

ARTICLES

DURABLE POWERS AS AN ALTERNATIVE TO GUARDIANSHIP: LESSONS WE HAVE LEARNED

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I. INTRODUCTION

The durable power of attorney, widely used in every jurisdiction,¹ is a statutorily sanctioned vehicle for creating an agency

1. Every jurisdiction has a power-of-attorney statute. Ala. Code §§ 26-1-2-2.1 (Lexis 1992 & Supp. 2006); Alaska Stat. §§ 13.26.332-358 (Lexis 2004); Ariz. Rev. Stat. Ann. §§ 14-5501-5507 (West 2005); Ark. Code Ann. §§ 28-68-101-419 (Lexis 2004); Cal. Prob. Code Ann. §§ 4000-4034, 4050-4054, 4100-4102, 4120-4130, 4150-4155, 4200-4207, 4230-4238, 4260-4266, 4300-4310, 4400-4409, 4450-4465 (West Supp. 2006); Colo. Rev. Stat. Ann. §§ 15-1-1301-1320, 15-14-501-509, 15-14-601-611 (West 2005); Conn. Gen. Stat. Ann. §§ 1-42-56, 1-56a-r (West 2000 & Supp. 2006); Conn. Gen. Stat. Ann. § 45a-562 (West 2004); Del. Code Ann. tit. 12, §§ 4901-4905 (Lexis 2001); D.C. Code §§ 21-2081-2085, 2101-2118 (West 2001); Fla. Stat. Ann. § 709.08 (West 2000 & Supp. 2006); Ga. Code Ann. §§ 10-6-1-39 (2000); Haw. Rev. Stat. Ann. §§ 551D-1-7 (Lexis 2006); Idaho Code Ann. §§ 15-5-501-507 (Lexis 2001); 755 Ill. Comp. Stat. Ann. 45/1-1, 45/2-1-45/2-11, 45/3-1-45/3-4 (West 1992 & Supp. 2006); Ind. Code Ann. §§ 30-5-1-1-30-5-10-4 (West 1994 & Supp. 2005); Iowa Code Ann. §§ 633B.1-.2 (West Supp. 2006); Kan. Stat. Ann. §§ 58-650-665 (2005); Ky. Rev. Stat. Ann. § 386.093 (West 2005); La. Civ. Code Ann. art. 2985-3032 (2005); 18-A Me. Rev. Stat. Ann. §§ 5-501-510 (1998 & Supp. 2005); Md. Est. & Trusts Code Ann. §§ 13-601-602 (2001); Mass. Ann. Laws ch. 201B §§ 1-7 (Lexis 1994 & Supp. 2006); Mich. Comp. Laws Ann. §§ 700.5501-.5520 (West 2002 & Supp. 2006); Minn. Stat. Ann. §§ 523.01-24 (West 2006); Miss. Code Ann. §§ 87-3-101-113 (West 1999); Mo. Rev. Stat. Ann. §§ 404.700-404.737 (West 2001); Mont. Code Ann. §§ 72-5-501, 72-5-502, 72-31-201-238 (2005); Neb. Rev. Stat. §§ 30-2664-2672 (1995), Neb. Rev. Stat. §§ 49-1501-1561 (2004); Nev. Rev. Stat. Ann. §§ 111.450-.470 (Lexis 2004); N.H. Rev. Stat. Ann. §§ 506:5-7 (Lexis 1997 & Supp. 2005); N.J. Stat. Ann. §§ 46:2B-8.1-19 (West 2003 & Supp. 2006); N.M. Stat. Ann. §§ 45-5A-101-403 (Lexis Adv. Legis. Code 2007); N.Y. Gen. Oblig. Law §§ 5-1501-1506 (McKinney 2001 & Supp. 2006); N.C. Gen. Stat. §§ 32A-1-3, 32A-8-14.12, 32A-40-43 (Lexis 2005); N.D. Cent. Code §§ 30.1-30-01-06 (1996); Ohio Rev. Code Ann. §§ 1337.01-1337.10 (Lexis 2002 & Supp. 2006); Okla. Stat. Ann. tit. 58, §§ 1071-1077, 1081 (West 1995 & Supp. 2006), Okla. Stat. Ann. tit. 15, §§ 1001-1020 (West Supp. 2006); Or. Rev. Stat. §§ 127.005-127.045 (2005); 20 Pa. Consol. Stat. Ann. §§ 5601-5611 (West 2005); R.I. Gen. Laws §§ 34-22-6-7 (1995 & Supp. 2005); S.C. Code Ann. §§ 62-5-501-505 (1987 & Supp. 2005); S.D. Codified Laws §§ 59-7-1-8, 59-7-1-9 (2004); Tenn. Code Ann. §§ 34-6-101-111 (Lexis 2001 & Supp. 2005); Tex. Prob. Code Ann. §§ 481-506 (2003); Utah Code Ann. §§ 75-5-501-504 (Lexis 1993 & Supp. 2006); Vt. Stat. Ann. tit. 14, §§ 3501-3516 (2002 & Supp. 2005); Va. Code Ann. §§ 11-9.1-9.7 (Lexis 2006); Wash. Rev. Code Ann. §§ 11.94.010-11.94.150 (West 1998 & Supp. 2006); W. Va. Code Ann. §§ 39-4-1-7 (Lexis 2004); Wis. Stat. Ann. §§ 243.07, 243.10 (West 2001 & Supp. 2005); Wyo. Stat. Ann. §§ 3-5-101-103 (2005).

relationship that survives the principal's incapacity.² The Uniform Probate Code first included durable power provisions in 1969 to offer an inexpensive method of surrogate decisionmaking.³ Although originally promoted as beneficial for those whose modest assets did not justify pre-incapacity planning with a trust or post-incapacity property management with a guardianship,⁴ the durable power of attorney is now used by both the wealthy and non-wealthy for incapacity planning as well as convenience.⁵

After more than three decades of using durable powers of attorney, we have the benefit of common experiences, best practices, and legislative trends to inform our assessment of durable powers as an alternative to guardianship. This Article examines that aggregate experience to distill important lessons not only for the use of durable powers, but also for legislative reform to improve their efficacy as a means of surrogate property management.

II. LESSONS LEARNED

Any method of surrogate property management—whether trust, guardianship, or durable power of attorney—should provide an incapacitated person with the following: (1) supplemental protection to offset the individual's loss of monitoring capabilities; (2) completion of delegable tasks that the individual can no longer perform; and (3) decisionmaking that is consistent with the individual's values and goals to the extent those values and goals are known by the surrogate.⁶ These criteria form the analytical framework for the following discussion of what we have learned

2. See Unif. Prob. Code art. 5, pt. 5, prefatory n. (2006) (noting that the purpose of a statutory durable power is alteration of the common law, which terminated an agent's authority upon the principal's incapacity).

3. See *id.* (noting that the only state durable power-of-attorney provisions to predate the Uniform Probate Code provisions were those enacted by Virginia).

4. See *id.* (explaining that the Uniform Probate Code included power-of-attorney provisions to offer an inexpensive form of "senility insurance" that was similar to trusts).

5. See Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 12 (2001) (finding that there has been an increase in durable power-of-attorney use); Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574, 584 (1996) (concluding that the availability, flexibility, and low cost of the durable power of attorney have made it a popular alternative to guardianships and trusts).

6. See Dessin, *supra* n. 5, at 589–600 (comparing the role of an agent under a power of attorney to the roles of a trustee and a guardian).

about durable powers and how we can improve their use through better planning strategies and legislative reform.

A. Lesson #1: A Power of Attorney Is Only as
Protective as the Agent Is Trustworthy

Theoretically, one of the benefits of guardianship over a trust or a durable power of attorney is court supervision of the guardian.⁷ However, this additional measure of protection for the incapacitated person may be more illusory than real, especially where guardian-reporting requirements are minimal or judicial resources for guardian monitoring are inadequate.⁸ A trust arrangement does not subject a trustee to regular court supervision; however, the trustee is generally bound by the terms of the trust, and the trust beneficiaries can challenge the trustee's actions if they perceive that the trustee is violating the terms of the trust or the trustee's fiduciary duties.⁹ Contrasted with guardianship and trust law, power-of-attorney statutes generally do not provide even theoretical monitoring of the agent by anyone other than the principal.¹⁰ The principal-agent relationship is intentionally pri-

7. *But see id.* at 591 (noting that "court supervision can be both time-consuming and expensive").

8. *See* Erica F. Wood, *Guardianship Reform at the Crossroads*, 15 *Experience* 12 (Winter 2005) (finding that courts continue to exercise minimal oversight of guardians, in part because most courts lack sufficient funding for oversight); Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 *Stetson L. Rev.* 867 (2002) (discussing the necessary elements of guardian accountability through court monitoring, including guardian reports, court review, and funding).

9. *Boxx, supra* n. 5, at 44; *Dessin, supra* n. 5, at 596–599.

10. *See Boxx, supra* n. 5, at 40–46 (arguing that because durable powers lack formal supervision, clarification of the agent's fiduciary duties is needed for the protection of both the principal and the agent).

The instances of proactive monitoring mechanisms in power-of-attorney statutes are rare. Examples of such isolated provisions include the requirements in Arkansas that all powers of attorney be filed with and approved by the probate court as well as recorded. Ark. Code Ann. §§ 28-68-304, 28-68-307 (Lexis 1987 & Supp. 2006). The amount of the principal's property and income that may be subject to a power of attorney is also strictly limited. *Id.* at § 28-68-303 (stating that property subject to the power of attorney may not exceed \$20,000, exclusive of homestead, the capitalized value of any annual income, and the annual money income subject to the power of attorney may not exceed \$6,000). However, the attorney-in-fact may act without court approval unless required by the power of attorney. *Id.* at § 28-68-306. North Carolina requires that when a principal is incapacitated, the power of attorney must be registered and the agent must file an inventory and an annual accounting with the court. N.C. Gen. Stat. §§ 32A-9(b), 32A-11. However, the requirement of inventories and accountings can be waived by the principal in the power of attorney. N.C. Gen. Stat. § 32A-11(b). In contrast, most states do not require the agent to

vate, operating under the judicial radar screen and away from the direct scrutiny of those who might stand to benefit from the principal's estate.¹¹

The unsupervised nature of durable powers is justified by the premise that persons with legal capacity can autonomously choose a trusted individual to serve as a surrogate decision-maker.¹² One of the continuing dilemmas of guardianship is how to protect persons with diminished capacity without truncating the legal rights they are still capable of exercising.¹³ The informality of the power of attorney avoids this dilemma because there is no adjudication of the principal's incapacity and the agent need only assume the degree of surrogate management that the principal's condition requires.¹⁴ Given that a trustworthy agent is the

account or to defend the agent's actions unless the request is made by someone with standing under the power-of-attorney statute. See *infra* nn. 140–153 and accompanying text (discussing standing provisions to request an agent accounting or judicial review of the agent's conduct).

A few states have provisions that, although not monitoring mechanisms, are intended to enhance the accountability of the agent by requiring some affirmative act of notification. For example, South Carolina requires that all powers of attorney be recorded. S.C. Code Ann. § 62-5-501(C). Utah provides that if the agent determines that “the principal has become incapacitated or disabled,” the agent must notify “all interested persons” of the agent's status, provide them with the agent's name and address and, upon written request, provide to any interested person “a copy of the power of attorney” and “an annual accounting of the assets.” Utah Code Ann. § 75-5-501(2). The power of attorney may specifically direct, however, that the agent is not required to provide an annual accounting of assets. *Id.* at § 75-5-501(2)(c). Nonetheless, as Professor Boxx correctly noted, “Even in states with supervisory mechanisms, the attorney-in-fact can operate autonomously when there are no close friends or relatives available to monitor and question the attorney-in-fact's performance.” Boxx, *supra* n. 5, at 46.

11. See Boxx, *supra* n. 5, at 46 (noting that “[t]o include a thorough monitoring process would essentially gut the usefulness of the power of attorney because the increased costs and intrusiveness would turn it into a de facto guardianship . . .”).

12. See generally Linda S. Ershow-Levenberg, *When Guardianship Actions Violate the Constitutionally-Protected Right of Privacy*, 12 Natl. Acad. Elder L. Attys. News 1 (Apr. 2005) (discussing whether the appointment of a guardian violates the principal's rights of privacy when a power of attorney is already in place).

13. See Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 Stetson L. Rev. 735, 748–749 (2002) (advocating limited guardianship as a way to ensure that older individuals get needed help without sacrificing legal rights).

