in 1964, the Model Special Power of Attorney for Small Property Interests Act, contained a number of restrictions intended to limit the potential for abuse.<sup>74</sup> However, starting with the Uniform Probate Code in 1969, the focus turned to making powers of attorney less

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63. *Id.* at 6.

64. *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America’s Elders*, METLIFE 2 (2011) [hereinafter *MetLife Study*], available at <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf>.

65. *Id.*

66. *How Financial Exploitation is Defined and Detected*, DEP’T OF JUSTICE, <http://www.justice.gov/elderjustice/research/how-financial-exploitation-is-defined-and-detected.html?print=1>.

67. Black, *supra* note 59, at 294.

68. *Id.*

69. Sandra L. Hughes, *Can Bank Tellers Tell?—Legal Issues Related to Banks Reporting Financial Abuse of the Elderly*, 58 CONSUMER FIN. L. Q. REP. 293, 294 (Winter 2004).

70. *Id.*

71. *Id.*

72. XinQi Dong et al., *Elder Self-Neglect and Abuse and Mortality Risk in a Community-Dwelling Population*, 302 JAMA 517, 518, 522 (2009).

73. Boxx, *supra* note 16, at 45 (noting “a few state statutes [that] have addressed the lack of supervision”).

74. Failingler, *supra* note 20, at 133–34.

cumbersome and promoting their use.<sup>75</sup> As a result, “financial abuse of elders and others through the durable power of attorney has burgeoned.”<sup>76</sup> The durable power of attorney—the informal and inexpensive alternative to guardianship—can come at a cost.<sup>77</sup> An agent “is able to act without any formal supervision,” and “[t]his lack of oversight can lead to abuse” such as financial exploitation.<sup>78</sup>

In addition to ease of use and lack of monitoring, other aspects of powers of attorney make them susceptible to abuse.<sup>79</sup>

To be used effectively as a tool for planning for incapacity, a POA must give the agent broad decision-making authority over the principal’s finances and property.<sup>80</sup> [An agent’s] authority may include the [power] to sell or mortgage the principal’s home, withdraw and deposit money in bank and retirement accounts, make gifts, [and] change a principal’s estate plan . . . .<sup>81</sup>

Further, durable powers of attorney can be executed with relatively few formalities, in most cases fewer than are required for a will.<sup>82</sup> Minimal execution requirements combined with the “breadth of power” granted to an agent create the prospect of “overreaching by unscrupulous agents” and the potential for abuse.<sup>83</sup>

#### A. *Power of Attorney Abuse – Types*

Agents under powers of attorney can abuse their authority and thus, exploit their principal in numerous ways.<sup>84</sup> Professor Linda Whitton<sup>85</sup>

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75. See Boxx, *supra* note 16, at 10, 44–45 (noting the modifications made to the Uniform Probate Code).

76. Failing, *supra* note 20, at 134; see also Boxx, *supra* note 16, at 12 (stating that expanding use of the durable power of attorney has “led to increased instances of abuse”); Kohn, *supra* note 15, at 9 (“[A]s the use of DPOAs has expanded, so too have the opportunities for their misuse and for the financial exploitation of principals.”).

77. Seal, *supra* note 11, at 316.

78. *Id.* at 316–17.

79. See Stiegel & Klem, *supra* note 14, at 5.

80. *Id.*

81. *Id.*

82. Dessin, *supra* note 37, at 581–82 (“Typically, the only execution requirements are that the power of attorney be in writing and signed by the principal.”).

83. *Id.* at 582.

84. Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 345 (2008) [hereinafter Whitton, *Striking a Balance*].

suggests three categories of power of attorney abuse.<sup>86</sup> One category is “transactions that exceed the intended scope of authority” granted in the power of attorney.<sup>87</sup> For example, an agent might make gifts of a principal’s property when the power of attorney did not grant gifting authority.<sup>88</sup> The second category of abuse is “transactions conducted for self-dealing purposes.”<sup>89</sup> For example, an agent might spend a principal’s money for the agent’s personal benefit rather than use it to pay for the principal’s healthcare needs.<sup>90</sup> The final category of abuse is “transactions conducted in contravention of the principal’s expectations.”<sup>91</sup> For example, an agent who has gift-making authority might make gifts that undermine the principal’s estate plan.<sup>92</sup>

Other types of power of attorney abuse occur at or near the execution of the document. A prospective agent or other person might have the principal, who is cognitively impaired, sign the power of attorney.<sup>93</sup> “[A]n older person who lacks decision-making capacity might be persuaded or tricked into signing a [power of attorney].”<sup>94</sup> An unscrupulous agent might get an elderly person to sign a power of attorney through “deception, coercion, or undue influence.”<sup>95</sup> The principal’s signature might be forced or forged,<sup>96</sup> “or the terms of the [power of attorney] may not reflect the principal’s actual wishes.”<sup>97</sup>

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85. “Professor Whitton is the Reporter for the Uniform Power of Attorney Act.” See *Linda S. Whitton Bio*, VALPARAISO UNIV. LAW SCH., <http://www.valpo.edu/law/about-us/full-time-faculty/linda-s-whitton/bio> (last visited Apr. 18, 2015).

86. Whitton, *Striking a Balance*, *supra* note 84, at 345.

87. *Id.*

88. *Id.* at 355.

89. *Id.* at 345.

90. *Id.* at 357.

91. *Id.* at 345.

92. See *id.* at 359 (discussing the case of Ronald Slomski, whose mother (his agent) changed the beneficiaries of Slomski’s pension plan to his siblings instead of his stepdaughters he raised throughout their childhood).

93. Thomas L. Hafemeister, *Financial Abuse of the Elderly in Domestic Settings*, in *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* 382, 426 (Richard J. Bonnie & Robert B. Wallace eds., 2003).

94. Steigel & Klem, *supra* note 14, at 4.

95. Hafemeister, *supra* note 93, at 389.

96. *Id.* at 388.

97. Steigel & Klem, *supra* note 14, at 5.

B. *Prevalence of Power of Attorney Abuse*

1. Surveys of Attorneys and Professionals

One common methodology used to determine the prevalence of power of attorney abuse has been to survey lawyers and other professionals who would be aware of the problem.<sup>98</sup> Between 1993 and 2002, four major surveys about power of attorney abuse were conducted:

In 1993, the Government Law Center of Albany Law School surveyed elder law attorneys, service providers, judges, and prosecutors. Of the 410 respondents, 94 percent believed that durable power of attorney abuse happened occasionally or frequently. Two-hundred seventy respondents (66 percent) “had actually encountered [power of attorney] abuse.” In 48 percent of the encounters described, respondents estimated that “75 percent or more of the principal’s assets were exploited.”<sup>99</sup>

In 1995, the ABA Section of Real Property, Probate and Trust Law conducted a survey of over 2,000 of its members.<sup>100</sup> Out of the 854 members who responded,<sup>101</sup> 40 percent “were aware of one or more [durable powers of attorney] that had been misused.”<sup>102</sup> When power of attorney abuse occurs, respondents reported that it was usually serious; 91 percent of the cases involved the transfer of the principal’s assets and, on average, 50 percent of the principal’s assets.<sup>103</sup>

Also in 1995, the American College of Trust and Estate Counsel surveyed 2,711 fellows, and 776 respondents (32 percent) answered that they personally had knowledge of durable power of attorney abuse.<sup>104</sup>

In 2002, the Uniform Law Commission’s Joint Editorial Board for Uniform Trust and Estate Acts surveyed probate, elder law, trust,

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98. *Id.* at 6.

99. *Id.* at 7; accord Federman & Reed, *supra* note 40, at 39.

100. Steigel & Klem, *supra* note 14, at 7.

101. *Id.*

102. English & Wolff, *supra* note 34, at 33.

103. *Id.* at 34.

104. Steigel & Klem, *supra* note 14, at 7; see also E. Thomas Schilling, *Report on ACTEC Elder Law Committee Questionnaire on Possible Abuse of Financial Durable Power of Attorney*, 21 ACTEC NOTES 247, 247 (1995).

estate, and real property attorneys.<sup>105</sup> Of the 371 respondents, 64 percent reported “they had encountered [power of attorney] abuse in their own work.”<sup>106</sup> Nearly a quarter (24%) encountered more than ten instances of power of attorney abuse.<sup>107</sup>

## 2. Reported Appellate Cases

Case law often highlights glaring misuse of powers of attorney. One commentator summarized several appellate decisions dealing with types of power of attorney abuse.<sup>108</sup> In *In re Estate of Cumbee*, a son, who held power of attorney for his mother, “transferred the money out of his mother’s joint accounts into accounts held solely in his own name.”<sup>109</sup> Later, a court held the son exerted undue influence in his mother’s execution of a will naming him sole beneficiary of her estate, attempting to revoke prior wills distributing her estate equally among all her children.<sup>110</sup> In *In re Estate of Ferrara*, it was a nephew who, with power of attorney, transferred about \$820,000 of his uncle’s assets to himself under the guise of an unlimited gift-giving provision added to the power of attorney.<sup>111</sup> The nephew was held to have violated the “best interest requirement” of the fiduciary duty he owed his uncle under the power of attorney.<sup>112</sup> Even one’s own sister can misuse her power of attorney. In *Levy v. Thompson*, a sister used a power of attorney to liquidate her sister’s certificates of deposit and purchase “annuities naming herself [and her heirs] as beneficiary ‘per stirpes.’”<sup>113</sup> The sister’s actions in creating the annuity were held to be improper.<sup>114</sup> These cases suggest that the law is reactionary by only punishing the abuser after the harm occurs, rather than preventing it from happening.<sup>115</sup>

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105. Steigel & Klem, *supra* note 14, at 7; Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis*, UNIF. LAW COMM’N 4, 12 (Oct. 29, 2002), [http://www.uniformlaws.org/shared/docs/power%20of%20attorney/dpasurveyreport\\_102902.pdf](http://www.uniformlaws.org/shared/docs/power%20of%20attorney/dpasurveyreport_102902.pdf) [hereinafter Whitton, *National Durable Power of Attorney Survey*].

106. Steigel & Klem, *supra* note 14, at 7; Whitton, *National Durable Power of Attorney Survey*, *supra* note 105, at 4, 12.

107. Whitton, *National Durable Power of Attorney Survey*, *supra* note 105, at 4, 12.

108. Black, *supra* note 59, at 296–300.

109. *Id.* at 296–97 (citing *In re Estate of Cumbee*, 511 S.E.2d 390, 392–93 (S.C. Ct. App. 1999)).

110. *Id.* at 296–98.

111. *Id.* at 298–99 (citing *In re Estate of Ferrara*, 852 N.E.2d 138, 139–41 (N.Y. 2006)).

112. *Id.* at 299.

113. *Id.* at 300–01 (citing *Levy v. Thompson*, No. 20641, 2006 WL 2875429, at \*1–2 (Ohio Ct. App. Oct. 6, 2006)).

114. *Id.* at 301.

115. *Id.* at 301–02.

The three cases discussed above appear in their respective reporters relatively recently: 1999, 2006, and 2006.<sup>116</sup> Below is a summary of research the author conducted on the number of power of attorney abuse cases appearing in appellate reporters since 1975.<sup>117</sup> This research does not of course account for cases that were never appealed, but the findings do suggest an upward trend in power of attorney abuse cases being litigated. While the number of cases appealed is fairly small, the numbers are not insignificant given the many reasons power of attorney abuse cases may never be litigated at all.<sup>118</sup>

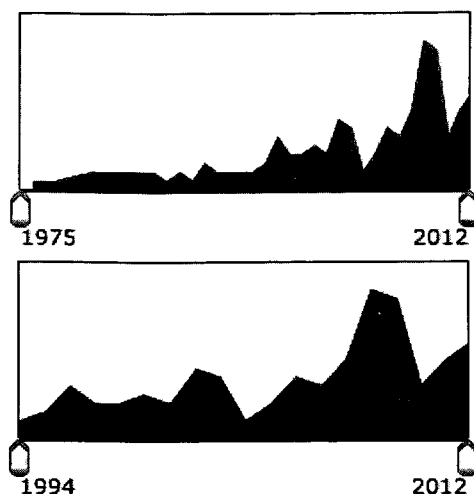
Year	Number of Cases	Year	Number of Cases	Year	Number of Cases
2012	11	2001	7	1990	2
2011	5	2000	3	1989	1
2010	5	1999	4	1988	2
2009	12	1998	4	1987	1
2008	12	1997	4	1986	2
2007	7	1996	5	1985	2
2006	6	1995	2	1984	2
2005	5	1994	2	1981	1
2004	2	1993	1	1978	1
2003	1	1992	1	1976	1
2002	3	1991	2		

116. *Ferrara*, 852 N.E.2d 138; *Levy*, 2006 WL 2875429; *In re Estate of Cumbee*, 511 S.E.2d 390 (S.C. Ct. App. 1999).

117. The following search of all state and federal cases was conducted using Lexis Advance®. The search terms used were: “power of attorney” near/10 abus! or misus! but not “abus! of discretion.”

118. *See infra* Part III.C.





Interestingly, the upward tick in cases since 1994 coincides with studies being conducted in the early 1990s “investigating the frequency and severity of [power of attorney] abuse . . . and elder abuse in general [becoming] a prominent concern later” in the 1990s.<sup>119</sup>

### 3. Media Reports – The Story of Virginia Freck

Reports in the media are also instructive of the extent of power of attorney abuse. The case of 98-year-old Virginia Freck is one. At a young age, Freck learned to be frugal. She had an allowance of one quarter a week. If she spent “the entire quarter that same week, she would owe [her parents] 50 cents the next week.”<sup>120</sup>

Freck would “build a nice nest egg” over her life.<sup>121</sup> She graduated from Duke University and moved to New York City. There, she became a success and a bit of a New York socialite. Freck was a member of the Rockettes, modeled for Macy’s department store, worked for CBS, and volunteered for both the USO and Coast Guard. She was known to socialize with CBS and RCA executives.<sup>122</sup>

119. See Boxx, *supra* note 16, at 12–13 (discussing the studies of power of attorney misuse and emerging concerns regarding elder abuse occurring in the 1990s).

120. The story of Virginia Freck was reported in the *Montgomery Advertiser* on June 4, 2012. See Scott Johnson, *Betrayal of Trust: Elderly Woman’s Life Savings of Millions Drained*, MONTGOMERY ADVERTISER (June 4, 2012), <http://archive.montgomeryadvertiser.com/article/99999999/NEWS01/106150006/Betrayal-trust-Elderly-woman-s-life-savings-millions-drained>.

