

## NO ONE IN CHARGE: DURABLE POWERS OF ATTORNEY AND THE FAILURE TO PROTECT INCAPACITATED PRINCIPALS

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*Durable powers of attorney allow principals to select agents to act on their behalf in the event that they later lose the ability to act for themselves. In the hands of the wrong person, however, a durable power of attorney can be a weapon used to financially abuse elders by stripping them of their life savings. Durable powers of attorney agreements, which are based on agency law, often grant agents vast powers, including the ability to sell an elderly person's home and assets, make investments, cancel insurance policies, name new beneficiaries, and empty bank accounts. Yet durable powers of attorney presume the incapacity of principals, while agency law presumes the capacity of principals to supervise their agents. This means that durable powers of attorney leave elders vulnerable to manipulation and exploitation, requiring the additional protection of principals who may lack the requisite mental capacity to supervise the agents they appoint. This Note looks at recent legislation in the United States and Great Britain and argues that registration, notification, and signature witnesses will help protect incapacitated principals while retaining the benefits of simplicity, flexibility, and convenience that make durable powers of attorney so popular among elders and their families.*

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## I. Introduction

Elaine, a seventy-one-year-old woman, was in a desperate situation.<sup>1</sup> Her kidneys were failing and she faced a long hospitalization.<sup>2</sup> She needed someone to pay her rent and utilities while she was in the hospital or she would lose her apartment.<sup>3</sup> When Elaine's younger sister Anne agreed to handle Elaine's financial affairs during the hospitalization, Elaine saw Anne as her rescuer.<sup>4</sup> At Anne's suggestion, Elaine executed a power of attorney, a common legal device that gave Anne legal authority to sign documents on behalf of her older sister.<sup>5</sup> After recovering from her illness, Elaine visited the bank and discovered Anne was not her rescuer after all.<sup>6</sup> Using the authority granted to her under the power of attorney, Anne withdrew most of Elaine's life savings—nearly \$50,000—and spent it gambling in Atlantic City.<sup>7</sup>

For many elders and their families, like Elaine and Anne, the financial durable power of attorney can be a very useful tool because of its simplicity, convenience, and flexibility.<sup>8</sup> But, as Elaine discovered after giving power of attorney to her sister, those same features make it an effective tool for financial exploitation.<sup>9</sup> A power of attorney is a legal instrument "by which one person, as principal, appoints another as his or her agent and confers upon the agent the authority to perform certain specified acts or kinds of acts on behalf of the principal."<sup>10</sup> General power of attorney terminates when a principal becomes

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1. See THOMAS HILLIARD, SCHUYLER CTR. FOR ANALYSIS & ADVOCACY, POWER FAILURES: POWER OF ATTORNEY AUTHORITY AND THE EXPLOITATION OF ELDERLY NEW YORKERS 1 (2006), available at [http://www.scaany.org/resources/documents/power\\_failures.pdf](http://www.scaany.org/resources/documents/power_failures.pdf).

2. See *id.*

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.* The New York District Attorney intervened on Elaine's behalf and Anne ultimately made restitution to her sister. *Id.* However, intervention by a district attorney is uncommon; only about one in seven cases related to abuse of power of attorney are prosecuted. *Id.* at 3.

8. See *id.*

9. See *id.* at 2.

10. 3 AM. JUR. 2D Agency § 21 (2002). In the United Kingdom, the principal is referred to as the *donor* and the agent as the *attorney*. See Office of the Public Guardian, Lasting Power of Attorney, <http://www.publicguardian.gov.uk/arrangements/lpa.htm> (last visited Dec. 11, 2008). For simplicity and clarity, the terms *principal* and *agent* will be used throughout this Note regardless of the location being discussed.

mentally incapacitated, but durable power of attorney continues regardless of whether the principal has capacity.<sup>11</sup>