14. See e.g. Marshall B. Kapp, *Who's the Parent Here? The Family's Impact on the Autonomy of Older Persons*, 41 Emory L.J. 773, 792 (1992) (noting that “[t]he pragmatic shortcomings of excessive reliance on judicial appointment of surrogate decision-makers include substantial expenditures of time, money, and administrative and emotional turmoil for all parties, often without achieving much actual beneficial protection for the individual's welfare”); see also Boxx, *supra* n. 5, at 52–54 (observing that loss of capacity is often a gradual process and that “execution of the power of attorney does not affect the authority of the principal to conduct his or her own affairs . . .”); but see Dessin, *supra* n. 5,

cornerstone of an incapacitated principal's protection, what can or should be done to prevent and redress abuse by an agent?

Before answering the foregoing question, we must first consider how much power-of-attorney abuse occurs and whether the potential harm from power-of-attorney abuse justifies undercutting the benefits of a low-cost, flexible, and private means for surrogate property management. Unfortunately, there currently exists no national mechanism to track or evaluate the prevalence of financial exploitation in general, let alone exploitation through abuse of durable powers in particular.¹⁵ Recent studies do suggest, however, that financial exploitation, which includes exploitation by theft, forgery, fraud, undue influence, coercion, as well as breach of fiduciary duty,¹⁶ is widespread and on the rise.¹⁷

National surveys conducted by the legal community on the topic of power-of-attorney abuse have produced remarkably similar results.¹⁸ In each, when asked about their personal knowledge of power-of-attorney abuse, the majority of lawyer-respondents perceived the rate of incidence as low.¹⁹ An important question

at 601–602 (noting that although much has been written on how to draft and use powers of attorney, little emphasis is given to the importance of the principal actually discussing with the agent the expectations for the agent's role).

15. Donna J. Rabiner, David Brown & Janet O'Keeffe, *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*, 16(1) J. Elder Abuse & Neglect 65, 72 (2004); see also John F. Wasik, *The Fleecing of America's Elderly*, 39 Consumers Dig. 77, 78 (Mar./Apr. 2000) (noting that power-of-attorney abuse is rarely reported and is not tracked by FBI Uniform Crime Statistics).

16. Rabiner et al., *supra* n. 15, at 69; see also Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?* 34 McGeorge L. Rev. 267 (2003) (defining financial abuse as misuse or misappropriation of a person's assets).

17. Rabiner et al., *supra* n. 15, at 67 (highlighting the findings of the National Elder Abuse Incidence Study, various state studies, and research conducted by the National Research Council).

18. Compare Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis* 12–13 (2002) (available at <http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm> (answering questions concerning the prevalence of power-of-attorney abuse)) and David M. English & Kimberly K. Wolff, *Survey Results: Use of Durable Powers*, 10 Prob. & Prop. 33 (1996) with E. Thomas Schilling, *Report on ACTEC Elder Law Committee Questionnaire on Possible Abuse of Financial Durable Power of Attorney*, 21 Am. College Trust & Est. Counsel Nn. 247 (Winter 1995).

19. Whitton, *supra* n. 18, at 12 (reporting that 53% of respondents had encountered fewer than five incidents of power-of-attorney abuse); English & Wolff, *supra* n. 18, at 33–34 (reporting that 62% of respondents concluded that misuse of powers of attorney occurred in 1% or less of the situations in which they had prepared the power of attorney or were aware of the power of attorney); Schilling, *supra* n. 18, at 247–248 (reporting that only 32% of respondents were personally aware of instances of power-of-attorney abuse, and most cited knowledge of only one or two instances; 68% reported no personal knowl-

yet to be studied, however, is whether the incidence of abuse is higher among agents of durable powers executed without legal counsel than those executed with legal counsel.

Even if further studies confirm that the rate of abuse is low compared to the number of agents who faithfully exercise their authority, anecdotal reports continue to demonstrate the devastating consequences of abuse for the principal.²⁰ The loss of life savings and home, as well as endangerment of health, are common outcomes.²¹ Concern about the growing number of reports of financial exploitation of the elderly prompted Congress to order a national study when it reauthorized the Older Americans Act in 2000.²² This study found that the level of financial crimes against older persons is particularly difficult to assess because victims often do not report abuse and the professionals with whom they deal are generally not trained to look for signs of financial exploitation.²³ The report identified numerous areas that require systematic study before effective counter-measures can be developed, including the following: the risk factors for victimization, the motives and methods of perpetrators, and accurate data on the incidence and prevalence of financial exploitation.²⁴

While further study of all aspects of financial exploitation is needed, a number of risk factors are commonly cited as increasing the likelihood that an individual will fall prey to abuse. These factors include cognitive impairment, emotional or physical de-

edge of power-of-attorney abuse).

20. See e.g. Jim Edwards, *The Lawyer, the Widow and the Gypsies*, 175 N.J. L.J. 729 (Mar. 1, 2004) (telling the story of an attorney who concocted an elaborate scheme to con an elderly widow out of her home and life savings); Kibret Marcos, *Maid Abused Power of Attorney*, Rec. (Bergen Co., N.J.) L1 (Mar. 30, 2004) (discussing a maid who used her power of attorney to deposit several thousand dollars of her employer's money into her personal bank account); Judith B. Sklar, *Elder and Dependent Adult Fraud: A Sampler of Actual Cases to Profile Offenders and the Crimes They Perpetrate*, 12(1) J. Elder Abuse & Neglect 19 (2000) (detailing several accounts of power-of-attorney abuse); Wasik, *supra* n. 15 (examining abuse of the power of attorney and discussing how power-of-attorney abuses are typically carried out).

21. See e.g. Edwards, *supra* n. 20, at 729 (describing how two elderly victims were defrauded out of their homes and life savings; one was locked in a dingy apartment and left to starve); Sklar, *supra* n. 20 (profiling a case in which an adult daughter refinanced her parents' home and embezzled Social Security payments to provide funds for her own needs).

22. 42 U.S.C. §§ 3001–3058 (2000); Rabiner et al., *supra* n. 15, at 67.

23. Rabiner et al., *supra* n. 15, at 70–72.

24. *Id.* at 74–76.

pendence on the perpetrator, and isolation.²⁵ Statistics also suggest that the majority of abusers are people close to the victim—usually family members or caregivers.²⁶ Localized studies and anecdotal evidence show that financial exploitation is a much bigger problem than agent misuse of durable powers or, for that matter, fiduciary misdeeds of any type. Unauthorized use of the victim's credit cards and bank cards, creation of joint account interests, and execution of deeds under duress, as well as diversion of Social Security and pension payments, are but a few examples of how family members, caregivers, or the new "best friend" of a lonely victim can siphon off assets without even the façade of a fiduciary relationship.²⁷

Fear of the devastating consequences of unchecked financial abuse has led to suggestions for legislative reform, some of which would greatly change the nature of the power of attorney. Professor Carolyn Dessin, one of the first to examine the legal complexities of financial abuse, urges formulation of better statutory definitions of abuse as a way to improve remedies.²⁸ She notes that many definitions focus solely on "the idea that a person should keep all of his own assets for his own benefit"²⁹ and do not adequately respect autonomous decisionmaking that is motivated by moral obligations of support or genuine donative intent.³⁰ She suggests that the definitional focus should be shifted from "benefit to another" and placed instead on "a misuse of a person's assets or the person himself without consent."³¹ Her analysis also

25. *Id.* at 69–71; Wasik, *supra* n. 15, at 81.

26. Todd Gutner, 'License to Steal': How to Protect the Elderly from the People They've Chosen to Trust, 3987 Bus. Wk. 124 (June 5, 2006) (noting that of the 80,000 cases of financial fraud reported last year "more than two-thirds of the victims were defrauded by someone close to them"); Wasik, *supra* n. 15, at 78; see also Debra Sacks, *Prevention of Financial Abuse, Focus of New Institute at Brookdale Center on Aging*, Aging 86, 88 (Spring 1996) (reporting the results of a survey of 200 case-management agencies, health-care facilities, senior centers, and miscellaneous senior housing complexes).

27. See generally Rabiner et al., *supra* n. 15 (noting the various ways the elderly are financially exploited); Sacks, *supra* n. 26 (commenting that the extent of elderly victimization is difficult to determine because it is underreported); Sklar, *supra* n. 20 (identifying the four main groups that defraud the elderly); Wasik, *supra* n. 15 (citing the likelihood for caregivers to victimize senior citizens).

28. See generally Dessin, *supra* n. 16 (discussing the problems accompanying a vague definition of financial abuse and suggesting a more effective definition).

29. *Id.* at 275.

30. *Id.* at 275–276.

31. *Id.* at 278.

offers helpful insight into the construction of non-ageist definitions of financial abuse that shift the focus from age to vulnerability.³²

In addition to changes in statutory definitions, Professor Des-sin recommends more careful monitoring of agents serving under powers of attorney.³³ She suggests court registration of agents, periodic accountings to the court once a principal becomes incapacitated, and the filing of a final accounting after the principal's death.³⁴ These recommendations, however, are not analyzed for the negative effects they may have on the use of durable powers,³⁵ the privacy interests of the principal,³⁶ or the already strained resources of the judicial system.³⁷

One difficulty posed by periodic accountings to the court would be the court's inability to effectively evaluate an agent's activities without a full initial inventory of the principal's property.³⁸ Not only would a full inventory be a significant invasion of the principal's privacy, but it would involve preparation costs for the principal. Under current practice, a principal does not have to divulge to an agent the extent of the principal's property. Although disclosure to an agent might be in the principal's best interest should there be a later loss of capacity,³⁹ disclosure to a court is a wholly different matter.

Triggering the duty of periodic accountings upon the principal's incapacity also raises serious concerns for the principal. This requirement would, in many instances, prompt the judicial inca-

32. *Id.* at 292–311.

33. *Id.* at 316–318.

34. *Id.* at 317.

35. See Boxx, *supra* n. 5, at 46 (noting that the costs of monitoring durable powers would outweigh the advantages).

36. See Ershow-Levenberg, *supra* n. 12 (arguing that the appointment of a guardian where there is already a power of attorney in place may violate the principal's right of privacy).

37. See Wood, *supra* n. 8, at 16 (noting the impact of financial cutbacks on court guardianship monitoring).

38. The North Carolina power-of-attorney statute, which requires the filing of inventories and periodic accountings to the court by the agent of an incapacitated principal (unless waived in the power of attorney), states that the agent shall file "inventories of the property of the principal *in his hands*." N.C. Gen. Stat. § 32A-11(b) (emphasis added). Consider, however, that there is little to prevent the abusive agent from failing to file or from under reporting the principal's property. See *supra* n. 10 and accompanying text (discussing the pragmatic difficulties of monitoring durable powers).

39. See *infra* nn. 67–70 and accompanying text (noting the benefits of disclosure).

capacity proceeding that the power of attorney was meant to avoid. What of the principal who gives an agent an immediately effective power of attorney with the understanding that the agent will only act when, and to the extent, necessitated by the principal's circumstances? Requiring agent registration and periodic accountings upon the principal's incapacity would completely undercut the privacy interests that this type of arrangement was meant to protect.⁴⁰ Furthermore, even registration and accountings would be inadequate to stop the abusive agent if there is no one close to the principal who can call the court's attention to the agent who fails to register or account.⁴¹

Before drastically reforming the private basis upon which powers of attorney were intended to operate, we must first have a better grasp of the prevalence of power-of-attorney abuse and whether proposed reforms would really produce the intended benefits. Even when the benefits of a reform can be substantiated, they still need to be analyzed against the likely detriments. We should not lose sight of the fact that durable powers were meant to be a low-cost, flexible, and private alternative to guardianship and that even guardianship-monitoring systems have failed to prevent financial abuse of wards.⁴²

Professor Lawrence Frolik has written eloquently of the dangers of premature reactive reforms in the context of guardianship:

What cannot provide the basis of future reforms (whether to increase or reduce limits on guardianship) is the anecdotal horror story. . . . In the absence of "hard" data, both reformers and counter-reformers are free to rally support for their positions by pointing to horror stories of individual injustices. While emotionally compelling, these individual cases do not add up to a sound policy argument. No guardianship system will operate flawlessly and dispense justice to all at affordable prices. No particular outcome nor even a series of bad outcomes can automatically be interpreted as evidence of systemic problems. As with any system dependent on the actions, judgment and discretion of numerous actors, the guardianship system will always fail some individuals. No

40. See Boxx, *supra* n. 5, at 52 (noting that incapacity is often a "gradual process" and that "taking over responsibility for the principal's affairs can be a delicate matter").

41. *Id.* at 46.