121. *Id.*

122. *Id.*

Freck married late in life, but never had any children. After her husband passed away, she lived alone in Florida.<sup>123</sup> Apparently, Freck needed some assistance and at some point started showing signs of dementia. Her husband's great-nephew, Joe, offered to assist, and Freck moved to Alabama where Joe had family.<sup>124</sup>

In 2006, Joe had Freck sign a power of attorney form appointing him as her agent. The power of attorney was not prepared with the assistance of an attorney, but rather was drafted by Joe's girlfriend. Joe proceeded to exploit Freck at the rate of \$53,000 per month. He spent Freck's money on casino gambling, alcohol, motorcycles, a house for himself, a convenience store, a bulldozer, and other property. The abuse did not come to light until one of Freck's bank accounts was overdrawn, and she was almost evicted from her apartment. In 2012, a judgment was entered against Joe in a civil lawsuit, and he was convicted of criminal elder financial exploitation. All told, Joe exploited Freck for more than \$2.5 million dollars.<sup>125</sup>

### C. Remedies for Power of Attorney Abuse

As the *Freck* case illustrates, power of attorney abuse is often difficult to detect, and justice may come too late for the victim. The abuse may not even be detected until after the principal has died, and the principal's heirs/beneficiaries discover it.<sup>126</sup> Lawmakers have enacted various protections and remedies for power of attorney abuse. Professor Marie Failinger categorized the types of laws intended to protect against power of attorney abuse using Professor Samuel Bray's "harm rules" and "power rules."<sup>127</sup> Harm rules are designed to "penalize the powerful person"—the agent under a power of attorney.<sup>128</sup> Power rules are designed to limit the powerful person's—the agent's—"ability to accumulate power over the vulnerable principal in the first place."<sup>129</sup> Professor Failinger concludes that harm rules have largely failed to curb power of

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123. *Id.*

124. *Id.*

125. *Id.*

126. Stiegel & Klem, *supra* note 14, at 6.

127. Failinger, *supra* note 20, at 138 (citing Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. 1172, 1173 (2010)).

128. *Id.* at 138–39 (giving as examples: "raising the level of fiduciary responsibility undertaken by [agents], expecting economically competent . . . investment and disposal of assets," and imposing damages for violation of fiduciary duties).

129. *Id.* at 138.

attorney abuse.<sup>130</sup> States have turned to three types of power rules in power of attorney reforms.<sup>131</sup> “First, states have attempted to create more robust [document] execution requirements” to provide some “assurance that the principal is competent.”<sup>132</sup> Secondly, states have endeavored to reduce an agent’s authority to conduct certain types of transactions.<sup>133</sup> Lastly, states have created “policing mechanisms during the life of the power of attorney.”<sup>134</sup>

### 1. Civil Remedies

A person subject to financial exploitation has civil remedies under tort law for causes of action “such as conversion, fraud, and breach of fiduciary duty.”<sup>135</sup> In the Uniform Law Commission’s 2002 survey, attorneys were asked about statutory relief: “Should [power of attorney] statute[s] provide remedies and sanctions for agent abuse in addition to those available under common or criminal law?”<sup>136</sup> Perhaps indicative of perceived inadequacies of common law and criminal remedies for power of attorney abuse, 75 percent of attorneys responded affirmatively.<sup>137</sup> Thus, the Uniform Power of Attorney Act (UPOAA) includes model statutory remedies for breach of duty to a principal.<sup>138</sup> Under the UPOAA, an agent owes certain

130. *Id.* at 140.

131. *Id.*

132. *Id.* (giving as examples: requiring “notarization of the document, increasing the number of witness to the [execution], and setting qualifications for witnesses”); *see also* Kohn, *supra* note 15, at 34 (stating that one current approach to reform is changing the execution requirements for a power of attorney).

133. Failingler, *supra* note 20, at 140 (giving as an example: limiting the agent’s ability to conduct transactions that benefit the agent); *see also* Kohn, *supra* note 15, at 34 (stating that a second current approach to reform is “clarifying the limits of an [agent’s] authority or imposing new limits on the [agent’s] authority to act”).

134. Failingler, *supra* note 20, at 140 (giving as examples: requiring the agent “to record the power of attorney when the principal becomes incapacitated,” requiring the agent “account to the court,” requiring the agent to “file inventories,” allowing “interested parties to petition for an accounting or other relief from the [agent],” and permitting “relatives of the principal to require the [agent] to post a bond to protect the principal against potential financial [exploitation]”); *see also* Kohn, *supra* note 15, at 35 (stating that a third current approach to reform is increasing “the ability of third parties to police” powers of attorney).

135. Julie A. Lemke & Seymour Moskowitz, *Protecting the Gold in the Golden Years: Practical Guidance for Professionals on Financial Exploitation*, 7 MARQ. ELDER’S ADVISOR 1, 11 (2005).

136. Whitton, *National Durable Power of Attorney Survey*, *supra* note 105, at 13.

137. *Id.*

138. *See* UNIF. POWER OF ATT’Y ACT prefatory note, 8A U.L.A. 374.

mandatory and default duties to the principal.<sup>139</sup> An agent found liable for breach of duty is required to “restore the value of the principal’s property to what it would have been had the violation not occurred” and must pay the principal “for the attorney’s fees and costs paid on the agent’s behalf.”<sup>140</sup> The remedies provided under the UPOAA are not exclusive.<sup>141</sup>

Despite the availability of civil remedies, the civil justice system will rarely hold agents fully accountable for abusing their authority under powers of attorney. There are several practical and circumstantial reasons for this. A victim of power of attorney abuse may lack the capacity to pursue civil litigation.<sup>142</sup> He or she may not have the financial resources to fund the often-costly litigation, perhaps because the agent has spent or dissipated the principal’s assets.<sup>143</sup> To encourage attorneys to represent victims of financial exploitation, “[s]ome states provide for additional or enhanced remedies, such as statutory attorney’s fees and treble damages.”<sup>144</sup> If litigation is ultimately pursued, some cases result in only partial recovery when the victims seek restitution.<sup>145</sup> Finally, a “lack of statutory clarity about an agent’s duties” may create challenges to the success of litigation.<sup>146</sup>

## 2. Criminal Remedies

Neither may criminal penalties be sufficient to fully curb power of attorney abuse. Some states distinctly criminalize power of attorney misuse.<sup>147</sup> However, the offense is often punished under another criminal law (theft or embezzlement, for example) without any sentencing enhancement.<sup>148</sup> Without a sentencing enhancement for crimes committed against the elderly victim, “a state’s criminal law code offers little, if any, added deterrence” against these types of crimes.<sup>149</sup> Power of attorney abuse, whether distinctly criminalized

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139. *Id.* § 114, 8B U.L.A. 203.

140. *Id.* § 117.

141. *Id.* § 123.

142. Stiegel & Klem, *supra* note 14, at 6.

143. *Id.*

144. Lemke & Moskowitz, *supra* note 135, at 11.

145. Hughes, *supra* note 69, at 294.

146. Stiegel & Klem, *supra* note 14, at 6.

147. *See* Black, *supra* note 59, at 303 (“About ten states address financial exploitation of the elderly through statutes that specifically address misuse of power of attorney.”).

148. *See id.* (citing ARIZ. REV. STAT. ANN. § 13-1815 (2007); CAL. PENAL CODE § 507 (West 2007)).

149. *Id.* at 308.

or not, may not be considered or understood to be a crime by investigators.<sup>150</sup> Law enforcement officers may not know that power of attorney abuse can be a crime, may not investigate the accusations, and may ultimately advise the complainant or those concerned that “it’s a civil problem.”<sup>151</sup>

“Prosecutors may not receive case referrals from adult protective services . . . banks, or law enforcement agencies.”<sup>152</sup> A 2006 New York study showed only a small fraction of power of attorney exploitation cases were referred to prosecutors.<sup>153</sup> And, of the referred cases, only one-seventh were actually prosecuted.<sup>154</sup>

Several factors contribute to low rates of prosecution. Prosecutors may lack expertise about power of attorney abuse or the resources to prosecute these cases, which can be demanding and labor intensive.<sup>155</sup> A prosecutor may not move forward with a case in which the principal granted broad authority to the agent, including the authority to make gifts with the principal’s property.<sup>156</sup> Such an extensive grant of authority could create a reasonable doubt that the agent acted beyond his or her authority.<sup>157</sup>

Prosecution may also be hindered due to the victim’s circumstances. Principals are often unwilling to prosecute immediate family members or close friends who are commonly appointed as agents.<sup>158</sup> An elderly victim may be an unreliable witness because of mental capacity impaired by old age, leading courts to be skeptical of a demented person’s allegations reasoning that “paranoid suspicions are a common incident of dementia.”<sup>159</sup> An elderly victim suffering from mental deficiencies may not recall that abuse has occurred, and thus, will not be able to testify in court.<sup>160</sup> Finally, the principal may

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150. Stiegel & Klem, *supra* note 14, at 6.

151. *Id.*

152. *Id.* (footnote omitted).

153. Thomas Hilliard, *Power Failures: Power of Attorney Authority and the Exploitation of Elderly New Yorkers*, SCHUYLER CTR. FOR ANALYSIS & ADVOCACY 2–3 (2006), available at [http://www.scaany.org/resources/documents/power\\_failures.pdf](http://www.scaany.org/resources/documents/power_failures.pdf) (finding that power of attorney exploitation cases were referred to New York state prosecutors at an annual rate of 9.5 referrals per 100,000 seniors).

154. *Id.* at 3.

155. Stiegel & Klem, *supra* note 14, at 6.

156. Black, *supra* note 59, at 307 (explaining by way of example how the broad authority granted to an agent might weaken the victim’s case and dissuade the district attorney from moving forward with the prosecution).

157. *See id.*

158. Federman & Reed, *supra* note 40, at 6.

159. *See* Black, *supra* note 59, at 307 (quoting *Boyce v. Fernandes*, 77 F.3d 946, 949 (7th Cir. 1996)).

160. *Id.*

have signed the power of attorney document on his own volition and “in accordance with the jurisdiction’s proper procedures.”<sup>161</sup> That fact likely strengthens a defendant’s case even if the principal was “unaware of what he or she was signing,” or completely trusted the agent they were appointing only to be victimized later.<sup>162</sup>

#### IV. THE EVOLUTION OF UNIFORM POWER OF ATTORNEY LAWS

“Despite the significant potential for abuse by an agent,” and the inadequacy of remedies for the principal, “protections for principals have been largely absent from [power of attorney] laws.”<sup>163</sup> Starting in 1964, the National Conference of Commissioners on Uniform State Laws (NCCUSL), promulgated four model or uniform power of attorney acts: the Model Special Power of Attorney for Small Property Interests Act (1964), the Uniform Probate Code (1969), the Uniform Durable Power of Attorney Act (UDPOAA) (1979), and the Uniform Power of Attorney Act (2006).<sup>164</sup> The safeguards for principals have evolved from judicial supervision and restrictive provisions contained in the 1964 Act,<sup>165</sup> to making powers of attorney less cumbersome and more available as low-cost alternatives to guardianship/conservatorship in the 1969 and 1979 Acts,<sup>166</sup> and recently, to new provisions protecting against financial exploitation and preserving a principal’s autonomy in the 2006 Act.<sup>167</sup>

##### A. *Model Special Power of Attorney for Small Property Interests Act (1964)*

In 1964, the NCCUSL enacted a limited Model Special Power of Attorney for Small Property Interests Act (Model Act).<sup>168</sup> The Model Act was promulgated in response to American Bar Foundation and other studies of the needs of elderly and incapacitated persons.<sup>169</sup> It was intended to help people with limited financial resources avoid

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161. *Id.* at 307–08.

162. *Id.*

163. Stiegel & Klem, *supra* note 14, at 8.

164. *Id.* at 8–9.

165. *Id.* at 9–10.

166. *See id.* at 9.

167. *See id.* at 11–12.

168. *Id.* at 8–9.

169. Boxx, *supra* note 16, at 6–7; *see also* Kohn, *supra* note 15, at 7 (stating that elderly principals are “[c]onsistent with the original purpose of the 1964 Model Act”).

expensive guardianship or conservatorship proceedings.<sup>170</sup> The stated purpose of the Model Act was to:

provide a simple and inexpensive legal procedure for the assistance of persons with relatively small property interests, whose incomes are 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. It is not contemplated that a power of attorney executed under this Act will be used for the general handling of sizable commercial property interests. Neither is it intended wholly to replace conservatorship or guardianship, but rather it is designed as a less expensive alternative.<sup>171</sup>

The Model Act sought to limit the possibility for abuse that can result when principals surrender their legal power to agents.<sup>172</sup> Due to the commissioners' apparent concerns about durable powers of attorney, the Model Act contained a number of restrictive provisions.<sup>173</sup> It ensured some "daylighting" of the transfer of authority from principal to agent.<sup>174</sup>

The Model Act required that a durable power of attorney, which must include yearly income and a description of any property subject to the power, be "signed before a judge who approved the document."<sup>175</sup> The document had to be filed with the court clerk and recorded in real property records.<sup>176</sup> The Model Act also included a blank space for the maximum dollar value of property that could be

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170. Seal, *supra* note 11, at 310.

171. Boxx, *supra* note 16, at 7 (quoting NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 274 (1964)).

172. Failing, *supra* note 20, at 133 (citing NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 275-81 (1964)).

173. Seal, *supra* note 11, at 310.

174. Failing, *supra* note 20, at 133.

175. Boxx, *supra* note 16, at 7-8 (noting the drafters' hope that the judge would know the principal and be able to determine if there were any concerns about the power of attorney).

176. *Id.*

subject to a durable power of attorney, allowing enacting states to set that value.<sup>177</sup> The power of attorney would cease when the income and/or assets subject to the power exceeded that relatively small dollar amount.<sup>178</sup> The drafters of the Model Act warned that if the restrictions on estate size were removed, then “extensive safeguards and more detailed and complicated procedures” would be required to protect principals.<sup>179</sup> Finally, the Model Act required agents “to account to the principal or the principal’s legal representative” if required by the document itself or a judge.<sup>180</sup>

### B. *Uniform Probate Code (1969)*

The NCCUSL next addressed powers of attorney and the issue of durability in creating the Uniform Probate Code (UPC) of 1969.<sup>181</sup> The UPC did not contain any of the protections of the Model Act.<sup>182</sup> Instead, the focus turned to making powers of attorney less cumbersome.<sup>183</sup> By removing the provisions limiting the use of powers of attorney to small estates, the UPC made it possible for anyone to execute a power of attorney.<sup>184</sup> The drafters of the UPC were prepared to make the durable power of attorney “available for a broad constituency as an economic alternative to guardianship.”<sup>185</sup> This prompted an enduring legislative tendency to make the power of attorney more accessible and easier to use.<sup>186</sup> The policy choices seem to have had their intended effect. After the UPC was enacted, the durable power of attorney gained popularity.<sup>187</sup>

The UPC authorized durable powers of attorney and, for the first time, springing powers of attorney in section 5-501:

Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words “This power of attorney shall not be affected by disability of the principal,” or “This power of

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177. *Id.*

178. *Id.*

179. *Id.* at 9.