Under ideal conditions, durable powers of attorney allow principals to enhance their autonomy by selecting agents to act on their behalf in the event that they later lose the ability to act for themselves.<sup>12</sup> However, in the hands of the wrong agent, a durable power of attorney creates enormous potential for abuse.<sup>13</sup> Elaine's story of exploitation is just one among thousands; in 2004 alone, a study of elder abuse complaints made to state Adult Protective Services in nineteen states revealed 52,000 incidents of financial abuse.<sup>14</sup> And these numbers do not even include the vast numbers of cases of elder abuse that go unreported.<sup>15</sup> Consider the following stories of financial exploitation:

- Louis, a seventy-six-year-old man with no family living nearby, first met Catherine and Robert at his church.<sup>16</sup> The couple convinced him they could act on his behalf under a power of attorney.<sup>17</sup> When Louis was diagnosed with the early stages of dementia, not long after granting power of attorney to Robert and Catherine, the couple allegedly began siphoning money out of his bank account.<sup>18</sup> They are accused of misappropriating more than \$84,000 of Louis's money and are being tried for seven counts of theft by unlawful taking and one count of conspiracy.<sup>19</sup>

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11. RESTATEMENT (THIRD) OF AGENCY § 3.08 (2006).

12. JONATHAN FEDERMAN & MEG REED, GOV'T LAW CTR., ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM 4-5 (1994), available at [http://www.governmentlaw.org/files/1993\\_Sandman.pdf](http://www.governmentlaw.org/files/1993_Sandman.pdf).

13. *Id.*

14. PAMELA TEASER ET AL., THE NAT'L CTR. ON ELDER ABUSE, THE 2004 SURVEY OF STATE ADULT PROTECTIVE SERVICES: ABUSE OF ADULTS 60 YEARS OF AGE AND OLDER 5-6 (2006).

15. NAT'L CTR. ON ELDER ABUSE, FACT SHEET: ELDER ABUSE PREVALENCE AND INCIDENCE 1 (2005), available at [http://www.ncea.aoa.gov/ncearoot/Main\\_Site/pdf/publication/FinalStatistics050331.pdf](http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/FinalStatistics050331.pdf). "It is estimated that for every one case of elder abuse, neglect, exploitation, or self-neglect reported to authorities, about five more go unreported." *Id.*

16. Press Release, Pa. Office of Attorney Gen., Attorney General Corbett Announces Criminal Charges Against a Schuylkill County Couple Accused of Stealing More than \$84,000 from an Elderly Man (Nov. 29, 2007), <http://www.attorneygeneral.gov/press.aspx?id=3159>.

17. *Id.*

18. *Id.*

19. *Id.*

- Elizabeth, an eighty-seven-year-old woman, told her son that she wanted to move into an upscale assisted living facility.<sup>20</sup> When her son told her that she could not afford to move, she thought something was wrong.<sup>21</sup> A few years earlier, she had executed a durable power of attorney that gave her son the power to manage her financial affairs.<sup>22</sup> She shared her concerns with a friend who contacted Adult Protective Services, and the agency began an investigation that ultimately revealed Elizabeth's son had transferred \$225,000 from her account to his own.<sup>23</sup> Luckily, he had not spent the money, and it was returned to Elizabeth.<sup>24</sup>
- Wesley, an eighty-five-year-old man, was a recent widower with Alzheimer's when he met Michael, a former sheriff's deputy, in 2002.<sup>25</sup> Michael persuaded Wesley to open joint bank accounts for the two of them and to give him financial durable power of attorney.<sup>26</sup> Two years later, when Wesley died, it became clear that Michael had taken \$500,000 from Wesley's estate.<sup>27</sup> Wesley's estate filed a lawsuit to recover the funds; so far it has only been repaid \$200,000.<sup>28</sup>

Elaine, Louis, Elizabeth, and Wesley were all financially abused through inappropriate uses of durable powers of attorney. Durable power of attorney agreements often grant agents an enormous amount of power, including power to sell an elderly person's home and other assets, to make investments, to cancel insurance policies or name new beneficiaries, and even to empty bank accounts.<sup>29</sup> A 1993 national survey found that 94% of attorneys, social service providers, area aging administrators, district attorneys, and surrogate court judges believed that durable power of attorney abuse occurs; that

