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I. Introduction

The prevalence of financial elder exploitation has resulted in a rush of legislation and policies aimed at "protecting elders." Often this protection is at the expense of an elder's right to autonomy and runs contrary to their estate planning. Attorneys can utilize the Uniform Power of Attorney Act, paired with appropriate drafting around certain default provisions, to help clients strike their desired balance between protection from financial exploitation and protection against unnecessary intrusion into their private affairs.

In 2017, approximately 5,500 estate tax filers had taxable estates.[1] In that same year, 63,500 Suspicious Activity Reports were filed for suspected elder exploitation, 80% of which involved actual monetary loss to the elder at an average loss of $34,200.[2] Yet, when discussing threats to a client's estate plan, attorneys often emphasize transfer taxes while disregarding elder abuse. Estate planning attorneys must be able to discuss this risk with clients and craft appropriate safeguards.

When an agent under a financial power of attorney (POA) document is suspected of exploiting the principal, the Uniform Power of Attorney Act (UPOAA) provides an avenue for judicial relief.[3] However, the default process under the UPOAA can be cumbersome, leading to excessive litigation and unnecessary guardianship. Proper drafting of a financial POA can bolster the default protections under the UPOAA while preserving the elderly client's right to self-determination.

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* Mequon, Wisconsin.

1 Tax Pol'y Ctr., The Tax Policy Center's Briefing Book 407 tbl.1 (2020), https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book_2020.pdf.

2 Consumer Prot. Fin. Bureau, Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends 3, 6 (2019), https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf.

3 Unif. Power of Attorney Act § 116 (Unif. L. Comm'n 2006).

II. Elder Financial Exploitation

A. Population Affected

Elder financial exploitation, or the taking of the assets of an elderly client for the perpetrator's own personal benefit, affects an estimated 1 in 20 older adults.[4] However, according to a comprehensive study of elder abuse in New York State, for every 1 case of elder abuse reported, 44 cases go unreported.[5] This can then be applied to an estimated 52 million U.S. residents over age 65 as of 2018, projected to grow to 95 million by 2060.[6] Nationally, the cost of elder financial exploitation is estimated to be at least $2.9 billion and as much as $36.5 billion annually.[7] In addition, financial exploitation is linked to increased rates of hospitalization, nursing home admission, and death.[8]

B. Perpetrator Characteristics

The majority of elder financial exploitation is at the hands of a family member or other trusted person.[9] When an older adult is exploited by someone known to them, the loss is greater than when the perpetrator is a stranger.[10] When the perpetrator is a fiduciary of the victim, such as an agent or guardian, the average loss is $83,600 per older adult.[11]

C. Legislative Responses

The Senior Safe Act, federal legislation signed on March 24, 2018, aims to promote the reporting of financial abuse by providing immunity from liability to covered entities who make reports of suspected abuse "in good faith," "with reasonable care," and pursuant to a training pro-

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4 *Elder Financial Exploitation*, Nat'l Adult Protective Servs. Ass'n, https://www.napsa-now.org/get-informed/exploitation-resources [https://perma.cc/LEV4-4TUS].

5 Lifespan of Greater Rochester Inc. et al., *Under the Radar: New York State Elder Abuse Prevalence Study*, Off. Child. & Fam. Servs. 50 tbl.18 (2011), https://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf.

6 Mark Mather et. al., Fact Sheet: Aging in the United States, 70 Population Reference Bureau 2-3 (2015), https://www.prb.org/wp-content/uploads/2016/01/aging-us-population-bulletin-1.pdf.

7 Katherine Skiba, *Older Americans Hit Hard by Financial Fraud*, AARP (Feb. 28, 2019), https://www.aarp.org/money/scams-fraud/info-2019/cfpb-report-financial-elder-abuse.html [https://perma.cc/E2ZA-8KPL].

8 Marie-Therese Connolly, et al., The Elder Justice Roadmap: A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial and Social Crisis, U.S. Dep't of Just. 4 (2014), https://www.justice.gov/elderjustice/research/resources/EJRP_Roadmap.pdf.

9 Nat'l Adult Protective Servs. Ass'n, *supra* note 4.

10 Consumer Prot. Fin. Bureau, *supra* note 2, at 18.

11 *Id*. fig.9.

gram.[12] Many state proposals go much further. For example, legislation proposed in Wisconsin would permit a financial institution to freeze accounts and disregard financial POAs for any individual over age 60 when elder abuse is suspected, without any requirement that the financial institution document the basis for its suspicion.[13] Such "protective" provisions could undeniably curb an individual's right to manage their own property solely based on age and quickly undo their estate plan in favor of guardianship without any evidence of abuse whatsoever. Guardianship, long considered by government agencies to be the standard protection against financial exploitation, carries its own risks. Aside from a substantial loss of constitutional rights, evidence indicates guardianship is often used to further abuse rather than thwart it.[14]

III. Relief Under UPOAA

A. In General

Estate planners have long promoted powers of attorney as the way to avoid the removal of rights and autonomy that guardianship entails. Versus a guardianship or conservatorship, where the court-appointed decisionmaker is charged with protecting the ward's "best interest" under a theory of *parens patrie*,[15] an agent under a financial POA is charged with exercising their power according to the reasonable expectations of the principal.[16] Currently, 28 states base their power of attorney statutes on the UPOAA.[17] However, relying on the default provisions of the UPOAA may not provide the necessary safeguards against financial exploitation.