180. *Id.* at 8–9.

181. Seal, *supra* note 11, at 311.

182. *Id.*; see also Boxx, *supra* note 16, at 10.

183. See Boxx, *supra* note 16, at 11–12, 44–45 (noting the modifications made to the Uniform Probate Code).

184. Stiegel & Klem, *supra* note 14, at 9.

185. Boxx, *supra* note 16, at 11.

186. Federman & Reed, *supra* note 40, at 14.

187. Dessin, *supra* note 37, at 579.



attorney shall become effective upon the disability of the principal,” or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive.<sup>188</sup>

The second quoted expression above (“This power of attorney shall become effective upon the disability of the principal”) represents the first time a state law or uniform act permitted springing powers of attorney, in this case, upon the “disability” of the principal.<sup>189</sup> Neither the Virginia statute in 1954 nor the Model Act in 1964 contained language allowing springing powers of attorney.<sup>190</sup> The Virginia law provided for durability as follows: “This power of attorney (or his authority) shall not terminate on disability of the principal.”<sup>191</sup> The Model Act provided for durability as follows: “The power is not invalidated by reason of any subsequent change in the mental or physical condition of the principal, including but not restricted to incompetency.”<sup>192</sup> Thus, the concept of a springing durable power of attorney originated with the UPC.

### C. *Uniform Durable Power of Attorney Act (1979)*

The NCCUSL enacted the UDPOAA in 1979.<sup>193</sup> The UDPOAA was conceived as a free-standing act that a state could adopt separately from the UPC and was created to make powers of attorney more useful.<sup>194</sup> The drafters of the UDPOAA affirmed the legislative intent of altering the common law rule and allowing powers of attorney to continue to be effective in the event of a principal’s later incompetency or disability.<sup>195</sup> The stated purpose of durability was to allow for the management of an incapacitated person’s affairs by

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188. UNIF. PROBATE CODE § 5-501 (1969).

189. See generally Dessin, *supra* note 37, at 576–580, 577 n.11 (discussing the types, history, and formation of durable powers of attorney, and, particularly, the presence of a springing power as created by the UPC).

190. VA. CODE ANN. § 11-9.1 (repealed 2010); MODEL SPECIAL POWER OF ATT’Y FOR SMALL PROP. INTERESTS ACT (1964).

191. § 11-9.1.

192. MODEL SPECIAL POWER OF ATT’Y FOR SMALL PROP. INTERESTS ACT § 1(a) (1964).

193. UNIF. DURABLE POWER OF ATT’Y ACT historical notes (superseded 2006), 8A U.L.A. 373.

194. *Id.* at prefatory note, 8A U.L.A. 374.

195. *Id.*

non-court regimes.<sup>196</sup> The drafters also viewed durable powers of attorney as providing a simple way for people of more modest means to manage their property in the same way wealthier people might use trusts or other tools.<sup>197</sup> The UDPOAA contains the following:

only five short sections that define the creation and effect of a durable power of attorney, the relationship of an attorney-in-fact to a later court-appointed fiduciary, the binding effect of agent action taken without actual knowledge of the principal's death, and the sufficiency of an agent's affidavit as proof of the power's validity.<sup>198</sup>

By 1984, all 50 states had enacted statutes allowing a principal to create a durable power of attorney.<sup>199</sup>

In relation to springing powers of attorney, the UDPOAA uses the same authorizing language as the UPC except for the addition of the term "incapacity" to "disability of the principal" as the triggering event.<sup>200</sup> The springing provision in the UDPOAA reads: "This power of attorney shall become effective upon the disability *or incapacity* of the principal."<sup>201</sup> The drafters of the UDPOAA also saw the need to address two concerns about springing powers.<sup>202</sup> One, there seemed to be some uncertainty, following the UPC, about the validity of springing powers of attorney in general.<sup>203</sup> The drafters settled any doubt by emphasizing that durable powers of attorney with postponed effectiveness were permitted.<sup>204</sup> Two, the drafters acknowledged some concerns that critics of the UPC had raised—the difficulty of ascertaining the disability or incapacity of a principal without a court order.<sup>205</sup> The drafters responded by stating that "draftsmen of durable powers are not limited in their choice of words to describe the later time when the principal wishes the

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196. *Id.*

197. *Id.*

198. Linda S. Whitton, *Crossing State Lines with Durable Powers*, 17 PROB. & PROP. 28, 28 (2003).

199. Federman & Reed, *supra* note 40, at 15 (citing Mark Fowler, Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 1012–13 (1984)).

200. UNIF. DURABLE POWER OF ATT'Y ACT § 1, 8A U.L.A. 386.

201. *Id.* (emphasis added).

202. *Id.* at prefatory note, 8A U.L.A. 374.

203. *Id.* at prefatory note, 8A U.L.A. 374–375.

204. *Id.* § 1 cmt., 8A U.L.A. 386.

205. *Id.*

authority of the agent in fact to become operative.”<sup>206</sup> They concluded by suggesting specific ways a springing power of attorney could be designed to ascertain a principal’s future incapacity.<sup>207</sup>

#### D. *Uniform Power of Attorney Act (2006)*

The Uniform Power of Attorney Act (UPOAA) of 2006 continues the trend of reforms in the direction of utility by promoting the usefulness of durable powers of attorney as a “low-cost, flexible, and private form of surrogate decision-making.”<sup>208</sup> The UPOAA also provides new benefits such as mandatory safeguards that protect principals, agents, and third parties; clearer guidelines for agents; and, an optional statutory power of attorney form.<sup>209</sup> By 2015, the UPOAA had been adopted by 17 jurisdictions: Alabama, Arkansas, Colorado, Hawaii, Idaho, Iowa, Maine, Maryland, Montana, Nebraska, Nevada, New Mexico, Ohio, Pennsylvania, Virginia, West Virginia, and Wisconsin.<sup>210</sup>

The UPOAA includes numerous new provisions and makes important changes to the UDPOAA. First, durability is the default rule for powers of attorney involving finances.<sup>211</sup> Second, the UPOAA requires a power of attorney to be signed by the principal, and if that signature is acknowledged before a notary public, the principal’s signature is presumed to be genuine.<sup>212</sup> Third, the UPOAA defines the default and mandatory fiduciary duties an agent owes to his or her principal.<sup>213</sup> Fourth, the UPOAA requires an agent be granted express authority in the power of attorney in order to conduct certain types of transactions known as “hot powers.”<sup>214</sup>

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206. *Id.*

207. *Id.*

208. *Why States Should Adopt UPOAA, supra* note 13.

209. *Id.*

210. Legislative Fact Sheet – Power of Attorney, *supra* note 2.

211. See UNIF. POWER OF ATT’Y ACT §§ 103, 104, 8B U.L.A. 187–89.

212. *Id.* § 105, 8B U.L.A. 190. Under the UPOAA, a power of attorney can alternatively be signed by “another individual directed by the principal to sign the principal’s name on the power of attorney.” *Id.*

213. *Id.* § 114, 8B U.L.A. 203–04.

214. *Id.* § 201, 8B U.L.A. 225. The powers requiring a specific grant of authority are: (1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; (5) delegate authority granted under the power of attorney; (6) waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or] (7) exercise fiduciary powers

Lastly, the UPOAA provides for judicial review of agent conduct and imposes liability for agent misconduct.<sup>215</sup>

### 1. Springing Power of Attorney Provisions

Section 109 of the UPOAA provides the default rules for when a power of attorney is effective and how a principal's incapacity is to be determined if a springing power of attorney is used.<sup>216</sup> As a default, the authority of an agent under a power of attorney becomes effective when the document is signed by the principal.<sup>217</sup> A power of attorney is effective immediately when it is executed, unless the principal states in the power of attorney that it becomes effective in the future.<sup>218</sup> If a principal elects a springing power of attorney, the principal may authorize one or more persons to provide written verification that the future event or contingency, the principal's incapacity, has occurred.<sup>219</sup> To facilitate the authorized person's access to the principal's health information, likely needed to verify the principal's incapacity, the UPOAA provides that the authorized person may act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act (HIPAA).<sup>220</sup> Designating in advance who is authorized to determine the principal's incapacity helps protect the "principal's privacy and facilitates acceptance of springing powers by third persons."<sup>221</sup>

The UPOAA also provides the default method for determining and verifying a principal's incapacity if the principal has not designated any person to make the determination or such person is unable or unwilling to make the determination.<sup>222</sup> In such a case, a physician or licensed psychologist can determine that the principal is

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that the principal has authority to delegate[; or (8) disclaim property, including a power of appointment].

*Id.* (alterations in original).

215. *Id.* §§ 116–17, 8B U.L.A. 209, 211.

216. *Id.* § 109(a)–(b), 8B U.L.A. 196–97.

217. *Id.* § 109(a), 8B U.L.A. 196.

218. *Id.* ("A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.")

219. *Id.* § 109(b), 8B U.L.A. 197.

220. *Id.* § 109(d), 8B U.L.A. 197; *see also* § 109 cmt., 8B U.L.A. 197 (explaining that a power of attorney also acts as a personal representative of the individual).

221. Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, 3 NAELA J. 1, 15–16 (2007) [hereinafter Whitton, *Navigating*].

222. UNIF. POWER OF ATT'Y ACT § 109(c), 8B U.L.A. 197.

incapacitated.<sup>223</sup> Incapacity is defined in the UPOAA as the “inability of an individual to manage property or business affairs because the individual [] has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance . . . .”<sup>224</sup>

## 2. Provisions Intended to Protect Against Financial Exploitation

Partly as a result of horror stories about agents who exploited their principals using powers of attorney, the NCCUSL studied power of attorney abuse prior to working on the UPOAA.<sup>225</sup> The NCCUSL surveyed attorneys about power of attorney abuse, and 81 percent responded that power of attorney statutes should include safeguards against abuse by agents.<sup>226</sup> This potential for power of attorney abuse has caused much concern for states considering adopting the UPOAA.<sup>227</sup> They are as concerned about the potential for financial abuse as they are about promoting principal autonomy.<sup>228</sup> To address these concerns, the UPOAA contains a number of provisions intended to protect against financial exploitation.<sup>229</sup>

One set of provisions in the UPOAA addresses transactions that exceed the intended scope of authority granted to an agent.<sup>230</sup> The requirement that hot powers be expressly granted, rather than implied, eliminates any argument that a general grant of authority was intended to authorize these potentially dangerous transactions.<sup>231</sup> Furthermore, the standardized definitions of the types of authority granted in a power of attorney provide a “common field of understanding from which to interpret a power of attorney.”<sup>232</sup> This statutory clarity helps “reduce[] the risk that agents will unintentionally exceed [their scope of] authority but also provide[] [justification] to third persons who wish to reject the power of attorney because it does not authorize the desired transaction.”<sup>233</sup> An agent who succeeds in exceeding their scope of authority is subject to the mandatory duties prescribed in the UPOAA and may be found

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223. *Id.* § 109(c)(1), 8B U.L.A. 197 (alteration in original).

224. *Id.* § 102(5)(a), 8B U.L.A. 184–85.

225. Failinger, *supra* note 20, at 138.

226. Whitton, *National Durable Power of Attorney Survey*, *supra* note 105, at 13.

227. *Id.*

228. Whitton, *Striking a Balance*, *supra* note 84, at 355.

229. *Id.*

230. *Id.* at 355–56.

231. *Id.* at 356.

232. *Id.*

233. *Id.*

civily liable and, by extension, criminally prosecuted.<sup>234</sup> Finally, the UPOAA provides improved means for detecting power of attorney abuse.<sup>235</sup>

A second set of provisions in the UPOAA addresses transactions an agent conducts for a self-dealing purpose.<sup>236</sup> A transaction may “actually [be] within the agent’s scope of authority, but which is conducted for the agent’s benefit without the principal’s permission to self-deal.”<sup>237</sup> The UPOAA includes several default duties that bar an agent from engaging in self-dealing transactions unless modified by the power of attorney.<sup>238</sup> The UPOAA contains additional proscriptions against self-dealing by non-family-member agents.<sup>239</sup> One means of stopping this difficult to prevent abuse is found in UPOAA provisions allowing a third party to refuse a power of attorney if they have a good-faith belief that a principal may be subject to abuse.<sup>240</sup> A related requirement that such suspected abuse be reported to Adult Protective Services may prevent an attempt by the agent to conduct the abusive transaction at another location.<sup>241</sup>

A final set of provisions in the UPOAA addresses “transactions conducted in contravention of the principal’s expectations.”<sup>242</sup> This type of transaction is perhaps the most difficult to redress because the transaction may have been within the scope of authority granted in the power of attorney and may not constitute self-dealing.<sup>243</sup> Three

234. *Id.*

235. *Id.* at 357. The improved means of detection are as follows:

- (1) adult protective services, or equivalent government agency, has standing to request an agent accounting; (2) any person who demonstrates sufficient interest in a principal’s welfare may petition a court to construe a power of attorney or review an agent’s conduct; and (3) a person may refuse an otherwise valid power of attorney if the person in good faith believes that the principal may be subject to . . . abuse . . . and a report is made to adult protective services.

*Id.*

236. Whitton, *Striking a Balance*, *supra* note 84, at 345.

237. *Id.* at 357.

238. *Id.* at 358.

239. *Id.* (citing UNIF. POWER OF ATT’Y ACT § 201(b), 8B U.L.A. 226).

240. *Id.* at 353–54 (citing UNIF. POWER OF ATT’Y ACT § 120(b)).

241. *Id.* at 358.

242. *Id.* at 345.