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20. Toddi Gutner, "License to Steal" from Seniors, *BUS. WK.*, June 5, 2006, [http://www.businessweek.com/print/magazine/content/06\\_23/b3987113.htm?chan=gl](http://www.businessweek.com/print/magazine/content/06_23/b3987113.htm?chan=gl).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Dean Mosiman, *Elder Abuse: A Silent Shame, Day 4: Easy Targets*, *WIS. ST. J.*, Nov. 7, 2007, <http://www.madison.com/wsj/spe/elder/index.php?ntid=254558&ntpid=15>.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See Russ ex rel. Schwartz v. Russ*, 734 N.W.2d 874, 888 (Wis. 2007) (Abrahamson, J., concurring).

two-thirds had personal knowledge of a situation involving abuse of power of attorney; and that 38% had encountered such abuse more than six times.<sup>30</sup>

While powers of attorney can be used to financially exploit the elderly in a variety of ways,<sup>31</sup> this Note specifically focuses on the need for additional protection of principals who lack the requisite mental capacity to supervise the agents they appoint. There is an inherent conflict between the basic assumptions of agency law and the operation of durable powers of attorney. Agency law presumes that the person executing a power of attorney will retain the capacity to oversee the agent appointed to manage his or her affairs.<sup>32</sup> Durable power of attorney is designed to do the exact opposite; it creates a situation where the agent appointed continues to have the power to manage even if the grantor loses the ability to oversee.<sup>33</sup> And once the person granting the power of attorney becomes incapacitated, there is essentially no oversight or supervision of the person managing his or her affairs.<sup>34</sup>

An overview of durable powers of attorney in the United States is the subject of Part II of this Note. The discussion includes basic characteristics of durable powers of attorney, their evolution, and recent

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30. Hans A. Lapping, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 *ELDER L.J.* 143, 167–68 (1996).

31. Some examples of the different ways in which power of attorney can be abused include

having a power of attorney signed by a person who has a cognitive impairment at the time, using the power after it has terminated (e.g., the principal becomes incapacitated and the power is not a durable power), or using the power for purposes beyond those for which it was intended.

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

32. RESTATEMENT (THIRD) OF AGENCY intro. 10 (2006).

The common law of agency rests upon a definition of the relationship between principal and agent that presupposes the principal's capacity to consent and right to control the agent, as well as the power to revoke authority unless it has been given as security to protect an interest that is distinct from the agency relationship.

*Id.*

33. *Id.* (“[S]tatutes permit a principal to create a durable power of attorney, one that conveys authority to an agent that is not revoked by the principal's loss of competence or that becomes irrevocable when the principal loses competence.”).

34. Office of the N.Y. State Attorney Gen. Andrew M. Cuomo, *What's a Power of Attorney?*, [http://www.oag.state.ny.us/bureaus/health\\_care/seniors/pwrat.html](http://www.oag.state.ny.us/bureaus/health_care/seniors/pwrat.html) (last visited Dec. 11, 2008) (“There is no official or government monitoring of Agents acting pursuant to Power of Attorney. That is the responsibility of the Principal.”).

legal developments. Part III focuses on the widespread problem of financial exploitation of the elderly and how, in spite of recent legislation, the law still fails to adequately protect principals who lack capacity. Part IV looks at the Mental Capacity Act, passed in the United Kingdom in 2005,<sup>35</sup> as an example of ambitious government action to protect those who lack capacity, and compares it to recent legislation in the United States. Finally, Part V advocates implementation of the Uniform Power of Attorney Act and three additional safeguards: registration, notification, and signature witnesses. These safeguards will improve the protection of incapacitated principals who execute durable powers of attorney while retaining the benefits of simplicity, flexibility, and convenience that make durable powers of attorney such a popular tool for elders and their families today.