B. Section 114 Accountings

Under Section 114 of the UPOAA, an agent is required to keep a record of "receipts, disbursements, and transactions made on behalf of

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12 Economic Growth, Regulatory Relief, & Consumer Protection Act of 2018, Pub. L. No. 115-174, § 303, 132 Stat. 1296, 1335-38 (codified as amended at 12 U.S.C. 3423).

13 Financial Exploitation of Vulnerable Adults, Assemb. B. 481, 104th Leg., Reg. Sess. (Wis. 2019).

14 Susan M. Collins & Robert P. Casey, Jr., *Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans*, U.S. Senate Special Comm. on Aging 1, 14 (Nov. 2018), https://www.aging.senate.gov/imo/media/doc/Guardianship_Report_2018_gloss_compress.pdf.

15 *See* Susan G. Haines & John J. Campbell, *Defects, Due Process and Protective Proceedings*, 2 Marq. Elder's Advisor 13, 16 (2000).

16 Unif. Power of Att'y Act § 114(a)(1) (Unif. L. Comm'n 2006).

17 *Power of Attorney Act*, Unif. L. Comm'n, https://www.uniformlaws.org/committees/community-home?CommunityKey=b1975254-8370-4a7c-947f-e5af0d6cb07c [https://perma.cc/SMT5-YHQF].

the principal."[18] However, the agent is not required to disclose that accounting during the lifetime of the principal unless ordered by a court or demanded by the principal, a guardian, conservator, another fiduciary for the principal, or a government agency charged with protecting the welfare of the individual.[19]

C. Section 116 Review of Agent Conduct

Section 116 of the UPOAA provides that a broad list of individuals may petition a court to construe a POA or review the agent's conduct, including a parent, spouse, or descendants of the principal, an individual who would qualify as a presumptive heir, any person named as beneficiary to receive any property upon the principal's death, and the seemingly catch-all category of "another person that demonstrates sufficient interest in the principal's welfare."[20] This permits a party to obtain judicial relief when an agent financially exploits a principal.

D. Limitation of Action Under UPOAA

The UPOAA process falls short in several aspects. Under Section 114, there is no deadline for providing the accounting after a request is made. More importantly, in cases where a client executes a financial POA and health care POA, names the same agent for both and then becomes incapacitated (a common scenario), there is no party who can request an accounting. A government agency could choose to investigate if actually alerted to the issue. In most cases where a financial institution suspects elder financial exploitation, a Suspicious Activity Report is filed with federal authorities but not shared with local agencies.[21] Therefore, in these types of cases, the UPOAA protects the privacy of the client but also that of the agent/abuser.

Under Section 116, a non-agent child of the principal can petition the court to review the agent's conduct and simultaneously request an accounting. However, if an accounting is ordered under Section 116 and no wrongdoing is discovered, litigation is fruitless despite time and money expended. If an accounting is ordered and wrongdoing is discovered, a substantial amount of time likely passed from the initial exploitation to the court order, making recovery of funds unlikely. Also, a court may simply refuse to order an accounting at all.[22]

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18 UNIF. POWER OF ATT'Y ACT § 114(b)(4).

19 *Id.* § 114(h).

20 *Id.* § 116(a).

21 CONSUMER PROT. FIN. BUREAU, *supra* note 2, at 25.

22 *See* Fetters v. Duff, 107 N.E.3d 627, 631 (Ohio Ct. App. 2018); Robbins v. Foseid, 871 N.W.2d 693 (Table), ¶¶ 31-34 (Wis. Ct. App. 2015).

This interplay of Sections 114 and 116 is explained in *Colburn v. Cooper*.[23] A third party filed an action to review the conduct of the agent and demand an accounting. The agent moved to dismiss on grounds that the third party lacked standing to request an accounting. On appeal, the court specified that the third party did indeed have standing.[24] Even though she was not one of the parties who could request an accounting under Ohio's version of UPOAA Section 114,[25] she could use the Section 116 process, get the court order, and then receive the accounting to pursue her action for wrongdoing against the agent.[26] She obtained her desired outcome, but only after substantial effort and expense.