243. *Id.* at 359. Professor Whitton recounts the story of Ronald Slomski as an example. Slomski’s mother, using the power of attorney he granted her, changed the beneficiaries on his pension plan from his step-daughters to his siblings. The power of attorney authorized the agent to exercise all powers with respect to retirement

provisions of the UPOAA help protect against this type of abuse. First, as an example, a hot power like changing beneficiary designations must be expressly granted and cannot be “implied from a general grant of authority to deal with ‘insurance and annuities.’”<sup>244</sup> Second, the UPOAA requires agents, to the best of their knowledge, to perform as the principal reasonably expects.<sup>245</sup> Third, an agent must aim “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.”<sup>246</sup>

### 3. Provisions Intended to Preserve the Principal’s Autonomy

The UPOAA preserves principal autonomy by providing choices for principals and encouraging implementation of those choices by agents and third parties.<sup>247</sup> A successful power of attorney “depends on how effectively the scope of authority is delineated, how faithfully the agent acts to manifest the principal’s expectations, and how willing third persons and would-be surrogates are to honor the principal’s choice of agent.”<sup>248</sup> To that end, the UPOAA contains a number of provisions intended to facilitate a principal’s autonomous choice and a surrogate’s implementation of a principal’s choices and goals.<sup>249</sup> These provisions give a principal the flexibility to determine how to delegate authority, provide “clear guidelines for agent conduct,” and protect a “principal’s surrogate decision making plan.”<sup>250</sup>

The UPOAA contains detailed statutory descriptions of the typical areas of authority that a principal can delegate to an agent.<sup>251</sup> A principal may enlarge or limit the defined areas of authority in either the statutory form or an individually drafted power of attorney by

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plans. Slomski’s step-daughters were also the beneficiaries under his will. According to the news account, by the time Slomski died, “[e]verything he had saved had been moved beyond the reach of the heirs designated in his will.” *Id.* (quoting Dennis B. Roddy, *Courting Trouble: The Document Granting ‘Power of Attorney’ Often Leads to Abuse*, PITTSBURGH POST-GAZETTE (Sept. 2, 2007), <http://www.post-gazette.com/news/nation/2007/09/02/Courting-Trouble-The-document-granting-power-of-attorney-often-leads-to-abuse/stories/200709020148>).

244. *Id.* at 360.

245. *Id.* (quoting UNIF. POWER OF ATT’Y ACT § 114(a)(1), 8B U.L.A. 203).

246. *Id.* (quoting UNIF. POWER OF ATT’Y ACT § 114(b)(6), 8B U.L.A. 204).

247. *Id.* at 346.

248. *Id.*

249. *Id.* at 345.

250. *Id.*

251. *Id.* at 346.

adding specific language to the document.<sup>252</sup> Certain areas of authority require a principal's express grant of authority to an agent.<sup>253</sup> These powers were selected because of their potential danger: "dissipating the principal's property and altering the principal's estate plan."<sup>254</sup> Thus, their grant to an agent should be intentional and based on a principal's objectives.<sup>255</sup> The hot powers (with the exception of gifting authority) are not statutorily defined, giving a principal the incentive to further define or limit these powers in the document.<sup>256</sup>

A principal's expectations regarding the conduct of his or her agent are given paramount importance in the UPOAA.<sup>257</sup> One of the three mandatory duties an agent has is to "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."<sup>258</sup> A "principal's reasonable expectations, if known, trump the 'best interest' [standard] for agent conduct."<sup>259</sup> For example, principals who have expressed their wishes regarding long-term care housing or donative activities should have their wishes honored, without analysis by the agent of the principal's best interests.<sup>260</sup> The UPOAA contains other default duties an agent owes to a principal unless modified in the power of attorney.<sup>261</sup> A principal can expressly allow an agent to engage in self-dealing transactions, for example, where it would be prohibited by default.<sup>262</sup> Ultimately, the UPOAA encourages a principal to make his or her expectations regarding agent conduct known, protecting the self-determination interests of the principal.<sup>263</sup>

The UPOAA seeks to protect a principal's surrogate decision-making plan in two ways. First, the UPOAA revised a provision contained in the UDPOAA that gives a court-appointed fiduciary the power to revoke or amend a power of attorney.<sup>264</sup> The UDPOAA provision provided an opportunity for "would-be surrogates" to

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252. *Id.* at 346–47.

253. *Id.*

254. *Id.* at 348.

255. *Id.* at 349.

256. *Id.*

257. *Id.*

258. UNIF. POWER OF ATT'Y ACT § 114(a)(1), 8B U.L.A. 203.

259. Whitton, *Striking a Balance*, *supra* note 84, at 350.

260. *Id.* at 349–50.

261. *Id.* at 350.

262. *Id.*

263. *Id.* at 350–51.

264. *Id.* at 351–52.



undermine the authority of a principal's selected agent.<sup>265</sup> The UPOAA provision attempts to deter this type of undermining of the agent's authority<sup>266</sup> by providing that a "power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court."<sup>267</sup> Second, the UPOAA attempts to deter "arbitrary refusals of powers of attorney by third persons such as banks and brokerage houses."<sup>268</sup> The UPOAA contains "broad protections for good-faith acceptance of a power of attorney and statutory safe harbors for good-faith refusals."<sup>269</sup> By including these liability protections, the aim is to increase acceptance of powers of attorney by financial institutions and, by doing so, honor a principal's choice of agent.

## V. STATUTORY POWER OF ATTORNEY FORMS

Opinions are mixed as to the wisdom of states authorizing statutory power of attorney forms. When surveyed in advance of the UPOAA, 59 percent of attorneys were in favor of "statutory short forms" while 41 percent disfavored them.<sup>270</sup> State-approved forms provide some potential benefits. One, they reduce the costs associated with executing the document.<sup>271</sup> Two, they are more universally recognized by third parties such as banks,<sup>272</sup> and as a result, may promote acceptance of powers of attorneys by third parties.<sup>273</sup> On the other hand, the use of statutory power of attorney forms "may result in less individualized documents and encourage the execution of documents with little or no legal counseling."<sup>274</sup>

### A. *Uniform Statutory Form Power of Attorney Act (1988)*

The Uniform Statutory Form Power of Attorney Act (Statutory Short Form) provided a "simple, non-detailed, short form" power of attorney that states could adopt and give legislative sanction to.<sup>275</sup> Like the UPC and UDPOAA preceding it, the purpose of the Statutory Short Form was to make durable powers of attorney more

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265. *Id.* at 351.

266. *Id.* at 346.

267. *Id.* at 352 (citing UNIF. POWER OF ATT'Y ACT § 108(b), 8B U.L.A. 194).

268. *Id.*

269. *Id.* at 353.

270. Whitton, *National Durable Power of Attorney Survey*, *supra* note 105, at 6-7.

271. Kohn, *supra* note 15, at 7.

272. *Id.*

273. Whitton, *National Durable Power of Attorney Survey*, *supra* note 105, at 11.

274. Kohn, *supra* note 15, at 7.

275. Federman & Reed, *supra* note 40, at 16.

practical and easy to execute.<sup>276</sup> Statutory short form powers of attorney became increasingly popular with states in the mid- to late 1980s and early 1990s.<sup>277</sup> However, some commentators were concerned that statutory short forms enhanced the potential for abuse by making powers of attorney “easier for individuals to create . . . without legal counsel.”<sup>278</sup> Indeed, Indiana rejected the statutory short form, because the state wanted to avoid any potential for abuse that could result in the execution of these documents in the absence of legal counsel.<sup>279</sup> However, the trend was to the contrary, and by 2006, 20 states and the District of Columbia provided standard, statutorily described power of attorney forms for use by principals and attorneys alike.<sup>280</sup>

### *B. Uniform Power of Attorney Act (2006) – Statutory Forms*

Article 3 of the UPOAA provides two statutory forms, both optional: a statutory power of attorney form and agent certification form.<sup>281</sup> The drafting committee, seeing the proliferation of power of attorney forms available to the public, elected to include a “statutory form on the premise that the public would be better served by a form which minimizes traps for the unwary.”<sup>282</sup> The committee also looked at the experiences of some states where state-sanctioned power of attorney forms had been used and concluded that, over time, “statutory form[s] promote[] uniformity in power of attorney practice and facilitate[] [third-party] acceptance of powers of attorney.”<sup>283</sup> The UPOAA power of attorney form is designed so that it can be used by laypersons and lawyers alike.<sup>284</sup> It uses “layperson-friendly language” while at the same time providing drafting flexibility for attorneys.<sup>285</sup>

The statutory power of attorney form follows the default rule provided in Section 109(a) of the UPOAA that a power of attorney is

276. *Id.*

277. *See id.* at 19 (listing fifteen states that adopted statutory short form powers of attorney between 1983 and 1993).

278. *Id.* at 20.

279. *Id.* at 20–21 (first alteration in original) (internal quotation marks omitted).

280. *See Kohn, supra* note 15, at 6–7 (citing the state code sections providing model power of attorney forms).

281. UNIF. POWER OF ATT’Y ACT §§ 301, 302, 8B U.L.A. 250–55, 260–61 (2014).

282. Whitton, *National Durable Power of Attorney Survey, supra* note 105, at 11.

283. *Id.* (naming Illinois and New York as examples); *see also* UNIF. POWER OF ATT’Y ACT art. 3 cmt., 8B U.L.A. 250.

284. Whitton, *Navigating, supra* note 221, at 11.

285. *Id.*

effective immediately.<sup>286</sup> However, a principal or drafting attorney can modify the language to make the power of attorney springing.<sup>287</sup> Under "Important Information" directed to the principal, the form states: "This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions."<sup>288</sup> Later in the form, under "Effective Date", the same statement is essentially repeated: "This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions."<sup>289</sup> Finally, the principal or drafting attorney is given this direction under "Special Instructions (Optional): You may give special instructions on the following lines."<sup>290</sup>

A drafting attorney may recognize this inconspicuous invitation to use the form's Special Instructions to draft against the default rule and include springing language with a clearly-defined means for determining the principal's future incapacity. However, a principal may not recognize the invitation or the various consequences. First, the principal may not know that a springing power of attorney, one that goes into effect upon his or her incapacity, is even an option. Second, the principal may not fully understand the meaning of *this power of attorney is effective immediately*. A layperson's interpretation of this phrase may simply be that the document, like any other legal document, is effective when it is signed. A principal may not interpret the phrase to mean what it precisely means; that, the principal's execution of the document grants his or her agent the immediate authority to act with the principal's finances and property. Third, if a principal recognizes the invitation to make the power of attorney springing, he or she is not given any direction or suggested language to effectively define the future effectiveness of the agent's authority.

Section 302 of the UPOAA provides an optional agent's certification form.<sup>291</sup> The form may be used by an agent to certify, under penalty of perjury, certain facts concerning a power of attorney.<sup>292</sup> A person who is asked to accept a power of attorney may request and rely upon an agent's certification of any factual matter concerning the principal, agent, or power of attorney.<sup>293</sup> One of the

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286. UNIF. POWER OF ATT'Y ACT § 109, cmt., 8B U.L.A. 197.

287. *Id.* § 109(a), 8B U.L.A. 196.

288. *Id.* § 301, 8B U.L.A. 250-51.

289. *Id.* § 301, 8B U.L.A. 253.

290. *Id.*

291. *Id.* § 302, 8B U.L.A. 260.

292. *Id.*

293. UNIF. POWER OF ATT'Y ACT § 5B-119, 8B U.L.A. 310-11.

facts the form allows an agent to certify is “if the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred.”<sup>294</sup> Consequently, for springing powers of attorney, third parties may request and rely upon an agent’s certification that the event or contingency—the principal’s incapacity—has occurred.<sup>295</sup>

## VI. IMMEDIATE VS. SPRINGING POWERS OF ATTORNEY

Many people harbor differing opinions as to “whether a power of attorney should be immediately effective or ‘springing.’”<sup>296</sup> In advance of the UPOAA, attorneys were surveyed and asked “whether their clients prefer immediately effective or springing powers of attorney.”<sup>297</sup> Sixty-one percent of attorneys responded that their clients prefer immediately effective powers of attorney, 23 percent responded that their clients prefer springing powers of attorney, and 16 percent saw no trend.<sup>298</sup> Nine out of ten attorneys responded that a power of attorney statute should permit springing powers of attorney.<sup>299</sup> So, while nearly all attorneys think springing powers should be permitted, most also report their clients prefer immediately effective powers.<sup>300</sup>

Immediately effective powers of attorney offer several advantages. Many attorneys prefer this approach because they provide maximum flexibility to the agent acting in the interest of the principal.<sup>301</sup> A principal has the “convenience benefit of having a surrogate [decision-maker in place] who can act when it is logistically difficult

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294. UNIF. POWER OF ATT’Y ACT § 302, 8B U.L.A. 260.

295. California may have originated the concept of an agent’s certification form. In 1989, the California Law Revision Commission recommended “a simple statutory validation of springing powers of attorney that would protect third persons who act in reliance on a written declaration that the power is effective.” *Recommendations Relating to Powers of Attorney*, 20 CAL. L. REVISION COMM’N REPORTS 405, 411 (1990), <http://clrc.ca.gov/pub/Printed-Reports/Pub163.pdf> [hereinafter *Recommendations*].

296. Whitton, *National Durable Power of Attorney Survey*, *supra* note 105, at 13.

297. *Id.* (footnote omitted).

298. *Id.* at 6; see also UNIF. POWER OF ATT’Y ACT § 109 cmt, 8B U.L.A. 197–98.

299. Whitton, *National Durable Power of Attorney Survey*, *supra* note 105, at 7.

300. *Id.* at 6–7. While a survey of attorneys about their clients’ preferences is instructive, a direct survey of the general public about their assumptions and preferences regarding powers of attorney is needed. For a person who is contemplating executing a power of attorney, when do they assume their agent’s authority will begin? For a person who is given a choice between immediate and springing effectiveness, what is their preference?