42. Hurme & Wood, *supra* n. 8, at 870-872.

matter how many reforms or counter-reforms are enacted, no matter how the system is modified, there is no perfection this side of paradise.⁴³

Similarly, in the context of power-of-attorney reform to address financial abuse, English and Wolff conclude:

Any corrective action, particularly legislative action, should not focus on DPAs exclusively but should address the problem on a broader front. Changes to the DPA should be approached with great caution. Because the general public makes widespread use of the DPA, any change to this instrument must be consumer-conscious. No regulation is acceptable that will substantially impede the use of DPAs. The public will simply select other devices that may pose greater opportunities for abuse or that may be less efficient and more expensive. The reality is that regulations cannot ensure goodness. Short of totally banning the DPA, we must be willing to accept a certain degree of failure.⁴⁴

Although a perfect, abuse-proof system of surrogate property management is unrealistic, experience with powers of attorney has shown that certain planning strategies and legislative reforms can enhance the protective qualities of durable powers without sacrificing the benefits of flexibility, privacy, and cost savings.

1. Planning Strategies

a. Agent Selection and Monitoring

Beyond the most obvious planning strategy—careful selection of a trustworthy agent⁴⁵—a principal may incorporate protective mechanisms into the power of attorney.⁴⁶ For example, the princi-

43. Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 Stan. L. & Policy Rev. 347, 351 (1998).

44. English & Wolff, *supra* n. 18, at 35.

45. See Leg. Counsel for the Elderly, *Disability: Maintaining Control by Planning Ahead*, <http://www.uaelderlaw.org/powers.html> (accessed Feb. 8, 2008) (cautioning clients that “[i]t is critical to choose an agent . . . who is impeccably honest, has good [judgment], and will be sensitive to your preferences”) [hereinafter Legal Counsel].

46. See Richard B. Vincent, *Financial Exploitation Involving Agents under Powers of Attorney*, *Victimization of the Elderly & Disabled* 3 (May/June 2000) (offering drafting options to prevent exploitation).

pal may name co-agents and require that they make decisions by majority or unanimous consensus.⁴⁷ The principal may also give a third person authority to request accountings from the agent, revoke the agent's authority, or name successor agents.⁴⁸

Of course, there are trade-offs to protective mechanisms. Any arrangement that requires consensus decisionmaking is inherently more cumbersome to implement.⁴⁹ Co-agents may become deadlocked over important decisions, precipitating a petition for guardianship to break the stalemate.⁵⁰ Third parties may also be more reluctant to accept a power of attorney that names co-agents without proof that the co-agents reached agreement about the pending transaction.⁵¹ While a third-party monitor of the agent has theoretical appeal, in practice, most principals have difficulty identifying a trustworthy person to act as the agent, let alone someone to stand in the principal's shoes as a monitor. It is likely that any individual the principal would select as a surrogate monitor would also be the principal's first choice for the agent.

b. Scope of Authority

In addition to strategies for agent selection and monitoring, principals should carefully consider how much authority to give the agent, especially with respect to powers that have the potential of dissipating the principal's property or altering the principal's estate plan. Such powers include authority to do the following: (1) create, amend, or revoke an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) designate or change a beneficiary designation; (5) waive the principal's right to be a beneficiary of a joint and survivor annuity; and (6) disclaim property.⁵² If any of the foregoing powers are given to an agent, the principal should also consider whether the agent may exercise

47. *Id.* at 3; *but see* Legal Counsel, *supra* n. 45 (cautioning that naming more than one agent may have disadvantages).

48. Vincent, *supra* n. 46, at 3.

49. *See* Unif. Power Atty. Act § 111 cmt., 8A U.L.A. 252 (2006) (noting that naming co-agents may increase monitoring responsibilities and the risk of inconsistent actions); *see also* Legal Counsel, *supra* n. 45 (discouraging the practice of naming more than one agent).

50. *See* Legal Counsel, *supra* n. 45 (noting the need for a mechanism for dispute resolution in the event that joint agents are unable to reach consensus).

51. Unif. Power Atty. Act § 111 cmt.; Legal Counsel, *supra* n. 45.

52. Unif. Power Atty. Act § 201 cmt.

such powers in favor of the agent or someone to whom the agent owes a legal obligation of support.⁵³

There is unavoidable tension in the question of how much authority to give an agent. If the scope of authority is not broad enough, a guardianship may still be needed in the event of later incapacity; the broader the authority, however, the greater the potential for abuse. For example, omitting the power to make gifts may be desirable to reduce the potential for abuse.⁵⁴ This strategy may, nonetheless, work to the client's detriment if reduction of the principal's estate is later needed to qualify the client for Medicaid, or in the case of the wealthy client, beneficial to minimize future estate taxes.⁵⁵

A principal should also consider whether authority granted to the original agent is appropriate for successor agents. A common delegation strategy for married couples is to name one another as the original agent under a power of attorney and to name one or more of their adult children as successor agents.⁵⁶ Authority that may be appropriate for a spouse, such as unlimited authority to make gifts and to designate survivor and beneficiary interests, may not be suitable for adult children.⁵⁷

c. Immediate or Contingent Authority

Careful planning requires considering not only the scope of authority for original and successor agents, but also whether that authority should become effective immediately or upon a later event such as the principal's incapacity. The contingent, or "springing," power of attorney is recommended by some lawyers and preferred by some clients because the agent's access to the principal's assets can be delayed until surrogate management is

53. See *id.* (advising principals to consider whether to limit the scope of the agent's authority).

54. See Vincent, *supra* n. 46, at 3 (noting that even a clear prohibition in the power of attorney against making gifts cannot prevent an abusive agent from converting the principal's property).

55. See Jeffrey A. Marshall, *Power of Attorney—Key Issues for Elder Care Planning*, 74 Pa. B. Assn. Q. 160, 162–164 (2003) (discussing the effects of restricting an agent's authority to make gifts).

56. Bruce Methven, *Ezine Articles, Wills, Trusts and Durable Powers of Attorney*, <http://ezinearticles.com/?Wills,-Trusts-and-Durable-Power-of-Attorney&id=589433> (June 2007).

57. Unif. Power Atty. Act § 111 cmt.

necessitated by incapacity, which may never occur.⁵⁸ At first blush, the common sense wisdom of this approach is appealing—without keys to the kingdom, there is no access to the treasure. However, this short-term comfort may come at the expense of more important long-term considerations.

If a principal wants the agent to make decisions according to the principal's personal values, preferences, and objectives, then these expectations must be communicated to the agent.⁵⁹ Lip service is often paid to the importance of principals discussing their expectations with agents, but there is not much evidence that those conversations frequently occur.⁶⁰ In fact, some individuals execute durable powers and never tell their intended agents.⁶¹ The "secret" power increases the risk that when the agent is needed, the agent will be unavailable or unwilling to serve. Even when the agent is willing to serve, the agent's well-intended exercise of authority may not effectuate the principal's undeclared expectations.

There is a fundamental irony in the springing power arrangement. If the principal trusts an agent enough to empower the agent once the principal has lost the ability to monitor the agent's activities, shouldn't the agent be worthy of the principal's confidence while the principal can still direct how and under what circumstances the agent exercises concurrent authority?⁶² If the answer to this rhetorical question is no, then the principal should rethink the choice of agent.

With respect to client preferences about springing or immediately effective powers of attorney, sixty-one percent of attorney respondents to a national survey conducted by the Joint Editorial Board for Uniform Trusts and Estates Acts (JEB Survey) stated

58. Vincent, *supra* n. 46, at 3–4; see also Russell E. Haddleton, *The Durable Power of Attorney: An Evolving Tool*, Prob. & Prop. 59, 60 (May/June 2000).

59. See Legal Counsel, *supra* n. 45 (advising that a discussion with family members about preferences and expectations should include an explanation about why a particular agent was selected so that any concerns or objections can be addressed while the principal still has capacity).

60. Dessin, *supra* n. 5, at 602.

61. See Haddleton, *supra* n. 58, at 60 (discussing the practice of a drafting attorney serving as an "escrow agent" to hold a power of attorney until the escrow agent determines that the principal is incapacitated).

62. See *id.*

there was a client preference for immediately effective powers.⁶³ Twenty-three percent reported a preference for springing powers, and sixteen percent saw no trend.⁶⁴ When asked whether a power-of-attorney statute should authorize springing powers, eighty-nine percent responded in the affirmative.⁶⁵

Although individual client circumstances may commend use of springing powers, there are benefits of the immediately effective power of attorney that principals should consider. The principal's need for a surrogate decisionmaker may be occasioned by a temporary circumstance, such as transient illness, physical disability, or unavailability to complete a transaction, which does not rise to the level of full-fledged incapacitation. Furthermore, if the principal is suffering from a medical condition that may cause a gradual decline in capacity, the agent may assume responsibilities as needed without the stigma of an incapacity determination to "trigger" the springing power.⁶⁶

Probably the most compelling reason to execute an immediately effective power of attorney is the opportunity it affords for shared decisionmaking while the principal can still communicate with the agent. Sharing concurrent authority allows the principal to evaluate whether the agent is willing and able to carry out property management in a fashion consistent with the principal's expectations. If the principal is dissatisfied with the agent's performance, the principal still has the option of selecting a different agent.

Professor Marshall Kapp has examined the family dynamics of shared decisionmaking with older relatives who are "neither fully decisionally incapacitated nor totally independent."⁶⁷ With respect to financial decisionmaking, he gives the example of the home-bound individual who is physically unable to complete financial management tasks, such as banking and writing and mailing checks, but who is still capable of rational financial decisionmaking.⁶⁸ Professor Kapp acknowledges that unethical family members may abuse shared decisionmaking but suggests that the

63. Whitton, *supra* n. 18, at 6.

64. *Id.*

65. *Id.* at 7.

66. *Supra* n. 14 and accompanying text.

67. Kapp, *supra* n. 14, at 777.

68. *Id.* at 791.

“public policy challenge is to prevent this phenomenon from happening without routinely imposing bureaucratic intrusions that in the majority of cases would be excessive and counterproductive.”⁶⁹ Some might view shared decisionmaking as an infringement of the older person’s autonomy, but Professor Kapp suggests the following benefits:

The process of sharing power through frank and concrete discussions between an older person and the family, which take place while the individual is still decisionally capable, should lead to better, more accurate surrogate decision-making if it subsequently becomes necessary as a result of the individual’s mental decline. Shared decision-making affords a chance for continuing dialogue that informs future proxies more fully about the individual’s values and preferences concerning later decisions.⁷⁰

Whether a principal chooses a springing or an immediately effective power of attorney, the drafting attorney should emphasize the importance of communicating to the agent the principal’s expectations. More attention should also be paid to agent education. The drafting attorney will likely not have contact with a named agent prior to or contemporaneously with the principal’s execution of a power of attorney. When contact with the agent does occur, the principal’s attorney may find it ethically questionable to advise the agent—a non-client—about the agent’s duties and potential liabilities under the power of attorney.⁷¹ It is also unlikely that the agent, usually a family member who serves out of a sense of concern for the principal, will have independent legal representation. Perhaps the best solution is public education about a principal’s options and an agent’s duties under a state’s power-of-attorney statute.⁷² This is a community service that could be performed by state and local bar associations or the state adult protective services agency and could be implemented

69. *Id.* at 793.

70. *Id.* at 785.

71. See Haddleton, *supra* n. 58, at 61 (detailing possible conflicts of interest which could arise when giving advice to an incapacitated client’s agent).

72. See Vincent, *supra* n. 46, at 4 (stating that “[b]y educating the agent as to his or her duties . . . financial mismanagement and inadvertent abuse by an inexperienced agent may be avoided”).

through brochures, public-access Web sites, and community presentations.⁷³ Education may also reduce the vulnerability of principals to abuse.

Decisions about who should serve as the agent, how much authority the agent should have, when the authority should commence, and whether a third person should be named to monitor the agent, depend on the circumstances, needs, and preferences of each client. A separate question for legislatures is what protections should be built into power-of-attorney statutes for the benefit of all principals. The following Section discusses legislative trends with respect to those statutory protections.

2. Legislative Reform

In addition to statutes that deal specifically with criminal sanctions and civil penalties for financial exploitation of vulnerable adults,⁷⁴ states have included a variety of anti-abuse provisions within power-of-attorney statutes. These include the following: (1) definition of agent duties and liability provisions for misconduct;⁷⁵ (2) standing provisions to request an agent accounting or judicial review of the agent's conduct;⁷⁶ and (3) the requirement of specificity when granting powers that can dissipate the principal's property or alter the principal's estate plan.⁷⁷

a. Definition of Agent Duties and Liability Provisions for Misconduct

There appears to be no disagreement that an agent under a power of attorney is a fiduciary, but the definition of what it

73. See *id.* (noting that the Colorado Bar Association has produced brochures that address agent duties). This model has been used successfully to provide public education about healthcare advance directives, including the duties of healthcare agents and proxies. See Linda S. Whitton, *Planning for End-of-Life Health Care Decisions—What National Survey Results Reveal*, Prob. & Prop. 38, 38–39 (describing the ABA Section of Real Property, Probate and Trust Law's five-year national education campaign during which state and local bar associations provided community programs about healthcare advance directives and organ and tissue donation).