## II. Background

The durable power of attorney is a tool often characterized as “simple yet powerful.”<sup>36</sup> Today, some form of durable power of attorney is available in every state.<sup>37</sup> This Part of the Note begins by reviewing the major attributes of durable powers of attorney, such as common requirements for creation, how a power of attorney becomes effective, and what duties it creates between principal and agent. It continues by briefly summarizing the foundation and early evolution of durable power of attorney, and some of the challenges associated with it. Finally, it looks at the most recent changes and how they might help reconcile the divergent state laws and address modern concerns about durable power of attorney.

### A. Attributes of Durable Power of Attorney

Power of attorney creates an agency relationship in which “a principal empowers an agent to act on the principal’s behalf.”<sup>38</sup> Under traditional agency law, a power of attorney terminates when a principal becomes incapacitated, but a durable power of attorney contin-

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35. Mental Capacity Act, 2005, c. 9 (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

36. *E.g.*, *Russ ex rel. Schwartz v. Russ*, 734 N.W.2d 874, 888 (Wis. 2007) (Abrahamson, J., concurring); Lapping, *supra* note 30, at 167.

37. Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 6–7 (2006).

38. Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 576 (1996).

ues the agency relationship even after a principal loses capacity.<sup>39</sup> Principals in the United States can create two different types of durable powers of attorney.<sup>40</sup> The first type is a financial durable power of attorney, which grants an agent authority to manage a principal's financial affairs.<sup>41</sup> The second type is a health care durable power of attorney, which grants an agent authority to make health care decisions.<sup>42</sup> There is some variation in the laws that apply to each type of power of attorney. This Note exclusively discusses issues related to financial durable power of attorney.

Durable power of attorney is created and governed by state statutes, and therefore the requirements to create a durable power of attorney vary somewhat from state to state.<sup>43</sup> In general, the requirements to create a durable power of attorney are simple: the principal must be competent at the time the durable power of attorney is created, the durable power of attorney must be in writing and signed by the principal, and the principal must express the intention that the power be durable.<sup>44</sup> A number of states today also require the power of attorney to be notarized or witnessed, and some require both.<sup>45</sup>

When principals execute durable powers of attorney they must decide when the power of attorney will take effect and what its scope will be. Power of attorney can be either immediately effective or "springing."<sup>46</sup> An immediately effective power gives the agent authority to begin acting on the principal's behalf at the time it is executed, and the agent's authority survives the incapacity of principal.<sup>47</sup>

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39. *Id.* at 587–88; Lapping, *supra* note 30, at 144 n.3. It can be difficult to determine when an elderly person lacks decision-making capacity. Jennifer Moye & Daniel C. Marson, *Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research*, 62B J. GERONTOLOGY: PSYCHOL. SCI. 3 (2007) (discussing the importance of capacity assessment and the many factors that come into play in determining capacity).

40. Dessin, *supra* note 38, at 580.

41. *Id.*

42. *Id.*

43. See Kohn, *supra* note 37, at 6–7.

44. Dessin, *supra* note 38, at 581–82. Although most states require a principal to express the intention that a power of attorney be durable, some states interpret an instrument without an express durability provision to create a durable power of attorney. *Id.* at 581.

45. MedLawPlus.com, Financial Power of Attorney Form: State Specific Instructions for Execution, <http://www.medlawplus.com/library/legal/durablepowerofattorney3.htm> (last visited Dec. 11, 2008).

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

47. *Id.* An example of phrasing that creates an immediately effective durable power of attorney is: "This power of attorney shall not be affected by subsequent

A “springing” power does not give the agent any immediate authority; the power of attorney becomes effective only after the principal loses capacity.<sup>48</sup> The scope of a power of attorney can be either general or narrow.<sup>49</sup> If the scope of the power of attorney is general, it allows the agent to act to the full extent authorized under an enabling statute.<sup>50</sup> If the scope is narrow, the agent’s power is limited to particular actions.<sup>51</sup>