Litigating to request a simple accounting can also drive up the cost of proving financial exploitation because the default rules under the UPOAA do not hold an agent financially responsible for legal fees short of a finding of misconduct.[27] In *In re Estate of Carpenter*,[28] the Wisconsin Court of Appeals was asked to rule on $25,000 of legal fees incurred by an agent to defend a petition to review her conduct. The principal died before a decision was reached. Because the court did not find wrongdoing, fees incurred by the agent were paid out of the principal's assets, not the assets of the agent.[29] The lower court severely reduced the allowable fees on grounds the case had been "substantially overlitigated," but that ruling that was ultimately overturned.[30] Therefore, faced with the steep expense of litigation, many third parties simply will not take the risk of starting an action, and abuse will continue unchecked.

IV. Drafting to Strengthen Client Protections

A. Adding Teeth to the Accounting Requirement

One practical way to add additional protection to the UPOAA's default accounting rule is to include a provision that the agent shall provide an accounting to a specific person or category of persons, including a specific deadline for providing the accounting and a statement in the document that one purpose of the POA is to prevent financial mismanagement. The failure to abide by said accounting requirements could

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23 Colburn v. Cooper, No 2018-L-008, 2018 WL 6722664 *1, *2-3 (Ohio Ct. App. 2018).

24 *Id.* at *3.

25 Ohio Rev. Code Ann. § 1337.34 (West 2020).

26 *Colburn*, 2018 WL 6722664 at *3-4.

27 Unif. Power of Att'y Act § 117 (Unif. L. Comm'n 2006).

28 879 N.W.2d 127 (Wis. Ct. App. 2016).

29 *Id.* at 127, 129.

30 *Id.* at 128-29, 131.

then constitute "reckless indifference to the purpose of the power of attorney."[31] Per Section 115 of the UPOAA, this would supersede any language in a POA document relieving the agent of liability, meaning the third party could demonstrate agent misconduct without waiting for a full accounting to be requested, court-ordered, completed, and analyzed.

Clients often nominate co-agents as a purported check and balance. However, this begets an entirely new set of issues. Co-agents must either act concurrently with the potential of deadlock or inefficiency, or act independently with the potential for one agent to "go rogue."[32] These issues were highlighted in the Florida Court of Appeals case of *Rosekrantz v. Feit*.[33] One co-agent simply refused to authorize the release of information to the other co-agent, necessitating a court order to investigate potential wrongdoing of the agent. The co-agency failed on three counts: thwarting exploitation, avoiding court intervention, and keeping the co-agents accountable to one another.[34]

B. Addressing the Gifting Issue

Questions around gifting powers are common in POA misconduct cases, particularly self-dealing by the agent. Gifting of assets by a POA does require a specific grant of authority written into the document under the UPOAA.[35] However, when a gifting provision is drafted broadly, the agent may engage in substantial self-dealing and exploitation without running afoul of the document. The language of the document must then be measured against the requirement in Section 114 of the UPOAA that an agent act in the best interest of the principal when the principal's reasonable expectations are not clear.[36]

Gifting provisions in a POA are often appropriate and desired by the principal, but the provisions should be drafted no broader than the client's anticipated needs. If gifting for purposes of Medicaid eligibility is a concern, it is unlikely that the client has an estate that would necessitate annual exclusion gifting. A POA including both types of gifting powers may empower an agent to give himself $15,000 per year from a very modest estate contrary to the principal's expectations and interests. In that scenario, self-dealing by an agent for Medicaid planning could be permitted but limited by the requirement of obtaining prior advice of counsel. Because a review of agent's conduct relies heavily on the inten-

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31 UNIF. POWER OF ATT'Y ACT § 115(1).
32 *Id.* § 111(a).
33 81 So. 3d 526 (Fla. Dist. Ct. App. 2012).
34 *Id.* at 528-29.
35 *See In re* Estate of Lambur, 397 S.W.3d 54, 64 (Mo. Ct. App. 2013).
36 Cisneros v. Graham, 881 N.W.2d 878, 887 (Neb. 2016).

tion of the principal as set forth in the document, precise drafting can clarify the principal's intentions and avoid costly disagreements. This also shuts down the "I didn't know I couldn't do that" defense to financial exploitation allegations.

V. Summary

A client who chooses to include enhanced accounting and reporting requirements in their POA document does give up some privacy in the name of protection from financial exploitation. However, clients give up control of assets in the name of transfer tax planning all the time, despite transfer tax liability being considerably less prevalent than financial exploitation. Guardianships and elder abuse legislation may force the client to forfeit financial autonomy without a proportional increase in protection against abuse. Customizing UPOAA provisions to match a client's risk tolerance can preserve autonomy and provides protection from abuse. The solution does not need to be worse than the problem.