74. See Dessin, *supra* n. 16, at 280–290 (discussing various state statutory approaches to financial exploitation).

75. *Infra* nn. 78–138 and accompanying text.

76. *Infra* nn. 139–153 and accompanying text.

77. *Infra* nn. 154–173 and accompanying text.

means to be a fiduciary in this context is far less clear.⁷⁸ Neither the power-of-attorney provisions added to the Uniform Probate Code in 1969 nor the freestanding Uniform Durable Power of Attorney Act, approved in 1979 and amended in 1987, expressly address agent duties. In the absence of specific regulation of an agent's duty, the common law of agency is presumed to apply.⁷⁹

An agent's common law fiduciary duty is described in the *Restatement Second, Agency*, as follows: "Unless otherwise agreed, an agent is subject to a duty to his principal *to act solely for the benefit of the principal* in all matters connected with his agency."⁸⁰ However, *Restatement Third, Agency*, formulates this duty somewhat differently as a "fiduciary duty *to act loyally for the principal's benefit* in all matters connected with the agency relationship."⁸¹ The Reporter's Notes explain that this change in terminology "is intended to clarify that an agent's loyal service to the principal, may, concurrently, be beneficial to the agent."⁸² Another section of the *Restatement Third* provides that "[c]onduct by an agent that would otherwise constitute a breach of duty . . . does not constitute a breach of duty if the principal consents to the conduct. . . ."⁸³

Applied to the context of a durable power of attorney, this nuanced common law definition of fiduciary duty is problematic because it is not adequate, in all circumstances, to guide and protect the family-member agent who likely has inherent conflicts of interest, such as those arising from inheritance expectations or joint property ownership. While the common law standard is adequate to protect the agent of a principal who has provided advance authorization in the power of attorney,⁸⁴ contemporaneous consent,⁸⁵ or subsequent ratification for mutually beneficial

78. For further discussion, see Boxx, *supra* n. 5 and Dessin, *supra* n. 5.

79. See John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?* 114 Yale L.J. 929, 943 (2005) (noting that the Uniform Durable Power of Attorney Act does not regulate an agent's fiduciary duties; those duties are governed by agency law).

80. *Restatement (Second) of Agency* § 387 (1958) (emphasis added).

81. *Restatement (Third) of Agency* § 8.01 (2006) (emphasis added).

82. *Restatement (Third) of Agency* § 8.01 rptr. n. a.

83. *Restatement (Third) of Agency* § 8.06.

84. See *Restatement (Second) of Agency* § 387 (requiring that the agent, "[u]nless otherwise agreed, . . . act solely for the benefit of the principal").

85. See *Restatement (Third) of Agency* § 8.01 rptr. n. a (recognizing that "a principal

transactions,⁸⁶ it is of little use to the agent of an incapacitated principal who is now incapable of consent or ratification. In such a circumstance, only statutory protection will suffice.

Today, less than half of state statutes deal specifically with agent duties, and among those that do, the treatment varies widely.⁸⁷ On one end of the spectrum, the agent is merely referred to as a fiduciary without further specification of duties;⁸⁸ on the other, an extensive list of duties is provided.⁸⁹ The statutory standards of care to be exercised by agents vary as well and range from a due care⁹⁰ to a trustee-type standard.⁹¹

That reasonable minds can and do differ on the appropriate agent standard of care is evident from the results of the JEB Survey.⁹² Respondents were asked to choose among the three following alternatives to serve as the statutory default standard of care for agents: (1) the same fiduciary standard as trustees; (2) good faith; and (3) due care.⁹³ The majority, sixty-three percent, selected the trustee standard and the other respondents were almost evenly split between the good faith and due care standards—nineteen and eighteen percent, respectively.⁹⁴ What is striking, however, is that eighty-four percent of the same respon-

may consent to conduct by an agent that would otherwise constitute a breach of the agent's fiduciary duty"); see e.g. *In re Est. of Cummin*, 671 N.W.2d 165, 169 (Mich. App. 2003) (noting that "[c]ommon-law agency principles, which generally apply to powers of attorney, permit an agent to personally engage in a transaction with the principal with 'consent of the principal after a full disclosure of the details of the transaction'") (citations omitted).

86. See e.g. *Colarossi v. Faber*, 518 A.2d 1224, 1228–1229 (Pa. Super. 1986) (holding that the unauthorized act of an agent under a power of attorney may be ratified by the principal).

87. See Natl. Conf. Commrs. on Unif. St. Ls., *April 2003 Draft, Amendments to Uniform Durable Power of Attorney Act*, art. 5, rptr. cmt. (2003), available at <http://www.law.upenn.edu/bll/ulc/dpoaa/April2003draft.htm> [hereinafter NCCUSL April 2003 Draft] (summarizing statutory approaches to defining the agent's fiduciary standard of care).

88. See e.g. Ark. Code Ann. § 28-68-308(b) (2004) (listing no specific fiduciary duties owed to the principal); Okla. Stat. Ann. tit. 58, § 1081 (same); S.C. Code Ann. § 62-5-501(A) (same).

89. See e.g. Vt. Stat. Ann. tit. 14, § 3505 (specifically listing twelve fiduciary duties the agent owes to the principal).

90. E.g. 755 Ill. Comp. Stat. Ann. § 45/2-7; Ind. Code Ann. § 30-5-6-2.

91. See e.g. Fla. Stat. Ann. § 709.08(8) (requiring the attorney-in-fact to "observe the standard of care applicable to trustees . . ."); Mo. Stat. Rev. Ann. § 404.714 (stating that the attorney-in-fact has the same fiduciary obligations as that of a trustee).

92. See Whitton, *supra* n. 18, at 9–10 (noting a split of opinion among survey respondents as to what a statute dealing with an agent's fiduciary duties should require).

93. *Id.* at 9.

94. *Id.*

dents also favored including a statutory provision to clarify that an agent is not liable solely because the agent also benefits from an act.⁹⁵

Professor John Langbein has grappled with the tension between the traditional “sole interest” test of loyalty applied to trustees and a best-interest test that would permit mutually beneficial transactions.⁹⁶ He notes that under the sole interest formulation the “no further inquiry” rule invalidates transactions in which a trustee has a “conflict or overlap of interest” without regard to the underlying merits of the transaction.⁹⁷ He argues persuasively that even in the trust context the traditional “sole interest” test for the duty of loyalty should be replaced by the best-interest test because “a transaction prudently undertaken to advance the best interest of the beneficiaries best serves the purpose of the duty of loyalty, even if the trustee also does or might derive some benefit.”⁹⁸

Professor Karen Boxx has explored the unique fiduciary context of an agent acting under a power of attorney and argues that clear fiduciary guidelines are essential.⁹⁹ She observes that when the principal loses capacity, the agent is “uniquely directionless” as compared to a guardian, who takes direction from the court or a trustee who is guided by the terms of a trust.¹⁰⁰ Professor Boxx concludes that clear fiduciary rules are needed to replace the monitoring function that is lost when the principal loses capacity.¹⁰¹ Clarity with respect to an agent’s duties benefits not only the principal, but also the agent who is more vulnerable to liability without clear guidelines.¹⁰² Noting the rise of statutory abuse penalties, Professor Boxx cautions that “[w]ithout a corresponding clarification of the fiduciary duties, the pressure of the abuse reforms will make the power of attorney too unattractive to be useful, and we will return to the situation of the early 1960s where

95. *Id.*

96. Langbein, *supra* n. 79.

97. *Id.* at 931–932.

98. *Id.* at 932.

99. Boxx, *supra* n. 5.

100. *Id.* at 44.

101. *Id.* at 44–46.

102. *Id.* at 55–56.

no legal device was available to deal efficiently with disability planning.”¹⁰³

In defining an agent’s fiduciary duties, legislatures should be mindful that the majority of agents are family members who serve without compensation.¹⁰⁴ Given the difficulty of finding appropriate surrogates to act for the rising number of incapacitated persons in our society,¹⁰⁵ fiduciary rules for agents should comport with the reality that most of these agents are honest, well-meaning family members who lack the sophistication of a corporate trustee. Several state statutes acknowledge that an agent who has “conflicting interests in relation to the property, care, or affairs of the principal” can still act with due care for the benefit of the principal.¹⁰⁶ The new Uniform Power of Attorney Act (UPOAA) adopts this approach.¹⁰⁷ The advantage of this type of provision is that it removes from the common law quagmire transactions that are beneficial to a principal despite the agent’s conflict of interest.¹⁰⁸

In addition to providing greater clarity with respect to conflict-of-interest transactions, the UPOAA section on agent duties also offers flexibility in the form of both mandatory and default rules for agent conduct.¹⁰⁹ The mandatory rules establish the principal’s reasonable expectations as the paramount guideline for agent actions.¹¹⁰ If the agent has no actual knowledge of the principal’s expectations, then the agent is to act in the principal’s best interest.¹¹¹ This approach is consistent with the philosophy that “substituted judgment” is preferable to “best interest” as a

103. *Id.* at 61.

104. *Id.* at 36; see also Linda S. Whitton, *Caring for the Incapacitated—A Case for Non-profit Surrogate Decision Makers in the Twenty-First Century*, 64 U. Cin. L. Rev. 879, 882 n.17 (1996) (noting that agents are usually family members).

105. See generally Whitton, *supra* n. 104, at 881–882 (discussing the increasing need for surrogate decisionmakers).

106. E.g. Cal. Prob. Code Ann. § 4232(b); 755 Ill. Comp. Stat. Ann. 45/2-7; Ind. Code Ann. § 30-5-9-2.

107. Unif. Power Atty. Act § 114(d) (providing that “[a]n agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal”).

108. See *supra* nn. 78–98 and accompanying text (discussing the problematic application of the common law sole interest test of loyalty to agents acting under durable powers).

109. Unif. Power Atty. Act § 114 cmt.

110. *Id.* at § 114(a)(1).

111. *Id.*

surrogate decisionmaking standard because it better effectuates the incapacitated person's self-determination interests.¹¹² The other mandatory duties for agent conduct under the UPOAA are the duties to act in good faith and within the scope of authority granted in the power of attorney.¹¹³ Taken together, these mandatory duties set the baseline below which agent conduct should not fall.

Beyond the mandatory agent duties, the UPOAA default duties apply unless the terms of the power of attorney override them.¹¹⁴ Default duties include the traditional common law fiduciary duties as modified by the statute (e.g., the duty to act loyally for the principal's benefit,¹¹⁵ the duty to act with care, competence, and diligence,¹¹⁶ and the duty to keep records¹¹⁷ and to account to the principal when requested¹¹⁸) as well as two duties that are specific to the power-of-attorney context—cooperation with the principal's healthcare agent¹¹⁹ and preservation of the principal's estate plan.¹²⁰

The agent's duty to preserve the estate plan is qualified by both the extent to which the agent actually knows of the plan and by the principal's best interest.¹²¹ This duty is necessarily qualified because the principal has no affirmative obligation to disclose

112. See *id.* at § 114 cmt.; see also Wingspan—The Second National Guardianship Conference, *Recommendations*, 31 Stetson L. Rev. 595, 603 (2002) (recommending that “[t]he guardian use a substituted judgment standard in making decisions on behalf of the person with diminished capacity,” which “entails determining what the person with diminished capacity would decide if he or she had capacity”); Unif. Guardianship & Protective Procs. Act § 314(a) (1997) (stating that “[a] guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian.”). As the comment to Section 314 of the Uniform Guardianship and Protective Proceedings Act suggests, the substituted-judgment and best-interest standards do not operate independently. *Id.* at § 314 cmt. The ward's best interest requires that the guardian attempt to ascertain the ward's personal values and desires when making decisions on behalf of the protected person. *Id.*

113. Unif. Power Atty. Act § 114(a)(2)–(3).

114. *Id.* at § 114(b)(1)–(6), (h).

115. *Id.* at § 114(b)(1).

116. *Id.* at § 114(b)(3).

117. *Id.* at § 114(b)(4).

118. *Id.* at § 114(h).

119. *Id.* at § 114(b)(5).

120. *Id.* at § 114(b)(6). The Illinois power-of-attorney statute provides a similar duty. See 755 Ill. Comp. Stat. Ann. 45/2-9 (requiring the agent attempt to preserve the estate plan).