301. Kohn, *supra* note 15, at 4–5.

for the principal to [act, perhaps because of a] temporary absence or [period of] incapacity.”<sup>302</sup> A principal can also “test drive” the power of attorney while they still have capacity to assess the agent’s trustworthiness, skills, and judgment to determine if the agent can and will carry out the principal’s wishes.”<sup>303</sup> When the power of attorney is effective immediately, it gives a principal the opportunity to discuss his expectations with the agent and to delegate some decision-making responsibilities to the agent while the principal has capacity.<sup>304</sup> And, by executing “an immediately effective power of attorney,” a principal “avoids the stigma of the triggering event”—his or her incapacity—and having to determine how that incapacity is to be verified.<sup>305</sup> In contrast, springing powers of attorney “are seen as cumbersome for the agent” because of the need to provide “proof of the triggering event” to third parties before being allowed to act under the power of attorney.<sup>306</sup>

The primary justifications for a springing power of attorney are the principal’s “self-determination and privacy interests.”<sup>307</sup> Many principals prefer springing powers of attorney in order to maintain privacy and hope that they will never need someone else to make decisions on their behalf.<sup>308</sup> When planning for the possibility of later incapacity, a principal may not want to give up current control of his or her financial affairs.<sup>309</sup>

Some principals prefer springing powers of attorney for another reason—“the agent’s access to the principal’s [“treasure”] can be delayed until surrogate management is necessitated by [the principal’s] incapacity, which may never occur.”<sup>310</sup> Professor Whitton questions “the common sense wisdom of this approach” because it comes at the cost of the more important long-term consideration of the principal discussing their expectations, personal values, preferences, and objectives with their agent.<sup>311</sup> The suggestion is that a springing power of attorney, with its delayed effectiveness, may discourage or delay a principal from having a

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302. Whitton, *National Durable Power of Attorney Survey*, *supra* note 105, at 13.

303. *Id.*

304. *Id.*

305. *Id.* at 13–14.

306. Kohn, *supra* note 15, at 5.

307. Whitton, *National Durable Power of Attorney Survey*, *supra* note 105, at 14.

308. UNIF. POWER OF ATT’Y ACT § 109 cmt., 8B U.L.A. 197–98.

309. Whitton, *Navigating*, *supra* note 221, at 14.

310. Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 19–20 (2007) [hereinafter Whitton, *Durable Powers*].

311. *Id.* at 20.

conversation with their agent regarding the principal's expectations.<sup>312</sup> However, the opposite may be true—an immediately effective power of attorney discourages that important discussion.<sup>313</sup>

Some principals execute powers of attorney and don't inform their intended agents.<sup>314</sup> Some execute an immediately effective power of attorney only to leave the document with their lawyer for safekeeping who is authorized to release it to the principal's agent upon the incapacity of the principal.<sup>315</sup> These "secret powers" are detrimental for two reasons. One, the agent may be unable or unwilling to serve when they are needed.<sup>316</sup> Two, an agent who is willing to serve may not know the principal's expectations and thus the agent cannot fully effectuate the principal's objectives.<sup>317</sup>

The reason a principal secretes his power of attorney away may be that he was hesitant to grant an immediately effective power of attorney in the first place.<sup>318</sup> Why would a principal be wary of executing an immediately effective power of attorney? One, he may be afraid of losing his independence and allowing someone else to control his property and finances. Two, he may be concerned about being exploited by his agent. This hesitance causes the principal to keep the power of attorney away from his agent.<sup>319</sup> A principal who is fearful of sharing the power of attorney document with his or her agent is not likely to have an open and frank discussion with the agent about the principal's expectations.<sup>320</sup>

Rather than damper, springing powers of attorney may actually encourage a principal to discuss his wishes and expectations with his selected agent. Any wariness a principal has about losing control or being exploited is eased by the fact that the power of attorney goes into effect only if the principal is incapacitated.<sup>321</sup> The principal may be more comfortable talking about future decision making, which may never be needed, rather than present decision making. The principal may also be able to link the conversation to other advance

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312. *Id.*

313. Kohn, *supra* note 15, at 5.

314. Whitton, *Durable Powers*, *supra* note 310, at 20.

315. Kohn, *supra* note 15, at 5 (pointing out the "host of ethical and practical problems" that this type of arrangement raises).

316. Whitton, *Durable Powers*, *supra* note 310, at 20.

317. *Id.*

318. *Recommendations*, *supra* note 295, at 410.

319. *Id.* ("[T]here is no reason to force people into selecting this arrangement rather than a relatively simple springing power of attorney.").

320. Whitton, *Durable Powers*, *supra* note 310, at 20.

321. *See* Failingler, *supra* note 20, at 15.

decision-making instruments.<sup>322</sup> For example, the principal may have completed a living will at the same time he or she completed a springing power of attorney. With a living will, it is crucial that the principal discuss his wishes regarding end-of-life decisions with his proxy.<sup>323</sup> The principal can start the conversation, perhaps about both documents, with his or her agents/proxies by simply stating, “Here’s what I want to happen *if . . .*.”

#### A. *Ascertaining a Principal’s Incapacity*

Some commentators have pointed out that springing powers of attorney are problematic because of the difficulty in determining the triggering event—the principal’s incapacity.<sup>324</sup> Determining incapacity may be a challenge because people often experience a steady decline in mental capacity.<sup>325</sup> Moreover, it may be hard to determine when a person crosses that threshold and becomes incapacitated.<sup>326</sup> Adding to the problem, “a person’s competency may vary depending on the day or time of day.”<sup>327</sup> A principal and his or her family could eventually end up in court needing a judicial determination of capacity, “defeat[ing] one of the advantages of the durable power of attorney.”<sup>328</sup>

While determining incapacity can be difficult, there are several ways the problem can be alleviated. First, lawyers can, and really should, draft precise language in a springing power of attorney “specifically delineat[ing] how the principal is to be declared incompetent.”<sup>329</sup> It could be as simple as borrowing language already found in the Uniform Power of Attorney Act (UPOAA). As discussed previously, the UPOAA includes a statutory default that a physician can determine and provide written verification that a principal is incapacitated.<sup>330</sup> Another approach, borrowed from

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322. See Susan Martyn & Lynn Balshone Jacobs, *Legislating Advanced Directives for the Terminally Ill: The Living Will and Durable Power of Attorney*, 63 NEB. L. REV. 776, 797 (1984) (discussing the benefit of executing a living will in conjunction with a durable power of attorney).

323. See, e.g., ALA. CODE § 22-8A-4(b) (LexisNexis 2006) (requiring a proxy to accept his appointment in writing); *id.* § 22-8A-4(h) (providing this statement in the statutory Advance Directive for Health Care form, next to where the principal initials his intent to appoint a proxy, “I have talked with this person about my wishes”).

324. Christiansen, *supra* note 39, at 403.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. UNIF. POWER OF ATT’Y ACT § 109(c)(1), 8B U.L.A. 197.

guardianship law, is to articulate more specific and clear statutory definitions of incapacity.<sup>331</sup> The UPOAA seems to have accomplished this by including a statutory definition of incapacity.<sup>332</sup> This definition could be adopted uniformly by states and incorporated in springing power of attorney documents.

Principals can also specify in a springing power of attorney how their incapacity is to be determined. The principal can name a person who is authorized to determine the principal's incapacity, and state how that determination is to be made and verified. The nominated person, if asked by a third party, can certify that the contingency in the power of attorney (the principal's incapacity) has occurred using the sworn affidavit provided in the UPOAA.<sup>333</sup>

Certifying a person's incapacity, while difficult, is also not uncommon when viewed within the overall context of advance decision-making legal documents. Healthcare powers of attorney are one example. For healthcare powers of attorney, a principal's incapacity must be established before someone else is legally authorized to make medical decisions for the principal.<sup>334</sup> An agent's authority under a healthcare power of attorney is not effective unless the principal lacks capacity.<sup>335</sup> The same concept and methodology holds true for springing powers of attorney.

Finally, as a last resort, a court could determine if a principal has become incapacitated. While this eventuality would defeat the purpose of a durable power of attorney, durable powers were not intended to completely replace court involvement. Durable powers of attorney were conceived as alternatives to, not as substitutes for, guardianship or conservatorship proceedings.<sup>336</sup> The drafters of the Model Special Power of Attorney for Small Property Interests Act of 1964 were clear on this point. The durable power of attorney was not "intended wholly to replace conservatorship or guardianship, but rather it [was] designed as a less expensive alternative."<sup>337</sup> And in 1979, the drafters of the UDPOAA concurred: "When the [UPC] was

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331. Failing, *supra* note 20, at 15 (noting that many principals are adopting springing powers of attorney).

332. UNIF. POWER OF ATT'Y ACT § 102(5), 8B U.L.A. 184–85.

333. *Id.* § 109(b), 8B U.L.A. 197.

334. See Dorothy D. Nachman, *Living Wills: Is it Time to Pull the Plug?*, 18 ELDER L. J. 289, 316 (2011).

335. *Id.*

336. Seal, *supra* note 11, at 310.

337. See Boxx, *supra* note 16, at 7 (quoting MODEL SPECIAL POWER OF ATT'Y FOR SMALL PROP. INTERESTS ACT prefatory note (1964)).



originally drafted, the dominant idea was that durable powers would be used as *alternatives* to court-oriented, protective procedures.<sup>338</sup>

### B. *Choosing a Trustworthy Agent*

When executing a power of attorney, selecting a trustworthy, honest, reliable agent is critical.<sup>339</sup> The UPOAA drafting committee considered this the primary reason for making immediate effectiveness the default rule. “The default rule reflects a ‘best practices’ philosophy that any agent who can be trusted to act for the principal under a springing power of attorney should be trustworthy enough to hold an immediate power.”<sup>340</sup> If a principal mistrusts a prospective agent enough to avoid granting them immediate authority, the principal should rethink their choice of agent rather than grant them springing authority.<sup>341</sup> Practically, however, principals often find it difficult to identify a trustworthy agent.<sup>342</sup> Nor can we guarantee that those who hold power over us “will be predictable or faithful.”<sup>343</sup> Even a stereotypically ideal agent under a power of attorney can be untrustworthy. In one case, a city council member, family accountant, financial advisor, agent under power of attorney, and trustee who was authorized by a judge to manage an incompetent person’s business affairs was charged with stealing \$248,000 from the person’s accounts and trust.<sup>344</sup>

### C. *Statutory Defaults and Forms Should Assume No Attorney/Client Relationship*

Both immediately effective and springing powers of attorney have advantages and disadvantages. Ideally, these advantages and disadvantages are discussed when a client retains the services of a lawyer to prepare the document.<sup>345</sup> However, statutory defaults

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338. UNIF. DURABLE POWER OF ATT’Y ACT prefatory note (superseded 2006), 8A U.L.A. 374.

339. Seal, *supra* note 11, at 318–20 (discussing a case in which the Colorado Supreme Court reasoned that a rule placing the risk of an agent’s abuse of a power of attorney on the principal rather than on an innocent third party “increases the principal’s incentive to exercise care in selecting honest and reliable agents”) (quoting Willey v. Mayer, 876 P.2d 1260, 1266 (Colo. 1994)).

340. UNIF. POWER OF ATT’Y ACT § 109 cmt., 8B U.L.A. 197.

341. Whitton, *Durable Powers*, *supra* note 310, at 20.

342. *Id.* at 18.

343. Failingler, *supra* note 20, at 10.

344. Christiansen, *supra* note 39, at 389. See *infra* Part VII.B.3 for the story of “Gladys.”

345. See Whitton, *Durable Powers*, *supra* note 310, at 19 (“Careful planning requires considering not only the scope of authority for original and successor agents, but also

should not be premised on the assumption that a lawyer/client relationship exists. Today, numerous do-it-yourself sources provide power of attorney documents to individuals as an alternative to consulting with an attorney.<sup>346</sup> These do-it-yourself forms come with a heightened risk of power of attorney abuse.<sup>347</sup> Below, this Article contrasts a typical abuse situation with one in which an attorney would be involved. Statutory defaults should be premised on the assumption that a lawyer is not being consulted to prepare the document, and the client is not receiving any advice concerning immediate or springing authority.

### 1. The Typical Scenario = High Risk of Financial Exploitation

The following hypothetical represents a typical power of attorney abuse situation. The principal and soon-to-be victim is 82 years old.<sup>348</sup> The principal/victim is female.<sup>349</sup> We will call her Mrs. Smith, a widow. She has a high income.<sup>350</sup> Mrs. Smith has been experiencing some diminished cognitive functioning over the past few years.<sup>351</sup> The agent and soon-to-be perpetrator of power of attorney abuse is an adult child or other family member.<sup>352</sup> We will call the agent Jane, Mrs. Smith's 55-year-old daughter.<sup>353</sup>

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whether that authority should become effective immediately or upon a later event such as the principal's incapacity.").

346. Seal, *supra* note 11, at 313 & n.17 (illustrating the readily available sources for power of attorney forms on the internet).
347. Dessin, *supra* note 37, at 584.
348. Nearly three-quarters of people age 80 or older have a power of attorney. Kohn, *supra* note 15, at 7. Of victims 60 years of age and older, 42.8 percent were 80 years of age or older. Teaster et al., *supra* note 41, at 6.
349. It is likely that principals are disproportionately women because women have a longer life expectancy than men. Kohn, *supra* note 15, at 7–8. States reported that 65.7 percent of elder abuse victims were female. Teaster et al., *supra* note 41, at 6.
350. A fairly consistent finding of studies investigating what factors tend to be associated with signing a power of attorney is that individuals with higher incomes are more likely to execute a power of attorney than individuals with low incomes. Kohn, *supra* note 15, at 8.
351. Individuals experiencing cognitive decline are more likely to execute a power of attorney than those who are not experiencing cognitive decline. *Id.*
352. The typical agent under a power of attorney is either the spouse or adult child of an elderly principal. *Id.* Even if the hypothetical Mrs. Smith's spouse was still living, there is evidence to suggest that she would select an adult child as her surrogate decision-maker instead of her spouse. *Id.* The most common relationship of elder abuse victims to alleged perpetrators is parent/child and other family members. Teaster et al., *supra* note 41, at 6.
353. When a senior selects an adult child as surrogate decision-maker, it is more likely to be a daughter than a son. Kohn, *supra* note 15, at 9.

Jane realizes that her mother, with her declining mental capacity, needs assistance taking care of her own finances. Jane searches the Internet, finds, and downloads a power of attorney form. She fills out the form, takes it to her mother, and tells her that she (Jane) needs to be able to help take care of her finances. Mrs. Smith signs the power of attorney, and it is notarized.<sup>354</sup> The power of attorney is durable.<sup>355</sup> It grants the agent broad decision-making authority over the principal's finances and property, including real property.<sup>356</sup> Jane's authority to deal with her mother's finances and property is effective as soon as Mrs. Smith signed the power of attorney.<sup>357</sup>

Jane has never seemed able to hold down a job for any length of time. When she loses her most recent job, she decides to move in with her mother.<sup>358</sup> Unfortunately, things only get worse for Jane. She can't find employment. She starts to drink heavily. She frequents the local casino and quickly goes into debt. She starts to use the power of attorney to withdraw money from her mother's checking account, and eventually closes her savings accounts and CDs and deposits the proceeds into Jane's own accounts. However, Jane continues to go deeper into debt. She executes a deed, using the power of attorney, conveying her mother's home to herself. Finally, feeling her mother would be safer living in a nursing home, Jane sells the home and forces Mrs. Smith to move into a nursing home.<sup>359</sup> All totaled, Jane exploits her mother for \$145,768.<sup>360</sup>

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354. Under the UPOAA, a notarized power of attorney creates a presumption, upon which third persons can rely, that the principal's signature is genuine. UNIF. POWER OF ATT'Y ACT § 105, 8B U.L.A. 187, 190.