Although state statutes are what make powers of attorney durable, powers of attorney in general are derived from the common law of agency. The relationship a power of attorney creates is an agency relationship, so “agency principles are applicable in determining the authority and duties of the attorney in fact.”<sup>52</sup> Agency law imposes a fiduciary duty on agents, requiring agents to “act loyally for the principal’s benefit in all matters connected with the agency relationship.”<sup>53</sup> The duty of loyalty generally requires that the agent: (1) not engage in self-dealing; (2) not deal with the principal on behalf of an adverse party; (3) not compete with the principal; (4) act in accordance with the terms of the contract between the agent and the principal; and (5) act with the care, competence, and diligence normally exercised by agents in similar circumstances.<sup>54</sup>

## B. Foundation and Evolution of Durable Powers of Attorney<sup>55</sup>

In 1954, Virginia enacted the first power of attorney statute that allowed agents to act for incapacitated principals.<sup>56</sup> Before 1954, power of attorney existed only at common law and always terminated if

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disability or incapacity of the principal or the lapse of time.” 3 AM. JUR. 2D *Agency* § 26 (2002).

48. Dessin, *supra* note 38, at 577. An example of phrasing that creates a “springing” power of attorney is: “This power of attorney shall become effective upon the disability or incapacity of the principal.” 3 AM. JUR. 2D *Agency* § 26 (2002).

49. Kohn, *supra* note 37, at 4.

50. *Id.*

51. *Id.*

52. *In re Estate of Littlejohn*, 698 N.W.2d 923, 925 (N.D. 2005). Attorney-in-fact is another term for agent. UNIF. POWER OF ATTORNEY ACT prefatory note (amended 2006), 8B U.L.A. 24–27 (Supp. 2008).

53. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

54. *Id.* §§ 8.02–.08.

55. For a more detailed history of durable power of attorney, see Karen E. Boxx, *The Durable Power of Attorney’s Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 4–15 (2001).

56. VA. CODE ANN. § 11-9.1 (West 2006).

the principal became incapacitated.<sup>57</sup> The lack of durability meant that power of attorney was not a useful long-term planning tool for elderly principals facing the possibility of a decline in mental faculties. General powers of attorney would terminate just when they were needed most: when principals became incapacitated.<sup>58</sup>

In 1964, ten years after the Virginia statute was passed, the National Conference of Commissioners on Uniform State Laws (NCCUSL) distributed the Model Special Power of Attorney for Small Property Interests Act (the 1964 Act).<sup>59</sup> The preface to the 1964 Act identified as its purpose “to provide a simple and inexpensive legal procedure for the assistance of persons with relatively small property interest, whose incomes are small . . . and who, in anticipation or because of physical handicap or infirmity . . . wish to make provision for the care of their personal property rights or own affairs.”<sup>60</sup> The 1964 Act was in some ways more comprehensive than later statutes,<sup>61</sup> but was not widely accepted by the states.<sup>62</sup> Nevertheless, the 1964 Act is the clear forerunner of the Uniform Probate Code of 1969, and it is likely that states later borrowed provisions from it when enacting their own durable power of attorney statutes.<sup>63</sup>

The 1969 Uniform Probate Code first introduced the concept of the durable power of attorney as we understand it today.<sup>64</sup> It extended the authority of an agent acting pursuant to power of attorney even if a principal became incapacitated.<sup>65</sup> In the ten years following promulgation of the 1969 Uniform Probate Code, more than thirty

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57. Kohn, *supra* note 37, at 5.

58. *Id.* at 5–6.

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

60. Michael N. Schmitt & Steven A. Hatfield, *The Durable Power of Attorney: Applications and Limitations*, 132 MIL. L. REV. 203, 205 n.8 (1991) (quoting MODEL SPECIAL POWER OF ATTORNEY FOR SMALL PROPERTY INTERESTS ACT prefatory note, reprinted in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 175 (1964)). The preface further specifies that “[i]t is not contemplated that a power of attorney executed under this Act will be used for the general handling of sizeable commercial property interests. Neither is it intended wholly to replace conservatorship or guardianship, but rather it is designed as a less expensive alternative.” *Id.*

61. For example, the 1964 Act included three different standards of agent liability and required agents to account for their actions. MODEL SPECIAL POWER OF ATTORNEY FOR SMALL PROPERTY INTERESTS ACT §§ 7, 9 (1964).