121. Unif. Power Atty. Act § 114(b)(6).

to an agent any information about the principal's property or estate plan.¹²² Even when the agent is aware of the plan, an incapacitated principal's needs may require expenditure of resources that the principal had hoped would pass at death.¹²³ Relevant factors to consider in determining whether estate-plan preservation is in the principal's best interest include the extent of the principal's property, the principal's financial needs, tax minimization objectives, and the need to qualify the principal for government assistance.¹²⁴ The UPOAA also clarifies that an agent is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan if the agent has acted in good faith.¹²⁵

Given that most agents are family members, the UPOAA duty standards suit the typical principal-agent relationship better than either statutes holding agents to a trustee-type level of accountability or the common law "sole interest" loyalty rule. The UPOAA also permits a principal to include an exoneration provision that relieves the agent of liability provided the breach of duty was not "committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest[s] of the principal."¹²⁶ In light of articles that have labeled a power of attorney as "a license to steal,"¹²⁷ one might question the prudence of an exoneration provision. However, in the right circumstances, an exoneration provision may be needed to protect the principal as well as the agent.¹²⁸

Consider the contentious family situation, where a principal fears the agent will likely face confrontation or litigation by other

122. *Id.*

123. See Marshall, *supra* n. 55, at 162–163 (noting the importance of addressing these issues when preparing the power of attorney).

124. Unif. Power Att'y. Act §§ 114(b)(6)(A)–(D).

125. *Id.* at § 114(c).

126. Unif. Power Att'y. Act § 115. There are other examples of exoneration provisions. *E.g.* Ind. Code Ann. § 30-5-9-5; Mo. Rev. Stat. Ann. § 404.717(4); see also Unif. Trust Code § 1008 (2005) (providing analogous exculpation provision for trustees).

127. *E.g.* Gutner, *supra* n. 26; Mirry M. Hwang, *Durable Power of Attorney: Financial Planning Tool or License to Steal?* 15 J. Long-Term Home Health Care 13 (Spring 1996); Hans A. Lapping, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 Elder L.J. 143 (1996); Wasik, *supra* n. 15, at 82.

128. See Linda S. Whitton, *Durable Powers as a Hedge Against Guardianship: Should the Attorney-at-Law Accept Appointment as Attorney-in-Fact?* 2 Elder L.J. 39, 59–60 (noting that agents are not obligated to accept appointment under a power of attorney and discussing drafting considerations for inducing the agent to serve in a potentially contentious situation).

family members if the principal loses capacity and the ability to referee disputes.¹²⁹ Lowering the agent's standard of care from due care to good faith may discourage frivolous attacks or, at the very least, minimize the likelihood of success on the merits.¹³⁰ It may be difficult for a principal with contentious family members to find an agent—a relative or non-relative—who is willing to serve without the assurance that only reckless or dishonest actions will subject the agent to liability.¹³¹

At the other end of the spectrum from the incapacitated principal who has too many individuals contentiously vying for the surrogate role¹³² is the vulnerable principal who has few, if any, obvious candidates to serve as agent.¹³³ For such an individual, it may be a trusted neighbor or church member who agrees to provide assistance for as long as is practicable. Concern that isolated, incapacitated individuals may slip between the cracks when their volunteer surrogates are no longer able to serve has prompted consideration of mandatory requirements for notice of agent resignation.¹³⁴ The difficulty, of course, is delivering effective notice once the principal is incapacitated.¹³⁵ Predating the UPOAA, California enacted a provision that gives the agent a choice among the following four options to effect a resignation: (1) notice to the principal, if competent; (2) notice to a conservator, if one has been appointed; (3) obtaining written agreement from a successor agent to serve; or (4) by court order.¹³⁶

129. *Id.*

130. *Id.* at 60 (noting that limiting the standard of liability for the agent may reduce risk to an acceptable level).

131. See John J. Lombard, Jr., *Asset Management Under a Durable Power of Attorney—The Ideal Solution to Guardianships or Conservatorships*, 9 Prob. Notes 189, 202 (1983) (suggesting language to limit an agent's liability to "gross misconduct or fraud").

132. See *infra* nn. 235–255 and accompanying text (discussing the issue of family power struggles).

133. See generally Whitton, *supra* n. 104, at 882 n. 18 (noting the declining availability of relatives to serve as surrogate decisionmakers).

134. See Whitton, *supra* n. 18, at 10 (reporting that 75% of the respondents to the JEB Survey answered that a power-of-attorney statute should require agent notice of resignation); see also Boxx, *supra* n. 5, at 54 (observing that common law requires proper notice to terminate an agency, but that an agent of an incapacitated principal lacks a proper means to accomplish resignation without a statutory procedure).

135. See Boxx, *supra* n. 5, at 54 (noting the lack of effective means for notice with an incapacitated principal).

136. Cal. Prob. Code Ann. § 4207.

In contrast, the UPOAA provides the following hierarchy of persons to whom the agent may give notice if the principal is incapacitated: (1) a conservator or guardian and a co-agent or successor agent, if any; or (2) if none, then to either the principal's caregiver, a person who the agent reasonably believes has sufficient interest in the principal's welfare, or a governmental agency that possesses authority to protect the principal's welfare.¹³⁷ The advantage of the UPOAA provision over the California provision is that an agent does not have to go through the expense and delay of obtaining court approval when there is no appropriate individual to whom the agent can give notice of resignation. Notice may be given to a governmental agency that has authority to protect the welfare of the principal.¹³⁸

b. Standing Provisions to Request an Agent Accounting or
Judicial Review of the Agent's Conduct

A necessary corollary to statutory agent duties is a mechanism for assessing agent performance of those duties. As long as the principal retains capacity, it is assumed that the principal will monitor the agent's conduct and take whatever action may be appropriate, including revocation of the power of attorney.¹³⁹ However, if the principal becomes incapacitated, an alternative mechanism for monitoring the agent is needed.

Although the Uniform Durable Power of Attorney Act contained no explicit agent duty to account to the principal, this duty was inherent under the common law of agency¹⁴⁰ and implicit in the Act's provision dealing with later court appointment of a fiduciary for the principal. In the event of such an appointment, the

137. Unif. Power Atty. Act § 118.

138. *Id.*

139. See Boxx, *supra* n. 5, at 42 (noting that traditional powers of attorney differ from durable powers of attorney).

The fiduciary duties of an agent were created under the traditional agency assumption that the agent was subject to the control of the principal. A durable power of attorney's major feature is that, unlike traditional powers of attorney that terminate automatically upon the principal's [incapacity], the durable power continues in force

Id.

140. See *Restatement (First) of Agency* § 382 (1933) ("Unless otherwise agreed, an agent is subject to a duty to keep, and render to his principal, an account of money or other things which he has received or paid out on behalf of the principal.").

Act states that “the attorney in fact is accountable to the fiduciary as well as to the principal.”¹⁴¹ States that have codified the agent’s duty to account typically trigger the duty upon a request by the principal, a fiduciary acting for the principal, or, if the principal is deceased, by the principal’s personal representative or successor in interest.¹⁴² Agents must also account if ordered by a court.¹⁴³ A more recent addition to the list of those who may request an accounting is a governmental agency that has authority to protect the welfare of the principal.¹⁴⁴ Other amendments include statutory time limits for agent compliance when a request to account is made.¹⁴⁵

The statutory categories of persons to whom an agent must account if requested are typically defined narrowly to protect the principal’s privacy and discourage contentious meddling. If, however, an agent is financially exploiting an incapacitated principal, protecting the principal’s privacy may be at odds with protecting the principal’s financial well-being. Eighty-nine percent of the JEB Survey respondents favored having a standing provision that

141. Unif. Durable Power of Atty. Act § 3.

142. See e.g. Cal. Prob. Code Ann. § 4236(b) (establishing an attorney-in-fact has no duty to provide accounting except if requested by the principal, conservator, personal representative, successor in interest, or court order); Ind. Code Ann. § 30-5-6-4 (providing a statutory agent duty to account triggered upon request of the principal, the principal’s fiduciary, representative, or successor in interest); see also Mo. Rev. Stat. Ann. § 404.727(1) (providing, in addition, that if the principal is disabled, incapacitated, or deceased, an adult member of the principal’s family or any person interested in the welfare of the principal may petition for an accounting); Utah Code Ann. § 75-5-201(2)(c) (2006) (requiring an agent of an incapacitated principal to account to interested persons upon written request unless otherwise waived in the power of attorney).

143. See e.g. Cal. Prob. Code Ann. § 4236(b) (requiring agents to account when ordered to do so by a court); Ind. Code Ann. § 30-5-6-4 (same); Mo. Rev. Stat. Ann. § 404.727(1) (same).

144. See e.g. 755 Ill. Comp. Stat. Ann. 45/2-7.5(b) (permitting a representative of a provider agency, of the Office of the State Long Term Care Ombudsman, or of the Office of Inspector General for the Department of Human Services to request an accounting); 20 Pa. Consol. Stat. Ann. § 5604(d) (permitting an agency acting pursuant to Older Adults Protective Services Act to petition); Vt. Stat. Ann. tit. 14, § 3510(b) (permitting the Commissioner of Disabilities, Aging, and Independent Living to petition); Unif. Power Atty. Act § 114(h) (authorizing a governmental agency having authority to protect the welfare of the principal to request an accounting).

145. See e.g. 755 Ill. Comp. Stat. Ann. 45/2-7.5(c) (permitting a petition for court order if an agent fails to comply within twenty-one days); Ind. Code Ann. § 30-5-6-4 (requiring compliance within sixty days); Unif. Power Atty. Act § 114(h) (requiring compliance within thirty days and permitting an additional thirty days if written substantiation is provided for why additional time is needed).

would permit certain classes of interested persons to petition for judicial review of an agent's conduct when the principal is incapacitated.¹⁴⁶ An example is UPOAA Section 116(a), which provides that the following persons may petition the court:

- (1) the principal or the agent;
- (2) a guardian, conservator, or other fiduciary acting for the principal;
- (3) a person authorized to make health-care decisions for the principal;
- (4) the principal's spouse, parent, or descendant;
- (5) an individual who would qualify as a presumptive heir of the principal;
- (6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death, or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
- (7) a governmental agency having regulatory authority to protect the welfare of the principal;
- (8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and
- (9) a person asked to accept the power of attorney.¹⁴⁷

A principal who still has capacity can move to dismiss a petition filed under Section 116, and the court must dismiss the petition "unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney."¹⁴⁸

Of the twelve states that currently address standing to petition for judicial review of the agent's conduct, one has enacted the

146. Whitton, *supra* n. 18, at 13.

147. Unif. Power Atty. Act § 116(a).

148. *Id.* at § 116(b).

UPOAA provision¹⁴⁹ and five have provisions similar to the UPOAA that include within the categories of eligible persons any person interested in the welfare of the principal.¹⁵⁰ Four of the remaining states provide that “an interested person” may petition, but do not define interested person.¹⁵¹ Only Pennsylvania and Vermont limit standing to the principal and a governmental agency or official.¹⁵²

The rationale for a broad standing provision to initiate judicial review of an agent’s conduct is the increasing awareness that victimized principals are often socially or physically isolated.¹⁵³ Allowing any person who is concerned about the welfare of an incapacitated principal to trigger judicial review may be the only effective means to stop the surreptitious abuser.

c. Requiring Specificity When Granting Powers That
Can Dissipate the Principal’s Property or
Alter the Principal’s Estate Plan

With the evolution of durable powers over the past thirty years, experience has shown the importance of careful statutory delineation of what is included in a grant of authority as well as the importance of careful drafting to limit or enlarge the scope of that authority. Initially, most power-of-attorney statutes did not include provisions dealing with the definition or scope of authority because they were modeled after the Uniform Durable Power of Attorney Act, which is silent on these issues.¹⁵⁴ The trend toward statutory definition and default limitation of authority did not occur until the 1980s with the advent of statutory form powers of attorney. Following the lead of several states that enacted statutory forms, the Uniform Statutory Form Power of Attorney

149. N.M. Stat. Ann. § 45-5A-116.

150. Cal. Prob. Code Ann. § 4540(k); Kan. Stat. Ann. § 58-662(a); Mo. Rev. Stat. § 404.727(1); N.H. Rev. Stat. Ann. § 506:7(II); Wash. Rev. Code Ann. § 11.94.100(1)(e); *see also* Cal. Prob. Code Ann. § 4503(a)(1) (permitting a principal to exclude individuals who could otherwise petition, thus reducing the likelihood of harassment suits); Wash. Rev. Code Ann. § 11.94.100(2) (same).

151. Colo. Rev. Stat. Ann. § 15-14-609(1); 755 Ill. Comp. Stat. Ann. 45/2-10; Ind. Code Ann. § 30-5-3-5; Wis. Stat. Ann. § 243.07(6r).

152. 20 Pa. Consol. Stat. Ann. § 5604(d); Vt. Stat. Ann. tit. 14, § 3510(b).

153. *See supra* n. 25 and accompanying text (noting that isolation is one of the risk factors increasing the likelihood of abuse).

