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Tremendous focus has been placed on the immense intergenerational wealth transfer taking place in the United States.[1] However, as Americans continue to live longer, lifetime care for the elderly and disabled has become an equally important planning focus. Demographically, the median net worth of all American families is $97,300, and the mean net worth $692,100.[2] Many Americans have limited resources to hire an attorney and lack estate plans altogether.[3] Estate planning for those individuals often means cheap and easy solutions, such as adding a trusted family member or caregiver to a checking account and printing a generic form of financial power of attorney ("POA") from the internet to enable the agent to withdraw cash and pay bills.

Beyond the population at large, high net worth individuals often depend heavily on POAs for extensive financial management, including transferring and investing in complex assets, managing eight- and nine-figure balance sheets, operating family offices, pledging and borrowing, and even establishing new trusts and other estate planning vehicles. Many affluent elderly individuals also seek to minimize the time they spend on financial activities and prefer to allocate time to activities they find more enjoyable than personal finances.

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1 *See, e.g.*, Mark Hall, *The Greatest Wealth Transfer In History: What's Happening And What Are The Implications*, FORBES (Nov. 11, 2019, 12:14 PM), https://www.forbes.com/sites/markhall/2019/11/11/the-greatest-wealth-transfer-in-history-whats-happening-and-what-are-the-implications [https://perma.cc/T8R8-YRAK].

2 Jesse Bricker et al., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 FED. RES. BULL. 1, 12 (2017) (release of 2016-2019 data is expected late 2020).

3 *See* Hall, *supra* note 1 (providing statistics that implicate lack of resources amongst many Americans); Astrid Andre, *Can Estate Planning be Used to Help Preserve Economic Assets in Low-Income Communities?*, SHELTERFORCE (Mar. 1, 2019) https://shelterforce.org/2019/03/01/can-estate-planning-preserve-economic-assets-in-low-income-communities/ [https://perma.cc/U8MW-6UKP] ("concern about up-front cost and a lack of understanding of what would occur *without* a plan . . .").

POAs underpin many of these arrangements, and in the best circumstances, appropriately help address financial needs. However, opportunities abound for an agent to breach his fiduciary relationship to a principal, and few guardrails exist to protect a disabled agent. As the silent and baby boomer generations continue to live longer, inheritances expected by their children may dwindle from the burden of rising health and long-term care costs. The line can easily blur between the agent's duties to the principal and his need for additional assets. It can be tempting for even a well-intentioned child, acting as agent, to splurge and use mother's savings to benefit the broader family, treating the entire family to a lavish cruise or contributing to an extravagant family wedding. These expenses may not appear problematic on their face, but are they within the scope of authority that mother intended to grant her agent? Principles of agency law notwithstanding, in many situations when an individual executes a POA, the agent is not likely to be present and not likely to receive instruction regarding the agent's duties and the principal's desires.[4]

Currently, no common mechanism exists to provide oversight for agents acting under a POA other than oversight by the principal, who may be elderly or disabled. While some niche elder care firms accept agency appointments, their activities are unregulated and subject to uneven oversight. Most financial institutions are not equipped and so do not serve as agent under a POA. More often, family members or trusted caregivers serve as agents. Elderly individuals may feel uncomfortable complaining about – let alone litigating – breaches against an agent, both because of generational reluctance to bring suit against family members, but also out of dependence and fear of losing the agent's support in performing activities of daily life.[5] Third parties have limited ability to remove agents, as a court proceeding to appoint a guardian is generally a prerequisite to bringing suit on behalf of a disabled principal. Without watchful friends, local family members, or sophisticated advisors, a rogue agent's malfeasance can go undetected.

Without meaningful oversight, it is no surprise that POAs increasingly create opportunities for misuse of a principal's funds, at best, and outright financial exploitation, at worst.[6] Often abuses are not apparent until after death, and even then it may be difficult to investigate facts

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4 Catherine Seal, *Power of Attorney: Convenient Contract or Dangerous Document?*, 11 MARQ, ELDER'S ADVISOR 307, 315 (2010).