62. Dessin, *supra* note 38, at 578–79.

63. *Id.*

64. See UNIF. PROBATE CODE §§ 5-501, 5-502, 8 U.L.A. 513–14 (1989).

65. *Id.* The 1969 Uniform Probate Code also gave limited protection to an agent that acted after a principal’s death. See *id.*; Dessin, *supra* note 38, at 579 n.25.

states adopted some form of a durable power of attorney statute.<sup>66</sup> In 1979, the NCCUSL created the Uniform Durable Power of Attorney Act, a freestanding act that paralleled the language of Uniform Probate Code sections 5-501 to 5-505.<sup>67</sup> This Act was created on “a suggestion that a new free-standing uniform act [that a state could adopt without the rest of the UPC] . . . would be welcome in many states.”<sup>68</sup> By 1984, all fifty states and the District of Colombia enacted statutes creating durable powers of attorney.<sup>69</sup>

Durable powers of attorney as conceived by the 1969 Uniform Probate Code and 1979 Uniform Durable Power of Attorney Act were simple to create, inexpensive, had virtually unlimited use, and included protections for third parties.<sup>70</sup> The low cost and flexibility of durable powers of attorney made them a very popular estate planning tool, but those same characteristics made the possibility of misuse to exploit vulnerable principals more likely.<sup>71</sup> In the early 1990s, elder advocates began to focus on the misuse of durable powers of attorney to financially exploit the elderly.<sup>72</sup> In response to the increasing concerns about elder abuse, states began imposing enhanced penalties for abuse of durable powers of attorney and creating oversight mechanisms.<sup>73</sup> Today, states are still looking for ways to curb abuses of durable powers of attorney while maintaining their usefulness as an efficient estate planning tool.<sup>74</sup>

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66. FEDERMAN & REED, *supra* note 12, at 13.

67. *Id.* at 14–15.

68. *Id.* (quoting UNIF. PROBATE CODE §§ 5-501 to -505).

69. Boxx, *supra* note 55, at 12.

70. *Id.*

71. Dessin, *supra* note 38, at 582, 584.

72. There is documentation of such abuse in the form of anecdotal evidence, as well as several studies that attempted to quantify the scope of the problem. *See, e.g.,* FEDERMAN & REED, *supra* note 12, at 28–46; E. Thomas Schilling, *Report on ACTEC Elder Law Committee Questionnaire on Possible Abuse of Financial Durable Power of Attorney*, 21 AM. C. TR. & EST. COUNS. J. 247, 247–50 (1995); David M. English & Kimberly K. Wolff, *Survey Results Use of Durable Powers*, PROB. & PROP., Jan.–Feb. 1996, at 33–34.

73. Boxx, *supra* note 55, at 13 (citing, for example, 720 ILL. COMP. STAT. ANN. § 5/16-1.3(a)–(c) (West 1992 & Supp. 2001) (imposing criminal penalties); N.H. REV. STAT. ANN. § 506:7 (1997) (allowing interested persons to petition court for oversight of an agent)).

74. *See* HILLIARD, *supra* note 1, at 9 (noting that “[f]inancial exploitation through power of attorney is difficult to confront, since many standard anti-fraud measures used in other fields” would damage the durable power of attorney).

### C. Recent Developments: The Uniform Power of Attorney Act of 2006

Laws pertaining to durable power of attorney are constantly evolving. Individual states continue to enact laws dedicated to protecting the elderly from financial abuse.<sup>75</sup> However, more significant than the efforts of any single state is the promulgation of a new uniform law designed to supersede the Uniform Durable Power of Attorney Act,<sup>76</sup> last amended in 1987.<sup>77</sup> While almost all states adopted relatively uniform provisions around 1987, in the intervening years, a majority of states adopted nonuniform provisions addressing matters outside the scope of the uniform act.<sup>78</sup> This divergence belied the need for a new uniform act that would help reconcile the divergent state laws and address modern concerns about durable powers of attorney.