154. Unif. Durable Power of Atty. Act.

Act was drafted to provide a template for the definition of authority with respect to discrete subject areas.¹⁵⁵ To date, there are eleven official adoptions of the Uniform Statutory Form Power of Attorney Act,¹⁵⁶ but a number of other states have enacted statutory short forms that incorporate definitions of certain powers.¹⁵⁷

A more recent phenomenon, prompted in part by concern over power-of-attorney abuse, is special statutory treatment of specific powers that could dissipate the principal's property or alter the principal's estate plan. The first area of authority to receive significant statutory treatment was gift-making authority. Taken as a whole, state default positions with respect to gift-making authority reveal two competing policy objectives—one, facilitation of tax minimization through default recognition of implied gift-making authority¹⁵⁸ and the other, protection of incapacitated principals by giving agents no implied gift-making authority and very narrow express default authority.¹⁵⁹

As a general proposition, courts strictly construe power-of-attorney language and refuse to extend authority “beyond that which is directly given or necessary and proper to carry the authority to full effect.”¹⁶⁰ However, some courts have implied gift-making authority from a “facts and circumstances” analysis when the IRS has claimed that the value of gifts made by an agent should be included in a decedent's estate because, absent explicit gift-making authority, the gifts were revocable transfers.¹⁶¹ In response to these tax-planning concerns, several states revised their power-of-attorney statutes to provide, as a default position,

155. Unif. Stat. Form Power of Atty. Act prefatory n.

156. See Natl. Conf. Commrs. on Unif. St. Ls., *Legislative Fact Sheet*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-usfpaa.asp (accessed Feb. 12, 2008).

157. E.g. 755 Ill. Comp. Stat. Ann. 45/1-1, 45/2-1–45/2-11, 45/3-1–45/3-4; Minn. Stat. Ann. §§ 523.01–523.24; N.Y. Gen. Oblig. Law §§ 5-1501–1506.

158. See *infra* nn. 161–162 and accompanying text (providing case and statutory authority for the recognition of an implied gift-making power).

159. See *infra* nn. 163–165 and accompanying text (providing examples of statutes that require an express grant for gift-making authority and set default limits on exercise of that authority).

160. *Est. of Swanson v. U.S.*, 46 Fed. Cl. 388, 392 (2000) (quoting *Jay v. Dollarhide*, 3 Cal. App. 3d 1001, 1020 (Cal. App. 5th Dist. 1970)).

161. See e.g. *Est. of Pruitt v. Commr.*, 80 T.C.M. (CCH) 348, 354 (2000) (inferring power to make gifts in order to give effect to the decedent's intent); *LeCraw v. LeCraw*, 401 S.E.2d 697, 701 (Ga. 1991) (affirming declaratory judgment that power of attorney authorized gifts made by attorneys-in-fact).

that general grants of authority include the authority to make gifts.¹⁶² Other states have adopted the opposite approach—providing that there is no authority to make gifts unless express language is used in the power of attorney.¹⁶³ In addition, some states set default dollar limits on gifts (usually based on the annual federal gift tax exclusion)¹⁶⁴ as well as default limits on who may receive a gift (usually based on the degree of relationship to the principal).¹⁶⁵

As concern over abuse of durable powers has risen, so has the number of powers receiving heightened scrutiny by state legislatures. In addition to making improper inter vivos gifts, abusive agents exploit principals by creating, amending, or revoking trusts and by using other non-probate estate-planning vehicles such as survivorship interests and beneficiary designations. Recognition of the potential danger to an incapacitated principal has prompted some states to require express language to delegate any of these powers to an agent.¹⁶⁶ The UPOAA follows this approach.¹⁶⁷

The UPOAA also requires express authorization to grant an agent authority to do the following: (1) delegate the agent's authority; (2) exercise fiduciary powers that the principal has authority to delegate; (3) waive the principal's right to be a beneficiary of a joint and survivor annuity; and (4) disclaim or refuse an interest in property.¹⁶⁸ Furthermore, the UPOAA states that unless the power of attorney otherwise provides, agents who are not an "ancestor, spouse, or descendant of the principal, may not

162. *E.g.* Ala. Code § 26-1-2.1; Tenn. Code Ann. § 34-6-110; Va. Code Ann. § 11-9.5.

163. *E.g.* Cal. Prob. Code Ann. § 4264; Kan. Stat. Ann. § 58-654(f); Ky. Rev. Stat. Ann. § 386.093; Mo. Rev. Stat. Ann. § 404.710; 20 Pa. Consol. Stat. Ann. § 5601.2; Vt. Stat. Ann. tit. 14, § 3504; Wash. Rev. Code Ann. § 11.94.050.

164. *E.g.* N.Y. Gen. Oblig. Law § 5-1502M; 20 Pa. Consol. Stat. Ann. § 5603(a)(2)(ii).

165. *See e.g.* N.Y. Gen. Oblig. Law § 5-1502M (limiting gifts to principal's "spouse, children and other descendants, and parents"); 20 Pa. Consol. Stat. Ann. § 5603(a)(2)(i) (limiting gifts to principal's "spouse, issue and a spouse of the principal's issue"). Some states also provide special default limits on gifts to the agent or someone to whom the agent owes a legal duty of support. *See e.g.* Ind. Code Ann. § 30-5-5-9(a)(2) (aggregate annual gifts limited to the annual federal gift tax exclusion amount); Minn. Stat. Ann. § 523.24(8)(2) (same).

166. *E.g.* Cal. Prob. Code Ann. § 4264; Kan. Stat. Ann. § 58-654(f); Mo. Rev. Stat. Ann. § 404.710; Wash. Rev. Code Ann. § 11.94.050.

167. Unif. Power Atty. Act § 201(a).

168. *Id.*

exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise."¹⁶⁹ All agents, whether relatives of close degree or non-relatives, are also held to fiduciary duties that may prevent exercise of the power in favor of the agent or someone close to the agent.¹⁷⁰ These duties include exercising authority in accordance with the principal's expectations if known to the agent or, otherwise, in the principal's best interest.¹⁷¹

What makes an agent's financial abuse difficult to detect and stop is that the exploitative transaction is usually within the actual authority of the agent to complete. The abuse is either the undisclosed purpose of the transaction or the application of the principal's property in a manner that is contrary to the principal's expectations or best interest.¹⁷² For example, a principal may grant an agent the authority to make gifts of her property, including gifts to the agent, with the expectation that the agent will continue a pattern of annual exclusion gifts in equal amounts to all of the children or grandchildren. Instead, once the principal is incapacitated, the agent chooses to favor his own branch of the family over those of his siblings.

Another example is the principal who creates equal joint tenancy accounts with survivorship interests in each of her four children and expects her agent, the eldest child, to exercise the authority to create or change survivorship or beneficiary designations only in the event that market or family conditions justify new account arrangements (e.g., a better interest rate becomes available at another institution or the principal is predeceased by one of her children). Instead, once the principal has lost capacity, the eldest-child agent extinguishes the survivorship interest of a sibling with whom she has had a dispute.

169. *Id.* at § 201(b).

170. *Supra* nn. 109–120 and accompanying text (discussing the mandatory and default fiduciary duties under the Act).

171. Unif. Power Atty. Act § 114(a)(1).

172. *See e.g. In re Est. of Kurrelmeyer*, 895 A.2d 207, 215 (Vt. 2006) (finding that the power of attorney authorized the attorney-in-fact to create a trust on principal's behalf and to add assets to the trust but remanding to determine whether the attorney-in-fact breached her fiduciary duties to the principal).

Requiring express language to grant authority that could dissipate the principal's property or alter the principal's estate plan is a safety valve that should prompt the drafting attorney and principal to carefully consider whether such authority is advisable or necessary, and if so, whether limitations should apply. A general rule with respect to these powers cannot be made. While extremely dangerous in the hands of the abusive or negligent agent, these powers may be essential to implementing tax-planning or benefit-qualification strategies.¹⁷³

B. Lesson # 2: A Power of Attorney Is Only as Effective
as the Willingness of Third Parties to Accept It

Regardless of the care that a principal takes in choosing an agent and delineating the agent's scope of authority, a power of attorney will be ineffective as an alternative to guardianship if third parties refuse to accept it. Respondents to the JEB Survey were asked whether they had ever experienced difficulty obtaining third-party acceptance of an agent's authority. Sixty-three percent selected the answer "yes, occasionally," seventeen percent chose "yes, frequently," and twenty percent selected "no."¹⁷⁴ In a follow-up question, seventy-four percent of all respondents favored statutory remedies or sanctions to address unreasonable refusal of a power of attorney.¹⁷⁵ The problem of unreasonable refusals to honor valid powers of attorney was also echoed, anecdotally, at over twenty national professional meetings where the draft Uniform Power of Attorney Act was discussed.¹⁷⁶

Despite the significant percentages of attorneys who reported difficulty with acceptance of powers of attorney by banks, broker-

173. Marshall, *supra* n. 55, at 170.

174. Whitton, *supra* n. 18, at 10.

175. *Id.*

176. From January 2004 to May 2006, the Author, as Reporter for the Uniform Power of Attorney Act, met numerous times with the Joint Editorial Board for Uniform Trusts and Estates Acts, the National Conference of Lawyers and Corporate Fiduciaries, committees of the American College of Trust and Estate Counsel, and the leadership and committees of the ABA Section of Real Property, Probate and Trust Law. She also participated in programs for the National Academy of Elder Law Attorneys, the New York State Bar Association Trusts and Estates Law Section, and the DC Bar Association Trusts and Estates Section. Memo. from Linda S. Whitton, Rptr., Unif. Power Atty. Act, *Meetings and Presentations on the Uniform Power of Attorney Act, January 2004–December 2006* (copy on file with *Stetson Law Review*).

age houses, and insurance companies, case decisions on this issue are scant.¹⁷⁷ Practitioners report that if the principal is still competent, it is faster and less costly to have the principal execute the form favored by the third party.¹⁷⁸ If the principal is already incapacitated—a more frequent scenario—practitioners generally view seeking guardianship as more expedient than litigating a refusal.¹⁷⁹

1. Planning Strategies

In the abstract, one might conclude that the best planning strategy to avoid arbitrary refusals is to have the principal execute multiple powers of attorney on forms approved by every institution with whom an agent may need to transact business on behalf of the principal as well as under each state law where the principal has, or may in the future have, property interests. One need not consider this strategy for long before its limits and weaknesses become apparent.¹⁸⁰ In a society where principals are frequently mobile and institutions regularly metamorphose through mergers and acquisitions, the task of keeping asset and entity-specific powers of attorney up-to-date would be monumental.

This is not to suggest that an entity-specific power of attorney is not prudent in the case of a client with significant assets at a major institution. Likewise, a client who regularly divides time between residences in two or three states might benefit from having powers of attorney drafted under each of those respective state laws. However, the multiple power-of-attorney approach cannot provide complete protection against the exigencies of change, whether initiated by the principal or the third-party entities with which the principal's agent may need to transact. Furthermore, the principal may need to authorize the agent to engage in transactions that are neither asset nor entity specific,

177. *But see Maenhoudt v. Stanley Bank*, 115 P.3d 157, 161 (Kan. App. 2005) (finding material issues of genuine fact related to a bank's unqualified refusal to honor a power of attorney and reversing lower court's grant of summary judgment).

178. *See supra* n. 176 (describing statements made by meeting participants).

179. *Id.*

180. *See generally* Linda S. Whitton, *Crossing State Lines with Durable Powers*, Prob. & Prop. 28, 30–31 (Sept./Oct. 2003) (discussing the challenges of drafting durable powers for mobile clients and suggesting guidelines).

such as operating the principal's business, pursuing the principal's claims and litigation, providing for the maintenance of the principal and the principal's family, or making gifts. A power-of-attorney form prepared by a third-party entity will not likely meet all of the principal's needs for surrogate decisionmaking should the principal later lose capacity.

2. Legislative Reform

As the following discussion will demonstrate, a legislative solution to the unreasonable refusal problem must have three components. First, the statute must provide adequate protection for a good faith acceptance or refusal of a power of attorney;¹⁸¹ second, the statute must provide consequences for an unreasonable refusal of a power of attorney;¹⁸² and third, the statute must recognize portability of powers of attorney validly created or executed under another jurisdiction's law.¹⁸³ This Section outlines the development of various state approaches to these components as well as the UPOAA approach, which was synthesized from the legislative experiences of the various states.

a. Protection of Good Faith Acceptance or Refusal

The Uniform Durable Power of Attorney Act did not address the issue of unreasonable refusal of a power of attorney, but it did assure third persons that the death of the principal "does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power of attorney."¹⁸⁴ The provision further states that, "[a]ny action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal."¹⁸⁵ Third persons were also assured that they could in good faith rely on an attorney-in-fact's affidavit as conclusive proof of

181. See *infra* nn. 184–217 and accompanying text (explaining the importance of protecting both good faith acceptance and good faith refusal of a power of attorney).