5 Mary F. Radford, *What If Granny Wants to Gamble? Balancing Autonomy and Vulnerability in the Golden Years*, 45 ACTEC L.J. 221, 242-44 (2020).

6 *See, e.g.*, Hindman v. Moore, No. E2005-01287-COA-R3-CV, 2006 WL 1408394, at *1, *3 (Tenn. Ct. App. 2006) (upholding third party claim to property pledged by principal's son, acting as agent for his own benefit).

and trace expenditures, particularly when the agent may be the individual also charged with administering the principal's estate or a party may lack standing to contest an agent's actions.[7] Although, post-death, relatives may come forward and question even the appearance of financial exploitation, getting to the bottom of an agent's activities can easily result in protracted litigation, which many heirs cannot afford to sustain.[8] The question presented, then, is how can POAs be used to more effectively manage an elderly individual's finances while guarding against potential overreach or outright breach by an agent?

I. Heightened Legal Standard

Although agents are fiduciaries under state law, "there is little clarity in state statutes about what that standard means."[9] Many states and the Uniform Power of Attorney Act ("UPOAA")[10] impose a duty on the agent to act in the best interests of the principal.[11] This legal standard differs from that applicable to a trustee, who is required to act for the sole interest of the beneficiary.[12] As described in the comments to the UPOAA, this lesser standard enables an agent to use the principal's funds to benefit the agent,[13] which could tempt an agent to act for his own interest.

Consider a single, disabled man, age 90, without descendants, who designates his niece as agent. His deceased sister's trust designates her attorney as trustee and grants uncle a life estate in sister's former home, which passes to niece at uncle's death. As agent, niece handles all of uncle's finances but also uses his personal assets to make substantial improvements to the home, adding landscaping, a pool, and luxury kitchen upgrades. The trustee has no objection, as the improvements enhance the trust's property at no cost to the trust, and the trustee has no duty to monitor uncle's funds, which will benefit charity upon his death. Uncle benefits from the improvements to the extent they en-

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7 Restatement (Third) of Trusts § 107 cmt. b-c (Am. L. Inst. 2012).

8 *See, e.g.*, Danielle Moyaras & Andy Moyaras, *Mysteries Surround the $400 Million Estate of Huguette Clark*, Forbes (Nov. 28, 2011, 11:12 AM), https://www.forbes.com/sites/trialandheirs/2011/11/28/mysteries-surround-the-400-million-estate-of-huguette-clark [https://perma.cc/RJL4-XXHN].

9 Unif. Power of Att'y Act § 114 cmt. (Unif. Law Comm'n 2006).

10 At present, only 28 states have enacted the UPOAA in full (notably, California, New York, Florida, and Illinois have not). *Power of Attorney Act*, Unif. Law Comm'n, https://www.uniformlaws.org/committees/community-home?communitykey=b1975254-8370-4a7c-947f-e5af0d6cb07c [https://perma.cc/B8Q5-DQP7].

11 Restatement (Third) of Agency § 8.01 (Am. L. Inst. 2006); Unif. Power of Att'y Act § 114(b), cmt.

12 Unif. Trust Code § 802(a) (Unif. L. Comm'n 2010).

13 Unif. Power of Att'y Act § 114 cmt.

hance the property's aesthetic, but he does not realize value or benefit from their utility.

Are these expenditures consistent with the principal's reasonable expectations?[14] Will uncle feel comfortable correcting niece if he disagrees? At what point does niece transform from Red Riding Hood into the Wolf, placing her own interests above uncle's?

The UPOAA expressly provides niece is not liable simply because she also benefits or has an individual or conflicting interest in relation to the property.[15] Imposing a heightened legal standard to require an agent to act for the *sole* benefit of the principal could help curb abuse around the margins when circumstances may tempt an agent to benefit herself. The statutory form could prompt the principal to provide written guidance about his expectations and priorities for use of funds to provide clearer direction to the agent.