355. See UNIF. POWER OF ATT'Y ACT § 104, 8B U.L.A. 187, 189 (making durability the default position).

356. Powers of attorney often grant agents broad decision-making authority over a principal's finances and property. Stiegel & Klem, *supra* note 14, at 5. Under the UPOAA, a general grant of authority authorizes the agent to deal with the principal's real property. UNIF. POWER OF ATT'Y ACT § 204, 8B U.L.A. 231–32.

357. See UNIF. POWER OF ATT'Y ACT § 109(a), 8B U.L.A. 196 (making immediate effectiveness the default position).

358. Most elder abuse reports (89.3 percent) occurred in a domestic setting. Teaster et al., *supra* note 41, at 6.

359. "In most states, for example, an agent who felt her mother would be safer living in a nursing home could force an unwanted move by using the DPOA to sell the mother's house without so much as notifying her." Kohn, *supra* note 15, at 1.

360. In a study of 79 elder financial abuse cases, the average amount of money exploited by family, friends, neighbors, or caregivers was \$145,768. *MetLife Study*, *supra* note 64, at 8.

## 2. No Legal Counseling = Higher Risk of Exploitation

As the above hypothetical illustrates, it is easy to prepare a power of attorney without the benefit of legal advice.<sup>361</sup> Form documents are available on the Internet and from other do-it-yourself resources.<sup>362</sup> No longer are power of attorney forms found just at “stationery stores.”<sup>363</sup> “Many people make a [power of attorney] without fully understanding its inherent risks,” enhancing the likelihood of exploitation.<sup>364</sup> And not having a lawyer prepare a power of attorney heightens the risk of exploitation. Lawyers who draft powers of attorney for elderly clients help prevent financial abuse in several ways.<sup>365</sup> First, lawyers have certain ethical duties which reduce the risk of exploitation.<sup>366</sup> Second, a power of attorney document can be drafted with “built-in safeguards” to avert abuse.<sup>367</sup> Third, attorneys can counsel their clients on options the client might choose to reduce the risk of abuse.<sup>368</sup> A statutory power of attorney form executed without the benefit of legal advice comes with none of these protections.<sup>369</sup>

### The 4 C’s of Elder Law Ethics

Attorneys who regularly deal with elderly clients follow what are referred to as the “Four C’s” of elder law ethics.<sup>370</sup> The “Four C’s” are: client identification, conflicts of interests, confidentiality, and competency.<sup>371</sup> Each of these C’s represents an ethical duty owed by

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361. Stiegel & Klem, *supra* note 14, at 5.

362. *Id.*

363. English & Wolff, *supra* note 34, at 33 (writing, in 1996, “DPA forms are readily available and can be found at most stationery stores”).

364. Stiegel & Klem, *supra* note 14, at 5.

365. Ellen J. Henningsen, *Preventing Financial Abuse by Agents Under Powers of Attorney*, 73 WIS. LAW. 25, 25–27 (2000).

366. Lemke & Moskowitz, *supra* note 135, at 5, 11.

367. Black, *supra* note 59, at 308.

368. Henningsen, *supra* note 365, at 26, 28.

369. Stiegel & Klem, *supra* note 14, at 5.

370. ABA Comm’n on Law and Aging, *Understanding the Four C’s of Elder Law Ethics*, ABA (2011), available at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011\\_aging\\_4c\\_broch\\_jul\\_25\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_4c_broch_jul_25_2011.authcheckdam.pdf) [hereinafter *Understanding the Four C’s*].

371. *Id.*

an attorney to his or her client.<sup>372</sup> By adhering to these duties, attorneys can help protect their clients from financial exploitation.<sup>373</sup>

Elder law attorneys aspire “to identify who [their] client is at the earliest possible stage and communicate[] that information to the persons immediately involved.”<sup>374</sup> An attorney owes “professional duties of competence, diligence, loyalty and confidentiality” to the client.<sup>375</sup> The first step to the attorney-client relationship is identifying the elderly client.<sup>376</sup> “This is [particularly] important in Elder Law, because family members may be very involved in the legal concerns of [an elderly client], and they may even have a stake in the outcome.”<sup>377</sup> Elder law attorneys “exercise care to observe signs of undue influence,” and when undue influence appears, “take steps to ensure [their client] is protected.”<sup>378</sup>

To fulfill this duty, it is best that lawyers meet with their clients alone.<sup>379</sup> Elder law attorneys aspire to meet with the prospective client “in private at the earliest possible stage so that the client’s . . . voice can be engaged unencumbered” and uninfluenced by others.<sup>380</sup> Meeting with the client alone, not in the presence of a prospective agent, helps “ensure that the client is able to express his [or her] own wishes” (not the agent’s) regarding a power of attorney.<sup>381</sup> When an elderly client’s family members are involved, a lawyer should take direction from the client, not the family.<sup>382</sup> Though it seems elementary, it bears saying that attorneys “should not draft powers of attorney . . . for non-clients who will be executing the documents,” but should establish an “attorney-client relationship [with] the senior prior to execution.”<sup>383</sup>

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372. *Id.*

373. Lemke & Moskowitz, *supra* note 135, at 5 (discussing how knowing and applying the “Four C’s” of elder law ethics helps safeguard clients from financial exploitation).

374. Nat’l Acad. of Elder Law Attorneys, *Aspirational Standards for the Practice of Elder Law with Commentaries*, 2 NAELA J. 5, 7 (2005), available at [http://www.naela.org/App\\_Themes/Public/PDF/Media/AspirationalStandards.pdf](http://www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf) [hereinafter *Aspirational Standards for the Practice of Elder Law*].

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.* at 12.

379. Henningsen, *supra* note 365, at 26.

380. *Aspirational Standards for the Practice of Elder Law*, *supra* note 374, at 8.

381. Henningsen, *supra* note 365, at 26.

382. Betsy J. Abramson, *Ethical Considerations in Elder Law Cases*, 73 WIS. LAW. 16, 16 n.3 (2000) (citing a disciplinary proceeding against an attorney who “transferr[ed] a client’s property on the instruction of family members only, never meeting with the client, because the [attorney] ‘did not make house calls’”).

383. *Aspirational Standards for the Practice of Elder Law*, *supra* note 374, at 10.

Attorneys have an ethical duty to avoid conflicts of interest.<sup>384</sup> “[I]n most situations, [this means that] a lawyer may only represent one individual.”<sup>385</sup> In drafting a power of attorney, a lawyer should identify that individual as the senior, the principal.<sup>386</sup> “If there is no apparent conflict of interest, joint representation, [perhaps of spouses,] may be a preferred form of representation.”<sup>387</sup> Attorneys should ensure that family members understand who the clients are and the implications of separate or joint representation, “especially with respect to the attorney’s obligation to keep or share confidences.”<sup>388</sup> A lawyer may also represent a fiduciary, perhaps an agent under power of attorney, in their fiduciary capacity.<sup>389</sup> Elder law attorneys take care when representing a fiduciary to ensure the fiduciary is acting according to the “known wishes and best interest of the principal.”<sup>390</sup>

Attorneys have a basic obligation to keep information relating to the representation of a client confidential unless the client consents to disclosure.<sup>391</sup> Elder law attorneys aspire to explain the duty of confidentiality to the client and any other interested party early in the representation “to avoid misunderstanding[s], and to [determine] the client’s wishes regarding disclosure of confidential information.”<sup>392</sup> If a client requests disclosure, the attorney should counsel the client on the “possible risks and consequences of disclosure.”<sup>393</sup> For example, if a client asks the attorney to discuss the client’s matter with only one of the client’s children, the attorney should explain that disclosure “could raise issues of undue influence or overreaching on the part of that child.”<sup>394</sup> In sum, elder law attorneys aspire to “[s]trictly adhere[] to the obligation of client confidentiality, especially in representation that may involve frequent contacts with family members, care takers, or other involved parties who are not clients.”<sup>395</sup>

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384. See MODEL RULES OF PROF’L CONDUCT r. 1.7 (2009).

385. *Understanding the Four C’s*, *supra* note 370.

386. *Aspirational Standards for the Practice of Elder Law*, *supra* note 374, at 10.

387. *Id.* at 10–11.

388. *Id.* at 10.

389. *Id.* at 14.

390. *Id.*

391. See MODEL RULES OF PROF’L CONDUCT r. 1.6 (2009).

392. *Aspirational Standards for the Practice of Elder Law*, *supra* note 374, at 15.

393. *Id.*

394. *Id.*

395. *Id.* at 16.

Attorneys assess and determine a client's competency (capacity) to execute a particular legal document.<sup>396</sup> There are different thresholds for the capacity required to complete a legal task depending on the type of task being undertaken.<sup>397</sup> A client may have the capacity to perform some tasks but not others.<sup>398</sup> For example, a client might have the capacity to make a will but not a contract.<sup>399</sup> The capacity required to execute a power of attorney is a contractual standard.<sup>400</sup>

Elder law attorneys may employ certain techniques to assess and determine their client's capacity to accomplish a legal task. The attorney should use "appropriate skills and processes [to] mak[e] and document[] preliminary assessments of client capacity."<sup>401</sup> The attorney may also "[a]dapt[] the interview environment, timing of meetings, communications and decision-making processes to maximize a client's capacities."<sup>402</sup> Ultimately, the attorney should consider a number of factors, "including the kind of decision [being] made and the applicable legal standard," when determining if the client has the capacity required to complete the task at hand.<sup>403</sup> Who, in the hypothetical "typical scenario," determined if Mrs. Smith had the requisite capacity to execute the power of attorney?

### Counseling the Client on Appointing Agents

Attorneys should advise their clients regarding the need to select a trustworthy agent. In addition, attorneys can counsel their clients on the options available when two or more agents are appointed: co-agents acting independently, co-agents requiring agreement, or successor agents. The Uniform Power of Attorney Act

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396. *Id.* at 23.

397. *Id.* at 20.

398. *Id.* at 19–20.

399. *Id.* at 20.

400. "Case law consistently holds that a principal who appoints an agent under a power of attorney must have the capacity required to make a contract." Lawrence A. Frolik & Mary F. Radford, "Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents, 2 NAELA J. 303, 313 (2006); see also *Yates v. Rathbun*, 984 So. 2d 1189, 1195 (Ala. Civ. App. 2007) ("[T]he standard for determining whether a person is competent to execute a power of attorney is whether that person is able to understand and comprehend his or her actions."); *In re Guardianship of Ray*, No. 657, 1991 WL 179418, at \*4 (Ohio App. Sept. 16, 1991) ("Derived from contracts law, the test to be used to determine mental capacity [to execute a power of attorney] is the ability of the principal to understand the nature, scope and the extent of the business she is about to transact.").

401. *Aspirational Standards for the Practice of Elder Law*, *supra* note 374, at 20.

402. *Id.* at 22.

403. *Id.* at 21.

“provides several default rules that merit careful consideration by the principal.”<sup>404</sup> When co-agents are appointed, the default rule is that each agent can “exercise [his or her] authority independently.”<sup>405</sup> A “principal can override the default rule by requiring coagents to act by majority or unanimous consensus.”<sup>406</sup> A requirement that co-agents agree to actions taken under the power of attorney may impede its use.<sup>407</sup> Financial institutions may be “reluctant to accept a power of attorney that names co-agents without proof that the co-agents [agree to the transaction].”<sup>408</sup> However, a requirement that co-agents agree may be exactly what a principal intends to limit the possibility of exploitation by one agent.<sup>409</sup> Attorneys help their clients weigh these agency options, considering the risks and benefits of each, and decide which one meets the client’s objectives.

### Counseling the Client on Immediate and Springing Effectiveness

“Careful planning requires considering . . . [whether an agent’s] authority should become effective immediately or upon a later event such as the principal’s incapacity.”<sup>410</sup> Individual client circumstances will dictate the need for a springing power of attorney.<sup>411</sup> Springing powers of attorney are a type of safeguard against power of attorney abuse because they “only take[] effect in specified circumstances, such as [the principal’s] incapacitation.”<sup>412</sup>

### Ensuring the Client Determines the Extent of Authority Granted to the Agent

Power of attorney abuse may be avoided by limiting the authority granted to an agent and granting only the powers needed.<sup>413</sup> Principals should carefully consider the amount of power to be granted the agent, especially the types of authority that have the

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404. UNIF. POWER OF ATT’Y ACT § 111 cmt. (2006).

405. *Id.* § 111(a).

406. *Id.* § 111 cmt.

407. *Id.*

408. Whitton, *Durable Powers*, *supra* note 310, at 18.

409. See Lemke & Moskowitz, *supra* note 135, at 10 (including the appointment of two trustworthy agents who are required to act jointly as a type of safeguard against power of attorney abuse).

410. Whitton, *Durable Powers*, *supra* note 310, at 19.

411. *Id.* at 21.

412. Lemke & Moskowitz, *supra* note 135, at 10.

413. Black, *supra* note 59, at 309.



“potential of dissipating the principal’s property or altering the principal’s estate plan.”<sup>414</sup> For that reason, “attorneys should question their elderly clients to find out exactly what he or she wishes the agent to do.”<sup>415</sup> For example, a client might want her daughter to make the client’s monthly mortgage payment if the client undergoes long-term hospitalization and rehabilitation.<sup>416</sup> Rather than draft a general power of attorney granting the daughter broad powers, a lawyer may draft a more limited power of attorney authorizing the daughter to pay the client’s bills, but “not to cash checks, withdraw money, or sell [the client’s] property.”<sup>417</sup>

The power of an agent to make unlimited gifts of the principal’s property and assets is “exceptionally dangerous” because it allows an agent to make gifts the principal may not have intended.<sup>418</sup> Lawyers should ask clients who want their agents to have gifting authority about the purpose and scope of those gifts.<sup>419</sup> “Perhaps the client . . . wants the[ir] agent to continue the client’s pattern of providing cash to children and grandchildren on birthdays and holidays.”<sup>420</sup> The attorney can then draft a gifting clause for that sole purpose.<sup>421</sup> “Gifting clauses can be limited in other ways to protect the client from financial abuse[:] . . . authorize[ing gifts] for the sole purpose of continuing an established pattern of charitable giving[,]” “clarify[ing] that the gifting [authority] is not to be used to change the [principal’s] estate plan[,]” requiring that “gifts to the principal’s children . . . [be] in equal amounts and to all at the same time[,]” requiring the agent “to provide notice to a third party of any gifts over a certain amount” or to made to the agent, or requiring the agent “to obtain the consent . . . of the principal’s children if a gift is [to be] made to the agent.”<sup>422</sup> A lawyer who counsels their client on gifting authority helps their client make an informed decision, and the attorney can then draft the document accordingly.<sup>423</sup>

### Including Oversight Provisions

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414. Whitton, *Durable Powers*, *supra* note 310, at 18.