182. See *infra* nn. 218–228 and accompanying text (discussing liability for unreasonable refusals of powers of attorney).

183. See *infra* nn. 229–234 and accompanying text (discussing the importance of including portability provisions in power-of-attorney statutes).

184. Unif. Durable Power of Atty. Act § 4(a).

185. *Id.*

the power of attorney's nonrevocation or nontermination.¹⁸⁶ While perhaps adequate to cover issues of nonrevocation or nontermination, these provisions do not address the panoply of circumstances that might arise with respect to liability for improper acceptance or refusal of a power of attorney.

The threshold question that must be answered when constructing statutory protection for persons who accept powers of attorney is, "Who should bear the risk that the power of attorney is not valid?" Placing the risk upon the principal enhances the likelihood of an acceptance and also strengthens the justification for sanctioning an unreasonable refusal.¹⁸⁷ While it could be argued that relieving third persons from the obligation to verify the validity of the power opens the door to agent abuse, agents can just as easily abuse a valid power of attorney as an invalid one.¹⁸⁸

In the case of *Estate of Davis v. Citicorp Savings*,¹⁸⁹ however, the Illinois Appellate Court chose to place the risk of accepting an invalid power of attorney on the third person presented with the power, rather than the principal.¹⁹⁰ The court affirmed a lower court's judgment against Citibank for relying on a forged power of attorney, ostensibly executed by a Citibank customer, Mrs. Davis, in favor of her nephew.¹⁹¹ When Davis' guardian discovered that the nephew had withdrawn all of Davis' assets, she filed suit against the bank.¹⁹² Citibank relied on a section of the Illinois Power of Attorney Act that provided, "Any person who acts in good faith reliance on a copy of the agency will be fully protected and released to the same extent as though the reliant had dealt directly with the principal as a fully-competent person."¹⁹³ The court, nonetheless, held that Citibank's reliance was misplaced because "[i]n order to claim good faith reliance on an agency, an agency, as defined by the Act, must first exist."¹⁹⁴ Illinois has since revised its Act to provide that, "[a]ny person who acts in

186. *Id.* at § 5.

187. *See* Unif. Power Atty. Act § 119 cmt.

188. *See supra* nn. 15–44, 158–173 and accompanying text (discussing various abuses of powers of attorney and attempts to remedy those abuses).

189. 632 N.E.2d 64 (Ill. App. 1st Dist. 1994).

190. *Id.*

191. *Id.*

192. *Id.* at 65.

193. *Id.* at 66 (citing Ill. Rev. Stat. ch. 110 1/2, par. 802-8 (1991)).

194. *Id.* at 66.

good faith reliance on a copy of a document *purporting* to establish an agency will be fully protected. . . .”¹⁹⁵

Of the twelve states that currently consider it unlawful to unreasonably refuse a power of attorney, Illinois, Indiana, New Mexico, and North Carolina use the term “purports” or “purporting” to clarify that good faith reliance on a power of attorney will be protected absent actual knowledge that the power was not validly executed.¹⁹⁶ California also protects reliance on a power of attorney that “appears on its face to be valid.”¹⁹⁷ In addition, Colorado, Illinois, Indiana, North Carolina, and South Carolina provide that the person accepting the power of attorney is not responsible for the agent’s breach of fiduciary duty or misapplication of the principal’s property.¹⁹⁸ This statutory approach is consistent with the majority of reported case decisions holding that third persons may rely on unambiguous terms in a power of attorney and are not responsible for monitoring the application of the principal’s property.¹⁹⁹

Of the remaining states that recognize liability for refusals of powers of attorney, Alaska and New York limit liability to refusals of “properly executed” statutory form powers of attorney.²⁰⁰ Both states also protect third-person reliance on “properly exe-

195. 755 Ill. Comp. Stat. Ann. 45/2-8 (emphasis added); *see also* Daniel A. Wentworth, *Durable Powers of Attorney: Considering the Financial Institution’s Perspective*, 17 Prob. & Prop. 37, 39 (discussing the *Citibank* case from a financial institution’s perspective and suggesting drafting tips to facilitate interactions between an agent and the principal’s financial institution).

196. 755 Ill. Comp. Stat. Ann. 45/2-8; Ind. Code Ann. § 30-5-8-2; N.M. Stat. Ann. § 45-5A-119(A); N.C. Gen. Stat. § 32A-40.

197. Cal. Prob. Code Ann. § 4303(a)(2). Colorado provides that third parties “may presume, in the absence of actual knowledge to the contrary,” that the power of attorney was validly executed. Colo. Rev. Stat. Ann. § 15-14-607(1)(b)(I)(A).

198. Colo. Rev. Stat. Ann. § 15-14-607(1)(b)(II); 755 Ill. Comp. Stat. Ann. 45/2-8; Ind. Code Ann. §§ 30-5-8-4, 30-5-8-7; N.C. Gen. Stat. § 32A-40; S.C. Code Ann. § 62-5-501(F)(2).

199. *See e.g. Milner v. Milner*, 395 S.E.2d 517, 521 (Va. 1990) (finding that “when dealing with a broad power of attorney, there is no obligation on a third party to go behind the power”) (citations omitted); *Parr v. Reiner*, 143 A.D.2d 427, 429 (N.Y. App. Div. 2d Dept. 1988) (finding that respondents were “entitled to rely upon the unambiguous terms” contained in the power of attorney); *Rheinberger ex rel. Est. of Adams v. First Natl. Bank*, 150 N.W.2d 37, 42 (Minn. 1967) (finding no evidence that the bank should have known the agent’s transfer was for an illegitimate purpose and no duty to insure that the agent did not misuse the funds); *but see Houck v. Feller Living Trust*, 79 P.3d 1140 (Or. Ct. App. 2003) (finding that the self-dealing transaction put the bank on inquiry notice that the agent may not be acting within the scope of his authority).

200. Alaska Stat. § 13.26.353(c); N.Y. Gen. Oblig. Law § 5-1504(2).

cuted” statutory form powers,²⁰¹ which raises the specter of liability for acceptance of form powers that appear to be properly executed but are actually forgeries. A similar potential for liability may be present in South Carolina. A third person in South Carolina must not refuse to honor a “valid power of attorney” if it contains a hold-harmless provision²⁰² and will be protected from liability “[u]nless the third person actually has received written notice of the revocation or termination of a *valid* power of attorney.”²⁰³ The statutory language in Florida, Minnesota, and Pennsylvania, the other three states that recognize liability for unreasonable refusal of a power of attorney, is silent with respect to whether reliance is protected for only “valid” or also “purportedly valid” powers of attorney.²⁰⁴

In the states that recognize liability for refusals of powers of attorney, the bases for legitimate refusals vary and, in some states, are undefined. For example, in Florida and Illinois, a power of attorney can be rejected for reasonable cause, but neither state defines what is reasonable.²⁰⁵ In Pennsylvania, the statute notes that reasonable cause includes, but is not limited to, “a good faith report having been made by the third party to the local protective services agency regarding abuse, neglect, exploitation or abandonment. . . .”²⁰⁶ In New York, a third party can presumably reject a power of attorney if it was not properly executed or if there is written notice of revocation or termination.²⁰⁷ Written notice of revocation or termination is also grounds for rejection in South Carolina.²⁰⁸ Presumably, a third party in South Carolina can also refuse an invalid power of attorney or one that does not contain the statutory hold-harmless language.²⁰⁹ In addition to actual notice of revocation or notice of the principal’s death, expiration of a term of duration in a power of attorney is

201. Alaska Stat. § 13.26.353(b); N.Y. Gen. Oblig. Law § 5-1504(4).

202. S.C. Code Ann. § 62-5-501(F)(1).

203. *Id.* at § 62-5-501(F)(2) (emphasis added).

204. Fla. Stat. Ann. § 709.08(4); Minn. Stat. Ann. § 523.19; 20 Pa. Consol. Stat. Ann. § 5608(b).

205. Fla. Stat. Ann. § 709.08(11); 755 Ill. Comp. Stat. Ann. 45/2-8.

206. 20 Pa. Consol. Stat. Ann. § 5608(a).

207. N.Y. Gen. Oblig. Law § 5-1504.

208. S.C. Code Ann. § 62-5-501(F)(1).

209. *Id.*

one of the stated bases for refusal in Minnesota.²¹⁰ California and Indiana include among the legitimate reasons for refusal the good faith belief that the agent is attempting to exceed or improperly exercise authority.²¹¹

The UPOAA also contains express protections for good faith acceptance and refusal of a power of attorney. A person is protected when accepting an acknowledged power of attorney (defined as one purportedly verified before a notary public or other individual authorized to take acknowledgements) provided that: the person has no actual knowledge that the signature is not genuine or that the power of attorney is void, invalid, or terminated; the purported agent's authority is void, invalid, or terminated; or the agent is exceeding or improperly exercising the agent's authority.²¹² Furthermore, a person may request and rely upon an agent's certification of any factual matter concerning the principal, agent, or the power of attorney; an English translation of the power of attorney if it contains language other than English; and an opinion of counsel as to any matter of law concerning the power of attorney.²¹³

Legitimate reasons for refusing a power of attorney include the following:

- (1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;
- (2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;
- (3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;
- (4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;

210. Minn. Stat. Ann. § 523.20.

211. Cal. Prob. Code Ann. § 4306; Ind. Code Ann. § 30-5-9-9.

212. Unif. Power Atty. Act § 119.

213. *Id.* at § 119(d).

- (5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; or
- (6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective service office] stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.²¹⁴

The rationale for the foregoing statutory approach is that clear protections for acceptance of powers of attorney, as well as clear delineation of safe harbors for reasonable refusals, will result in fewer arbitrary refusals.²¹⁵

Of particular note in the UPOAA approach is the safe harbor for refusing a power of attorney when the third person believes the principal may be subject to some type of abuse by the agent or by a person acting in concert with the agent.²¹⁶ This provision, similar to the one in Pennsylvania,²¹⁷ may be the only effective way to stop an agent who is operating under a valid power of attorney, with actual authority to complete the transaction at issue, but who is completing the transaction for reasons that do not comport with the expectations or best interest of the principal. While statutes that sanction unreasonable refusals do not require third persons to investigate why the transaction is being completed or how the principal's property will be applied, a safe harbor permitting refusals of a valid power of attorney when the third person suspects that something is amiss allows the third person to "do the right thing" without imposing an unreasonable burden to "watch dog" all agent-conducted transactions.

214. The UPOAA contains alternative Section 120. The quoted language appears in subsection (b) of Section 120 (Alternative A) and in subsection (c) of Section 120 (Alternative B). *Id.* at § 120(b)(6) (Alt. A); *id.* at § 120(c)(6) (Alt. B).

215. *See id.* at § 120 cmt. (noting the importance of clear statutory provisions that delineate legitimate bases for refusing a power of attorney without liability).

216. *Id.* at § 120(b)(6) (Alt. A), § 120(c)(6) (Alt. B).

217. 20 Pa. Consol. Stat. Ann. § 5608(a).

b. Consequences for Unreasonable Refusals

Protecting third persons from liability for good faith acceptance and reasonable refusal of powers of attorney should, in theory, be sufficient to decrease unreasonable refusals, but experience suggests that consequences may be necessary to prevent harmful delays in the agent's ability to use a power of attorney.²¹⁸ Seventy-four percent of the respondents to the JEB Survey favored including a remedies or sanctions provision for unreasonable refusals.²¹⁹ Among those respondents, eighty-seven percent also favored awarding attorney's fees and costs associated with an action to remedy the unreasonable refusal.²²⁰ Of the twelve states that currently recognize liability for unreasonable refusals of powers of attorney, seven allow recovery of attorney's fees,²²¹ while five allow recovery of costs.²²² In addition to the actual damages that would presumably be available in any state that deems unreasonable refusals unlawful, Alaska provides for a civil penalty of \$1000,²²³ and Indiana provides for treble damages as well as prejudgment interest on actual damages.²²⁴

The UPOAA offers adopting states a choice between two alternative liability provisions. One alternative provides liability for refusal to accept an acknowledged power of attorney;²²⁵ the other limits liability to refusals of acknowledged *statutory form* powers of attorney.²²⁶ Each contains the same safe harbors for legitimate refusals.²²⁷ A person that refuses a power of attorney in violation of each respective provision is subject to the following:

218. See *supra* nn. 187–217 and accompanying text (discussing the importance of protecting both good faith acceptance and good faith refusal of a power of attorney for maintaining the viability of durable powers as an alternative to guardianship).