II. Impose Added Statutory Protections and Oversight

The UPOAA and some states build some guardrails around agent authority, including requiring a specific grant of authority to permit an agent to exercise so-called "hot" powers, which generally include powers allowing the agent to change distribution of the principal's property post-death and make gifts of the principal's property.[16] For example, the UPOAA imposes specific limits on amounts and types of gifts that can be made by an agent.[17] Additionally, the UPOAA requires the agent to "attempt to preserve the principal's estate plan to the extent actually known by the agent, if preserving this plan is consistent with the principal's best interest" based on certain enumerated factors.[18]

Some states have not adopted a statutory POA form, and many state statutes could be amended in small ways to adopt UPOAA limitations to create more meaningful limits on agent power. In addition, facilitating the appointment of co-agents could encourage greater oversight where the principal can designate two trusted individuals. Where a single agent is the only option, state laws could enable the principal to designate a third party or court to exercise annual oversight, receive accountings, or enforce the principal's rights, akin to a monitor or a "designated representative" concept that has been adopted by the New York POA statute and several state trust codes.[19]

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[14] *Id.* § 114(b)(5).
[15] *Id.* § 114(d).
[16] *Id.* § 114(h).
[17] *Id.* § 217(b).
[18] *Id.* § 114(b)(6).
[19] *See, e.g.*, Del. Code Ann. tit. 12, § 3339 (2020); 760 Ill. Comp. Stat. 3/307(a) (2020); N.Y. Gen. Oblig. Law § 5-1513 (McKinney 2020).

III. Revocable Living Trusts

Where a principal has established and funded a revocable living trust ("RLT"), that structure can help limit a rogue agent's reach and misuse of funds. Although an RLT alone does not prevent misuse of assets, the trustee is subject to a higher fiduciary standard than an agent and a trust document typically defines the trustee responsibilities and settlor's desires more fully than a POA. Moreover, professional trustees and co-trustees can be appointed when an individual has few or no trusted advisors. Generally speaking, trustees also are subject to more oversight and can be required more easily to account to beneficiaries as well as the settlor.

Notwithstanding the RLT structure, some agents attempt to reach into the trust to access all of the principal's assets, and state laws vary regarding the extent to which an agent may reach beyond assets titled in the principal's individual name.[20] The UPOAA clearly permits the agent to act for the principal in the principal's capacity as beneficiary of the trust, receipting for property, participating in agreements, and even exercising powers of appointment held by the principal.[21] However, some non-statutory POAs are drafted to grant the agent access to trust assets as if the agent were trustee of the principal's RLT. Additionally, some state statutes contain provisions occasionally interpreted as extending an agent's power over the principal's RLT. For example, the Illinois POA statute provides that an agent may not require the trustee of any trust benefitting the principal to pay trust assets to the agent "unless specific authority to that end is given, and specific reference to the trust is made, in the statutory property power form."[22] Even absent this language, it seems clear an agent could exercise a mandatory right of withdrawal granted to the principal.[23] Therefore, this power to demand trust assets can create confusion between the trustee's discretionary distribution powers and the agent's powers over trust assets. It would be helpful for states to very clearly tailor statutory language impacting the intersection between agent powers and trust assets, or alternatively, to eliminate agent power to reach trust assets altogether.

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20 *See, e.g.*, 755 Ill. Comp. Stat. 45/3-4(n).

21 Unif. Power of Att'y Act § 211(b).

22 The Illinois statute creates further confusion by permitting an agent to "exercise any power over any trust, estate, or property subject to fiduciary control." 755 Ill. Comp. Stat. 45/3-4(n).

23 *See id.*; *see also* Unif. Power of Att'y Act § 211(b) (discussing the general authority granted to the power of attorney with respect to estates, trusts, and other beneficial interests).

IV. Conclusion

Opportunities exist to improve many state POA statutes to better safeguard elderly individuals from misdeeds by a rogue agent. Until better oversight can be incorporated into these statutes, principals should communicate their intentions to agents when executing a POA and before disability prevents those conversations. Attorneys and advisors play a key role in helping principals and agents understand the obligations and potential pitfalls of POAs.