415. Black, *supra* note 59, at 309.

416. *Id.*

417. *Id.*

418. Henningsen, *supra* note 365, at 26.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at 26–27.

423. *Id.* at 26.

By including oversight provisions, “[a]ttorneys can increase the likelihood that [power of attorney] abuse [is] discovered.”<sup>424</sup> A lawyer may want to include an express accounting requirement in the power of attorney document.<sup>425</sup> This provision sets forth the frequency with which accountings should be done and to whom the accountings should be provided.<sup>426</sup> Including a requirement to account to a third party, in addition to the principal, may be “particularly important if the principal becomes incapacitated.”<sup>427</sup> Another oversight provision a lawyer may detail in the power of attorney is one requiring the agent to keep records.<sup>428</sup> This provision should specify “which records . . . must [be kept] and for how long.”<sup>429</sup> It may also require the agent to turn over records to a designated third party if requested.<sup>430</sup>

### Ensuring the Client and the Agent Understand the Agent’s Responsibilities

A lawyer should educate his or her client about the agent’s responsibilities, “such as [a] requirement to provide . . . regular accounting[s].”<sup>431</sup> A lawyer may make the client aware of the “warning signs of financial abuse and [provide instructions on] what to do if suspicions arise,” for example, revoking the power of attorney.<sup>432</sup> Lawyers can also reduce the risk of exploitation “by educating the agent.”<sup>433</sup> Agents who are “aware of [their] responsibilities and limitations” under a power of attorney are “less likely to abuse [their authority].”<sup>434</sup> Therefore, a drafting attorney may, with the client’s consent, meet with an agent to “[d]iscuss the [agent’s] dut[ies] owed to the principal and review the [p]ower of [a]ttorney document[.]”<sup>435</sup> The drafting attorney may also include a statement of the agent’s fiduciary duties in the power of attorney and

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424. *Id.*

425. *Id.* at 27–28.

426. *Id.*

427. *Id.* at 28.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* at 25–26.

434. *Id.*

435. *Id.* at 28, 77.

have the agent sign the statement to acknowledge the agent's fiduciary duties owed to his or her principal.<sup>436</sup>

## VII. SPRINGING POWERS OF ATTORNEY PREVENT EXPLOITATION AND PRESERVE AUTONOMY

### A. *The Balance of POA Reforms Should Tip in Favor of Preventing Exploitation and Preserving Autonomy*

In 1994, commentators wrote that, over the previous thirty years, states had reformed “durable power of attorney statutes while keeping in mind [the] original purpose” of the durable power as “a simple, inexpensive financial management tool.”<sup>437</sup> Reforms had taken a “*singular direction* . . . [o]f improving the utility of the device.”<sup>438</sup> The commentators suggested “that a *more balanced approach* [would] be required for the future.”<sup>439</sup> There were few legal or administrative safeguards in place for potential victims of power of attorney abuse.<sup>440</sup> And, in fulfilling the objective of “improving the usefulness of durable powers of attorney,” policymakers had not created adequate safeguards for principals and had inadvertently opened the door to abuse.<sup>441</sup> The balanced approach suggested by the commentators included certain protective reforms.<sup>442</sup>

Twenty years later, the debate continues. Should the balance of power of attorney reforms tip in favor of usefulness and efficiency? Protecting the primary users of durable powers of attorney, the elderly, from financial abuse? Enhancing the autonomy of principals who choose to execute durable powers? This Article suggests that the balance of reforms should tip in favor of the latter two—safeguards from financial abuse and preserving principal autonomy—especially given the proliferation of fill-in-the blank power of attorney forms, downloadable from the Internet, and executed without the benefit of legal counsel. The UPOAA made strides in this direction with its provisions protecting against financial

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436. *Id.* at 26. The UPOAA statutory form contains a section explaining the agent's legal duties, but does not require an agent's acknowledging signature. UNIF. POWER OF ATT'Y ACT § 301, 8B U.L.A. 250.

437. Federman & Reed, *supra* note 40, at 1.

438. *Id.* (emphasis added).

439. *Id.* at 1–2 (emphasis added).

440. *Id.* at 1.

441. *Id.* at 24.

442. *Id.* at 2–3.

exploitation and preserving a principal's autonomy.<sup>443</sup> Making springing effectiveness of durable powers of attorney the default position in the UPOAA moves reforms further in the direction of protecting principals from abuse and preserving independent decision-making.<sup>444</sup>

Springing powers of attorney serve both purposes: preventing financial exploitation and preserving a principal's independence.<sup>445</sup> In a study funded by the AARP's Public Policy Institute (AARP Report), staff from the American Bar Association's Commission on Law and Aging, AARP staff, and an advisory committee composed of experts in power of attorney abuse "identified 21 provisions in the UPOAA that protect against abuse and promote autonomy."<sup>446</sup> One of the provisions identified in the study is "[s]ection 109 [of the UPOAA], which authorizes springing [powers of attorney] and provides guidance on how to determine whether the future event or contingency . . . has occurred."<sup>447</sup>

The AARP Report points to the triggering provisions included in section 109 of the UPOAA as promoting principals' autonomy and protecting against abuse.<sup>448</sup> When making a springing power of attorney, a principal can name a person, not necessarily the agent, "who is to determine whether the future event or contingency" (the principal's incapacity) has occurred.<sup>449</sup> A principal can specify in the power of attorney "how th[e] determination [of his or her incapacity] is to be made."<sup>450</sup> For example, a principal might require in the power of attorney that "a certain trusted physician or psychologist" be involved in determining the principal's incapacity.<sup>451</sup> If a principal is concerned about the motives of some individuals, he or she can exclude them from or "minimize their role in the determination of incapacity," and perhaps prevent abuse.<sup>452</sup> Finally, the UPOAA

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443. *Id.* at 15, 23.

444. *See id.*

445. *See* Student Note, *Planning Tools Available to the Elderly Client*, 19 AM. J. TRIAL ADVOC. 599, 604 (1995); Harry S. Margolis, *Should Your Durable Power of Attorney be "Springing,"* MARGOLIS & BLOOM, LLP (Sept. 20, 2011), <http://www.margolis.com/Our-Blog/bid/67214/Should-Your-Durable-Power-of-Attorney-be-Springing>.

446. Stiegel & Klem, *supra* note 14, at 11.

447. *Id.* at 12.

448. *Id.* at 35.

449. *Id.*

450. *Id.*

451. *Id.* at 36.

452. *Id.*

“establishes a default mechanism” for determining a principal’s incapacity if the principal decided not to name a person to make the incapacity determination or that person “is unable or unwilling to make [the] determination.”<sup>453</sup>

### *B. Springing Powers of Attorney Protect Against Exploitation*

The most effective remedy for power of attorney abuse is to prevent its occurrence.<sup>454</sup> Once it has occurred, the likelihood of the victim reporting the abuse and redressing the wrong is slim at best.<sup>455</sup> For the reasons discussed in Section II of this Article, financial exploitation often goes unreported to authorities.<sup>456</sup> One study estimated that only 1 out of 44 cases of elder financial exploitation is reported to authorities.<sup>457</sup> If power of attorney abuse is reported, as discussed in Section III, civil litigation and criminal prosecution do not provide adequate remedies for the victim.<sup>458</sup>

Therefore, prevention and mitigation should be the focus of law reform efforts to protect elders from power of attorney abuse. Arguably, with the exception of one section in the UPOAA, the Act’s provisions intended to protect against power of attorney abuse focus on the types of abuse that occur *after* an agent has begun acting for the principal.<sup>459</sup> Springing powers of attorney prevent and mitigate power of attorney abuse *before* an agent is vested with authority to act.

#### 1. A Principal May Never Become Incapacitated

To state the obvious: If a springing power of attorney never springs, there is no opportunity for an agent to misuse the power of attorney. It may be tempting to discount this by assuming that a principal who never loses capacity is not likely to be exploited, and conclude the preventive effect is minimal. However, durable power of attorney abuse is not limited to incapacitated principals. There

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453. *Id.* at 35–36 (showing how the default mechanism also helps prevent battles over determining a principal’s incapacity).

454. *See id.* at vii.

455. *See Fact Sheet: Elder Abuse Prevalence and Incidence*, *supra* note 52 (“It is estimated that for every one case of elder abuse, neglect, exploitation, or self neglect reported to the authorities, about five go unreported.”).

456. *See supra* Part II.

457. *Under the Radar: New York State Elder Abuse Prevalence Study*, *supra* note 56, at 50.

458. *See Stiegel & Klem*, *supra* note 14, at 6 (“The lack of statutory clarity about agent duties poses challenges to civil litigation and criminal prosecution.”).

459. *Id.* at 5 (pointing to section 115 of the UPOAA as the one section that protects against abuse before an agent begins acting for a principal).

seems to be an incorrect assumption that power of attorney abuse only occurs when a principal is suffering from severe incapacitation.<sup>460</sup> Principals that are not incapacitated, however, can be and are taken advantage of by abusive agents.<sup>461</sup> It may be that more mentally and physically capable principals are exploited than incapacitated ones. In 1993, the Government Law Center of Albany Law School surveyed elder law attorneys, service providers, judges, and prosecutors about power of attorney abuse.<sup>462</sup> Sixty-six percent of the respondents reported personal knowledge of power of attorney abuse incidents.<sup>463</sup> In the majority of incidents (57 percent), the abuse was perpetrated “while the principal was either still competent or had not been adjudged incompetent.”<sup>464</sup>

## 2. Third-Party Involvement May Prevent Exploitation

Banks and financial institutions can be the “first line of defense” in preventing financial abuse by detecting the abuse before an elderly person’s assets are dissipated.<sup>465</sup> Financial institutions are in a prime position to observe and report suspicious activity such as:

- An unusual volume of banking activity.
- Banking activity inconsistent with a customer’s usual habits.
- Sudden increases in incurred debt when the elder appears unaware of transactions.
- Withdrawal of funds by a fiduciary or someone else handling the elder’s affairs, with no apparent benefit to the elder.
- Implausible reasons for banking activity are given either by the elder or by the person accompanying him/her.<sup>466</sup>

Recognizing this prime position, state Adult Protective Services agencies and other organizations have revised their state laws to encourage or mandate bank personnel to report suspected elder

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460. Kohn, *supra* note 15, at 36.

461. Rhein, *supra* note 18, at 179 (providing examples of power of attorney abuse involving principals who had decision-making capacity).

462. Federman & Reed, *supra* note 40, at 28.

463. *Id.* at 37.

464. *Id.* at 39.

465. Hughes, *supra* note 69, at 294.

466. *Id.*

financial exploitation.<sup>467</sup> Other initiatives have included “bank reporting projects” to train bank personnel how to identify and report elder financial exploitation.<sup>468</sup>

Springing powers of attorney offer another line of defense to elder financial exploitation. An agent under power of attorney may “make frequent trips to his or her [elderly principal’s] bank to make deposits and withdrawals.”<sup>469</sup> If a bank is presented with a springing power of attorney as authority to conduct a transaction, it should, pursuant to the terms of the document, determine if the springing event (the principal’s incapacity) has occurred.<sup>470</sup> This determination will typically include an inquiry with the agent regarding the principal’s status and a request for written certification by the principal’s physician of the principal’s incapacity.<sup>471</sup>

This process, admittedly inconvenient, may prevent an unscrupulous agent from conducting an abusive transaction. First, the bank inquiry itself may be enough to cause the agent to change his or her mind about pursuing the transaction. Second, the inquiry generates a subsequent step and the involvement of another person, the principal’s physician, which could prevent an abusive transaction from occurring. The physician may consult with and examine the principal to determine the principal’s capacity. That examination could result in a determination that the principal is not in fact incapacitated, and therefore, the agent does not have the authority to act.<sup>472</sup> And if the principal is competent, what he or she learns through this process will be useful in reviewing and regulating his or her agent’s future conduct.<sup>473</sup>

### 3. Springing Authority Delays an Agent’s Ability to Act

“By delaying the commencement” of an agent’s authority, a springing power of attorney “narrows the period of time [in which a

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467. *Id.* at 293.

468. *Id.*

469. Black, *supra* note 59, at 304–05.

470. *See* UNIF. POWER OF ATT’Y ACT § 109(b)-(c), 8B U.L.A. 197.

471. If a springing power of attorney does not specify who should make the determination of the principal’s incapacity, or a person has been authorized but is unable or unwilling to make the determination, the default rule is that the power of attorney “becomes effective upon a determination in a writing or other record by a physician [or licensed psychologist] that the principal is incapacitated . . . .” *Id.* § 109(c)(1), 8B U.L.A. 197.

472. *Cf. id.* § 109(b), (c), 8B U.L.A. 197 (stating that “a determination in writing or other record” is necessary when the “power of attorney becomes effective upon the occurrence of a future event or contingency”).