219. Whitton, *supra* n. 18, at 10.

220. *Id.*

221. Alaska Stat. § 13.26.353(c); Cal. Prob. Code Ann. § 4306(a); Colo. Rev. Stat. Ann. § 15-14-607(2); Fla. Stat. Ann. § 709.08(11); Ind. Code Ann. § 30-5-9-9(a)(2); N.M. Stat. Ann. § 45-5A-120(D)(2); N.C. Gen. Stat. § 32A-41(a)(1).

222. Alaska Stat. § 13.26.353(c); Colo. Rev. Stat. Ann. § 15-14-607(2); Fla. Stat. Ann. § 709.08(11); N.M. Stat. Ann. § 45-5A-120(D)(2); N.C. Gen. Stat. § 32A-41(a)(1).

223. Alaska Stat. § 13.26.353(c).

224. Ind. Code Ann. § 30-5-9-9(a).

225. Unif. Power Atty. Act § 120 (Alt. A).

226. *Id.* at § 120 (Alt. B).

227. *Id.* at §§ 120(b) (Alt. A), 120(c) (Alt. B).

- (1) a court order mandating acceptance of the power of attorney; and
- (2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.²²⁸

c. Portability of Durable Powers from Other Jurisdictions

No legislative strategy for encouraging third-party acceptance of durable powers would be complete without a portability provision that recognizes the validity of powers created under the laws of other jurisdictions. Ninety-seven percent of the respondents to the JEB survey favored inclusion of a portability provision in all power-of-attorney statutes.²²⁹ It is interesting to note that at the time the drafting committee for the UPOAA began its work, only twelve states had portability provisions.²³⁰ Most of these provisions simply recognize the validity of an out-of-jurisdiction power of attorney if it was valid where executed.²³¹

In addressing the issue of portability, the drafting committee for the UPOAA considered the increasingly common practice of mobile clients who execute a power of attorney in one jurisdiction that was drafted to comport with the laws of another jurisdiction. For example, an Indiana resident might execute, while in Indiana, a Florida power of attorney for use in conjunction with property owned in Florida. Thus, the portability issue really raises the following two issues: (1) recognition of another jurisdiction's law for purposes of determining the substantive meaning and effect of a power of attorney; and (2) recognition of another jurisdiction's law for purposes of determining whether the power of attorney was validly executed.

Rather than reference the place of execution for purposes of portability, the UPOAA focuses on the law of the jurisdiction that "determines the meaning and effect of the power of attor-

228. *Id.* at §§ 120(c) (Alt. A), 120(d) (Alt. B).

229. Whitton, *supra* n. 18, at 12.

230. NCCUSL April 2003 Draft, *supra* n. 87, at § 205 cmt.

231. *Id.* at § 205.

ney”²³² The Act defines this law as the “law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.”²³³ Because the default rules for various powers, such as the authority of co-agents and the authority to make gifts, vary from state to state, it is important that a portability provision recognize the validity of out-of-jurisdiction powers without altering the scope of authority originally intended by the principal.²³⁴

C. Lesson #3: Neither a Power of Attorney nor a Guardianship
Will Prevent a Family Power Struggle over
the Principal or the Principal’s Assets

National Public Radio recently aired a *Talk of the Nation* segment titled *Legal Battles over Parental Guardianship*, which discussed the increasing phenomenon of bitter custody battles between adult children over their elderly parents and the parents’ assets.²³⁵ During the program, one interviewee defined guardianship as “will fights while the parent is still alive.”²³⁶ Professor Alison Barnes first identified this phenomenon in an article that examines the similarities between guardianship disputes and will contests.²³⁷ After comparing guardianship and will-contest case decisions, she concludes there is a similar societal preference for the financial expectations and claims of the younger generation at the expense of the elder person’s autonomous choices and testamentary intent.²³⁸ She observes the following:

232. Unif. Power Atty. Act § 106(c)(1).

233. *Id.* at § 107.

234. *See generally* Whitton, *supra* n. 180 (discussing the legislative and drafting challenges posed by the use of powers of attorney across state lines); *see also* Unif. Power Atty. Act § 107 cmt. (discussing how the UPOAA encourages portability of foreign powers while preserving the scope of authority intended by the principal).

235. Natl. Pub. Radio, *Legal Affairs: Legal Battles over Parental Guardianship*, <http://www.npr.org/templates/story/story.php?storyId=5697280> (accessed Feb. 12, 2008) (audio webcast of the *Talk of the Nation* program aired Aug. 23, 2006).

236. *Id.*

237. Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 *Elder L.J.* 1 (2003).

238. *Id.* at 33–36.

elderly people may become a liability for conventional social order if they choose to spend their assets in ways which do not benefit their beneficiaries or serve socially approved causes, though their purposes are neither illegal nor, for other age groups, subject to criticism or constraint.²³⁹

Cases in recent years demonstrate that not only do family members fight over their elders and the elders' wealth,²⁴⁰ but jurisdictions may actually vie for control of an incapacitated, wealthy ward in total disregard of advance directives executed by the ward.²⁴¹ In fact, the new Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act²⁴² was drafted in response to these issues as well as more mundane issues such as a guardian's need to deal with property located outside the guardianship jurisdiction and the need to move a protected person out of state.²⁴³

One of the supposed advantages of durable powers is that guardianship and complex interstate property-management issues can be avoided with adequate advance planning. The principal ostensibly has the right, while competent, to choose an appropriate agent, to craft the desired scope of authority, and to set the expectations to guide the agent's actions. Theoretically, state portability provisions should ensure that a validly created power of attorney can be used in other jurisdictions.²⁴⁴ However, as the National Public Radio feature suggests, durable powers are no match for a family domination contest.

239. *Id.* at 29.

240. Two recent high profile family feuds were the interstate battle over Lillian Glasser, waged between her daughter in Texas and her son in New Jersey, and the battle in New York between father and son over the care of Brook Astor, their 104-year-old mother and grandmother, respectively. Rachel Emma Silverman, *Latest Custody Battle: Who Gets Mom*, Wall St. J. D1 (Aug. 17, 2006).

241. See Wood, *supra* n. 8, at 15 (discussing the case of Mollie Orshansky in which the D.C. Court of Appeals overturned the probate court decision to appoint a D.C. lawyer as Ms. Orshansky's guardian, despite the fact that prior to her incapacity she had executed a healthcare proxy in favor of her niece in New York and had placed all of her assets in trust with her sister as a co-trustee. *In re Orshansky*, 804 A.2d 1077 (D.C. Cir. 2002)).

242. Unif. Adult Guardianship & Protective Procs. Jxn. Act (2007).

243. See Wood, *supra* n. 8, at 16 (noting the problems posed by interstate guardianship-jurisdiction issues).

244. See *supra* nn. 229–234 and accompanying text (discussing the role of portability provisions in the use and interpretation of powers of attorney).

With respect to the use of guardianship to usurp an agent's authority, most power-of-attorney statutes permit the principal to state a preference for who should serve as a guardian if the need for protective proceedings later arises.²⁴⁵ The trend in guardianship statutes is to give the principal's preference first priority in the hierarchy of persons to be considered for appointment;²⁴⁶ but, in reality, the challenger often prevails—at least in the court of first instance.²⁴⁷

Although the Uniform Durable Power of Attorney Act permitted the principal to nominate a candidate to serve as guardian, the Act gave a court-appointed fiduciary “the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.”²⁴⁸ Due to the widespread adoption of the Uniform Durable Power of Attorney Act, this provision was incorporated into the majority of state statutes.²⁴⁹ When this provision was crafted, it was not contemplated that authority to revoke a power of attorney might become a powerful weapon for undermining the principal's advance planning if vested in the hands of feuding family members. Granting a contentious family member's petition for guardianship when there is a suitable agent already acting under a valid power of attorney, or giving that guardian the authority to revoke the agent's authority, not only usurps the autonomous choices of the principal, but arguably violates constitutionally protected rights of privacy and association.²⁵⁰

245. Unif. Durable Power Atty. Act § 3(b). Given that forty-five jurisdictions had at one time adopted the Act, this provision is in the majority of state power-of-attorney statutes. See Natl. Conf. Commrs. on Unif. St. Ls., *A Guide to Uniform and Model Acts* 11 (2003–2004).

246. See Unif. Guardianship & Protective Proc. Act §§ 310(a)(2), 310 cmt., 8A U.L.A. 362–363.

247. See *In re Hartwig*, 656 N.W.2d 268, 280 (Neb. App. 2003) (reversing the county court's decision to appoint challenger guardian of his grandmother's estate over the objections of her attorney-in-fact); *Guardianship of Smith*, 684 N.E.2d 613, 620 (Mass. App. 1997) (reversing the appointment of challengers as guardians where appointment was not made in accordance with the ward's nomination); *In re Sylvester*, 598 A.2d 76, 84 (Pa. Super. 1991) (reversing order appointing independent party as guardian where trial court failed to consider appointing attorneys-in-fact).

248. Unif. Durable Power Atty. Act § 3(a).

249. See *supra* n. 245 (discussing the majority adoption of the Uniform Durable Power of Attorney Act).

250. For further discussion, see Ershow-Levenberg, *supra* note 12, at 7, 9–10.

1. Planning Strategies

While there is no panacea for the phenomenon of family power struggles, the principal should consider the potential for family disharmony and choose an agent accordingly. The more clearly a principal communicates and memorializes personal preferences and objectives, the more difficult it will be for contentious family members to engage in revisionist history. In addition to careful agent selection, the principal should document any special expectations, especially if those expectations might not be congruent with an objective “best interest” standard under which the agent’s actions could later be evaluated.²⁵¹ The principal may also want to consider including an exoneration provision in the power of attorney as a deterrent to frivolous attacks on the agent’s performance.²⁵² Lastly, the principal should consider the opportunity to nominate a candidate for guardian and should nominate the same individuals as those chosen to serve as agents under the power of attorney.

2. Legislative Reform

On the issue of revocation of an incapacitated principal’s power of attorney, the UPOAA has departed from the Uniform Durable Power of Attorney Act approach and followed the lead of states that reserve to the court the authority to limit or terminate the agent’s authority,²⁵³ either by acting directly or by authorizing the court-appointed fiduciary to do so.²⁵⁴ This approach both protects the principal’s prior autonomous choices and promotes judicial economy. If the appointment of a fiduciary is necessitated by the agent’s poor performance or breach of fiduciary duty, the same evidence will be required for appointment of the fiduciary as for removal of the agent. Likewise, if a fiduciary is needed be-

251. See *supra* nn. 78–125 and accompanying text (evaluating the common law and UPOAA approaches to an agent’s fiduciary duties).

252. See *supra* nn. 126–131 and accompanying text (discussing exoneration provisions and their use to protect both principal and agent).

253. Unif. Power Atty. Act §§ 108(b), 108 cmt.

254. 755 Ill. Comp. Stat. Ann. 45/2–10(a); Ind. Code Ann. § 30–5–3–4(b); Kan. Stat. Ann. § 58–662(f); Mo. Rev. Stat. Ann. § 404.727(6); N.J. Stat. Ann. § 46:2B–8.4(c); N.M. Stat. Ann. § 45–5–503(A); Utah Code Ann. § 75–5–501(5); Vt. Stat. Ann. tit. 14, § 3509(a); Va. Code Ann. § 11–9.1B.

cause the agent's authority is not sufficiently comprehensive, the court must review the power of attorney to make that determination.

As noted by Professor Marshall Kapp, the motivations for seeking to control a vulnerable family member are complicated:

Family members who seek to reach filial domination, in which the older person is hectored into doing what the family member wants done, ordinarily are motivated by a conviction that they really know what is in the best interests of their relative, although less noble reasons, such as the opportunity for exercising dominion in a family that has a long history of rivalry for preeminence, are possible.²⁵⁵

Given the murky mire surrounding family feuds, a legislative approach that respects the principal's advance choices may be the only line of defense left to an incapacitated principal.

III. CONCLUSION

Examination of caselaw and legislative trends with respect to durable powers confirms that the power of attorney still offers significant advantages as a low-cost, flexible, and private alternative to guardianship. Nonetheless, these advantages come with corresponding risks. The trustworthiness of the agent, the willingness of third persons to accept the agent's authority, and the cooperation of the incapacitated principal's family are key components to the successful use of durable powers. Our collective experience with powers of attorney also demonstrates that certain planning strategies and legislative reforms can enhance the usefulness of durable powers while at the same time provide a measure of protection for the principal, the agent, and those who deal with the agent. Maintaining this delicate balance must be the continuing goal for legislators and practitioners if durable powers are to remain a viable alternative to guardianship.

255. Kapp, *supra* n. 14, at 784–785.