473. *See supra* Part VI.B (discussing the importance of choosing a trustworthy agent).

principal] may be subject to abuse.”<sup>474</sup> The following account illustrates how springing authority mitigates power of attorney abuse. One commentator tells the story of “Gladys Smith” which is “based on true and actual events.”<sup>475</sup> Shortly before undergoing a serious operation in 1998, Gladys appointed her family’s accountant, “Tim . . . as her agent under [a] durable power of attorney in case she became incapacitated.”<sup>476</sup> “Gladys recovered from her operation and would not be incapacitated for six more years.”<sup>477</sup> Thus, Tim’s power of attorney was not “activated” until 2004.<sup>478</sup> If it had been activated from the time it was created in 1998, and Tim had been able to steal large amounts of Gladys’ money earlier, she may not have had the resources to remain at home as long as she did.<sup>479</sup> It was costing “approximately \$100,000 a year for Gladys to live at home.”<sup>480</sup> As it was, Tim “was charged with stealing approximately \$248,000 from Gladys’ accounts and trust” after a bank employee, concerned about an account overdraft, made a report to the local department of aging.<sup>481</sup>

### C. *Springing Powers of Attorney Preserve Autonomy*

Americans “place great value on autonomy and . . . independent decision-making.”<sup>482</sup> This passion for the value of freedom is reflected in the law in many ways. The mentally ill benefit from a presumption that they should be given maximum autonomy until their incapacity is proven in a court of law.<sup>483</sup> The law generally presumes a person is “sane” unless proven to the contrary.<sup>484</sup> In making a will, a person is presumed to have the capacity to execute the will.<sup>485</sup> The burden falls on a contestant to prove the lack of

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474. Federman & Reed, *supra* note 40, at 23.

475. Christiansen, *supra* note 39, at 383 & n.1.

476. *Id.* at 386.

477. *Id.* at 400.

478. *See id.*

479. *Id.*

480. *Id.*

481. *Id.* at 389.

482. Kohn, *supra* note 15, at 15–16.

483. Failingler, *supra* note 20, at 6.

484. *See e.g.*, Thomas v. Neal, 600 So. 2d 1000, 1001 (Ala. 1992) (“The presumption is that every person is sane, until the contrary is proven.”).

485. *See e.g.*, *Ex parte Helms*, 873 So.2d 1139, 1147 (Ala. 2003) (“The law presumes that every person has the capacity to execute a will, and the burden is on the contestant to prove the lack of testamentary capacity.” (quoting *Allen v. Sconyers*, 669 So. 2d 113, 117 (Ala. 1995))).



testamentary capacity.<sup>486</sup> The same is true for powers of attorney. The party claiming that a principal did not have the required capacity to execute a power of attorney has the initial burden of showing the principal was incompetent,<sup>487</sup> perhaps by clear and convincing evidence.<sup>488</sup> Agency law presumes that a person who executes a power of attorney will retain the capacity to oversee the agent appointed to manage his or her affairs.<sup>489</sup>

Statutory defaults should likewise presume that a principal who executes a power of attorney will retain the capacity to manage his or her own financial affairs. An elderly principal's later incapacity should be viewed as an exception, not the rule. Immediately effective powers of attorney reflect an assumption that the principal is going to need a surrogate decision-maker in the future;<sup>490</sup> thus, the emphases on granting the agent immediate authority are to facilitate the agent's assumption of power and to reduce the stigma a principal will experience upon becoming incapacitated.<sup>491</sup> A statutory default making powers of attorney effective only if a principal becomes incapacitated reflects another assumption; namely, that the principal may never need a surrogate decision-maker, but if they wish to plan for the future possibility, the law provides a clear path to effectuate the principal's objectives.

Durable powers of attorney and springing powers of attorney promote principal autonomy in other ways. "The [durable power of attorney] was developed in response to the" recognition that some people, especially as they age, no longer meet the "default" position that allows "independent decision-making and action by adults."<sup>492</sup> Durable powers of attorney enhance a principal's autonomy by allowing the principal to choose an agent "to act on their behalf in the event they later lose the ability to act for themselves."<sup>493</sup> As useful as they are as advanced planning instruments, durable powers "are regularly executed in anticipation of a largely unrealized need"—the

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486. *Id.*

487. *See e.g.*, *Yates v. Rathbun*, 984 So. 2d 1189, 1195 (Ala. Civ. App. 2007) ("The burden initially falls on the party claiming that the person who executed the power of attorney was incompetent when he or she executed the power of attorney.").

488. *See e.g.*, *In re Guardianship of Ray*, No. 657, 1991 WL 179418, at \*7 (Ohio App. Sept. 16, 1991) ("The party seeking to prove mental incapacity to sign a power of attorney must do so by clear and convincing evidence.").

489. RESTATEMENT (THIRD) OF AGENCY intro. at 10 (2006).

490. Kohn, *supra* note 15, at 6.

491. *See* John C. Craft, *Preventing Power of Attorney Abuse: A Lawyer's Role*, 75 ALA. LAW. 116, 120 (2014); *see also* Christiansen, *supra* note 40, at 402.

492. Failinger, *supra* note 20, at 7.

493. Rhein, *supra* note 18, at 167.

principal may never need the agent to act in his or her stead.<sup>494</sup> Springing powers of attorney allow a “principal to retain plenary power as long as [he or she] can.”<sup>495</sup> And if a principal never becomes incapacitated, a springing power of attorney allows the principal to retain plenary power for the rest of their life, never formally ceding financial decision-making authority to another person.<sup>496</sup>

A durable power of attorney “can transform the role of the principal within his or her family.”<sup>497</sup> Professor Nina Kohn articulates how durable powers of attorney can undermine an elderly principal’s sense of control and lead to significant negative impacts on their physical and psychological well-being.<sup>498</sup> The very act of executing a power of attorney gives an agent, especially an agent who is the adult child of an elderly principal, “a new power” and “a new role.”<sup>499</sup> The newly executed power of attorney provides the adult child an “entree into the parent’s financial and personal affairs” and “creates a situation in which the elder no longer has exclusive control over his or her affairs.”<sup>500</sup> This loss is “exacerbated by the fact that [elderly principals] are routinely encouraged . . . to execute broad, immediately effective [powers of attorney].”<sup>501</sup> Executing a springing power of attorney may minimize an elderly principal’s loss of sense of control and disempowerment. By making his or her agent’s authority effective in the future, the principal maintains control and with it, their role within the family.

## VIII. RECOMMENDATION

Policymakers should travel back in time to 1964 and revisit the original purposes of the durable power of attorney. The drafters of the Model Special Power of Attorney for Small Property Interests Act seemed preoccupied with two thoughts. First, the drafters viewed the durable power of attorney as an anticipatory instrument.<sup>502</sup> Its

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494. Kohn, *supra* note 15, at 26.

495. Christiansen, *supra* note 39, at 403.

496. See Craft, *supra* note 491, at 120.

497. Kohn, *supra* note 15, at 3–4.

498. *Id.* at 26–33.

499. *Id.* at 26.

500. *Id.*

501. *Id.* at 33.

502. See MODEL SPECIAL POWER OF ATT’Y FOR SMALL PROP. INTERESTS ACT prefatory note (1964) (stating that the purpose of the Model Act was to assist individuals with small property interests in anticipating their incapacity).

usefulness was in its ability to plan for the future, for the possibility of incapacity.<sup>503</sup> The Model Act was intended for persons “who, *in anticipation* or because of physical handicap or infirmity . . . 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>504</sup> Second, the drafters viewed the durable power of attorney with some suspicion.<sup>505</sup> They were leery of completely ceding judicial oversight to private contract (as evidenced by involving a judge in the execution of the document) and were aware of the risks of abuse (as evidenced by setting a maximum dollar value of property subject to the power and providing for accountings).<sup>506</sup> By revisiting 1964, durable powers of attorney can reclaim their place as an “advance planning” tool while protecting against abuse and preserving the principal’s autonomy. Making springing powers of attorney the standard should be part of the journey.

*A. Make Springing Effectiveness the Default Position in the Uniform Power of Attorney Act*

Section 109 in the Uniform Power of Attorney Act should be revised making springing effectiveness of an agent’s powers the default rule. Springing powers of attorney provide a type of protection that may actually prevent power of attorney abuse.<sup>507</sup> The current protective provisions in the UPOAA focus in large part on the types of abuse that occur after an agent has begun acting for the principal.<sup>508</sup> As opposed to arguably ineffective “harm rules” intended to punish an unscrupulous agent, springing powers of attorney are a type of “power rule” intended to limit an agent’s “ability to accumulate power . . . in the first place.”<sup>509</sup> The event triggering an agent’s accumulation of power—the principal’s incapacity—may never occur. A financial institution may prevent an

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503. *Id.*

504. See Boxx, *supra* note 16, at 7 (emphasis added) (quoting MODEL SPECIAL POWER OF ATT’Y FOR SMALL PROP. INTERESTS ACT prefatory note (2006)).

505. See *id.* (“This proposal contained restrictive provisions that illustrate the tentative attitude of the drafting committee.”).

506. See MODEL SPECIAL POWER OF ATT’Y FOR SMALL PROP. INTERESTS ACT §§ 1(a)–(b), 4, 9; Boxx, *supra* note 16, at 7–9.

507. See UNIF. POWER OF ATT’Y ACT § 109, 8B U.L.A. 196–97; Seal, *supra* note 12, at 330 (“One of the merits of the springing power as claimed by practitioners is that it provides more protection against abuse.”).

508. Stiegel & Klem, *supra* note 17, at 5.

509. See Failing, *supra* note 20, at 13–15 (discussing “harm” rules and “power” rules in the context of power of attorney abuse and concluding that “harm” rules have been largely ineffective).

unscrupulous agent from activating his or her power and conducting an abusive transaction simply by asking for proof that the principal is incapacitated.<sup>510</sup> In addition, making springing effectiveness the standard serves the goal of enhancing a principal's autonomy. Springing powers preserve a principal's independence and dignity by allowing the principal to plan for alternative decision-making in the event of his or her incapacity, without ceding immediate control to another person.

Statutory defaults and power of attorney forms should be premised on the assumption that a principal is not receiving legal advice. The assumption should be that the principal (perhaps, their prospective agent) downloaded the form from the Internet and is not seeking legal advice. The UPOAA drafting committee recognized the "proliferation of power of attorney forms" available to the public in deciding to include a statutory power of attorney form.<sup>511</sup> That proliferation should guide policymakers to enhance protections for principals. The risks associated with executing an immediately effective power of attorney form without legal counseling are great. Therefore, the default rule should be reversed making springing powers of attorney, which provide more protection, the standard.

Springing powers of attorney will not be advisable for every client, but attorneys can always draft an immediately effective power of attorney based on a client's objectives and preferences.<sup>512</sup> As with other UPOAA default positions, "individual client circumstances [will] dictate the need for alterations."<sup>513</sup> A client's preference dictates whether the power of attorney should be immediately effective or springing, and "a lawyer's guidance plays a significant role" in that decision.<sup>514</sup>

Finally, making springing powers of attorney the standard will serve the ultimate purpose of durable powers of attorney. Policymakers have uniformly encouraged the use of durable powers of attorney as a private alternative to court-monitored guardianship.<sup>515</sup> Springing powers of attorney promote this purpose more so than immediately effective powers of attorney.<sup>516</sup> Seniors who believe that

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510. See UNIF. POWER OF ATT'Y ACT §§ 109(a)–(c), 8B U.L.A. 197, 119(d)(3).

511. See UNIF. POWER OF ATT'Y ACT § 300 cmt, 8B U.L.A. 250.

512. Whitton, *Navigating*, *supra* note 221, at 12 ("Drafting an effective power of attorney requires a clear understanding of the client's objectives and preferences.").

513. *Id.* at 13.

514. *Id.* at 14.

515. See Seal, *supra* note 11, at 310.

516. See *supra* Part VII.C.

signing a power of attorney will not significantly undermine their control over their own affairs are more likely to execute one.<sup>517</sup> With springing powers, a principal retains not just a sense of control, but actual control until they need a surrogate decision-maker.<sup>518</sup> In contrast, seniors who believe that signing a power of attorney will “cede significant control” to an agent are less likely to execute one.<sup>519</sup> A principal’s sense of control is instantly diminished by executing an immediately effective power of attorney.<sup>520</sup> So, having the default authority contingent on incapacity in the future allows the senior to maintain control and reduces their fear of executing a durable power of attorney.<sup>521</sup>

*B. Give Principals Who Use a Statutory Form a Meaningful Choice Between Immediate and Springing Authority*

Policymakers should also consider altering statutory power of attorney forms to allow a principal to choose when his or her agent’s authority is to become effective. Forms should educate the principal about the options and include clearly-worded triggering language if the principal chooses springing effectiveness. Nevada implemented exactly this method when it adopted the Uniform Power of Attorney Act.<sup>522</sup> Nevada altered the UPOAA statutory form to allow a principal to intentionally choose springing authority.<sup>523</sup> The form instructs the principal, in the same way the UPOAA instructs the principal, that the power of attorney becomes effective immediately unless the principal states otherwise in the “Special Instructions.”<sup>524</sup>

However, in addition to providing blank spaces under Special Instructions, the Nevada form includes a separate section entitled “Durability and Effective Date.”<sup>525</sup> There, a principal is instructed to

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517. Kohn, *supra* note 15, at 45 (citing a study finding that individuals who reported a “high sense of control over their lives” were significantly more likely to execute an advance directive than those who reported a low sense of control).

518. *See supra* Part VII.C.

519. Kohn, *supra* note 15, at 45.

520. *Id.*

521. *See supra* Part VII.C.

522. NEV. REV. STAT. ANN. § 162A.620 (West 2011).

523. *Id.*

524. *Id.*

525. *Id.* The Nevada form seems to encourage the use of Special Instructions to clarify or expound upon the extent of authority granted to an agent. It adds “or other or additional authority granted to agent” to the generic Special Instructions title found in the UPOAA form. *Id.* The section allowing a principal to select a springing power is found in a separately numbered section immediately following Special Instructions. *Id.*

initial the clause(s) that applies, the first clause making the power durable.<sup>526</sup> The second and third options allow a principal to make the power of attorney springing or effective at a future date certain:

\_\_\_ SPRINGING POWER. It is my intention and direction that my designated agent, and any person or entity that my designated agent may transact business with on my behalf, may rely on a written medical opinion issued by a licensed medical doctor stating that I am disabled or incapacitated, and incapable of managing my affairs, and that said medical opinion shall establish whether or not I am under a disability for the purpose of establishing the authority of my designated agent to act in accordance with this Power of Attorney.

\_\_\_ I wish to have this Power of Attorney become effective on the following date: . . . .<sup>527</sup>

The Nevada form essentially incorporates the UPOAA default rule of the principal's incapacity being determined and verified by a physician in some written form.<sup>528</sup> The UPOAA statutory form should be modified in similar fashion to allow a principal the choice of a springing power of attorney, and include a clear triggering mechanism.

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526. *Id.*

527. *Id.*

528. See UNIF. POWER OF ATT'Y ACT § 109(c)(1), 8B U.L.A. 197 (providing the default rule for determining a principal's incapacity).