The new act is the 2006 Uniform Power of Attorney Act (UPOAA).<sup>79</sup> The UPOAA is similar to the Uniform Durable Power of Attorney Act, but makes several important changes and incorporates new provisions.<sup>80</sup> First, the word *durable* does not appear in the title of

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75. *E.g.*, S. 193, 82d Legis. Assem., Reg. Sess. (S.D. 2007) (enacting a South Dakota law effective as of July 1, 2007, that creates explicit protections from financial exploitation and other forms of elder abuse).

76. UNIF. POWER OF ATTORNEY ACT prefatory note (amended 2006), 88 U.L.A. 24–27 (Supp. 2008). The new law also supersedes the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code. UNIF. POWER OF ATTORNEY ACT art. 1, general provisions.

77. DURABLE POWER OF ATTORNEY ACT §§ 5-501 to -505, 8 U.L.A. 418–24 (1998).

78. UNIF. POWER OF ATTORNEY ACT prefatory note. The prefatory note identifies the following topics as those with increasing divergence:

- 1) the authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal's marriage to the agent; 4) activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent conduct and liability. Other topics about which states had legislated, although not necessarily in a divergent manner, included: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on authority that has the potential to dissipate a principal's property or alter a principal's estate plan.

*Id.*

79. UNIF. POWER OF ATTORNEY ACT § 101.

80. The UPOAA is made up of four parts: Article 1 contains general provisions and definitions; Article 2 lays out the authority that can be granted to an agent; Article 3 provides a statutory short form that simplifies the creation of durable power of attorney by providing step-by-step instructions; and Article 4 sets forth various provisions governing the relationship of the Act to other law and powers of attorney that already exist. Unif. Law Comm'rs, *Summary: Uniform Pow-*

the UPOAA.<sup>81</sup> The Drafting Committee decided that the default rule for powers of attorney involving financial management should be durability.<sup>82</sup> Second, the UPOAA requires that the principal sign a written instrument to create the durable power of attorney and also specifies that if the signature is acknowledged before a notary it is presumed to be valid.<sup>83</sup> Third, the UPOAA defines default and mandatory fiduciary duties that the agent owes to the principal.<sup>84</sup> Fourth, the UPOAA requires that the principal use express language to grant an agent authority to dissipate the principal's property or alter the principal's estate plan.<sup>85</sup> And finally, the UPOAA provides for judicial review of the conduct of agents and imposes liability for agent misconduct.<sup>86</sup>

The final version of the UPOAA was first promulgated at the end of 2006.<sup>87</sup> As of February 2008, it had already been adopted by New Mexico, and introduced in the legislatures of eight other states: Idaho, Indiana, Maine, Maryland, Michigan, Minnesota, Mississippi, and Virginia.<sup>88</sup> The NCCUSL advocates that all states adopt the UPOAA, claiming that it "[p]reserves the effectiveness of durable powers as a low-cost, flexible, and private form of surrogate decision-making" while providing new benefits such as mandatory safeguards that protect principals, agents, and third parties; clearer guidelines for

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*er of Attorney Act (2006)*, [http://www.nccusl.org/Update/uniformact\\_summaries/uniformacts-s-upoaa.asp](http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-upoaa.asp) (last visited Dec. 11, 2008) [hereinafter *UPOAA Summary*].

81. UNIF. POWER OF ATTORNEY ACT § 101.

82. William P. LaPiana, *The New Uniform Power of Attorney Act*, E-STATE, Issue 2004.2, at 3, available at <http://www.abanet.org/rppt/publications/estate/2004/2/UPOAA-LaPiana.pdf>. The presumption of durability does not apply to powers of attorney for health care, or to specialized powers of attorney associated with dealing or proxy voting. UNIF. POWER OF ATTORNEY ACT overview of the Uniform Power of Attorney Act.

83. UNIF. POWER OF ATTORNEY ACT § 105.

84. *Id.* § 114. Liability for misconduct, provisions for judicial review of an agent's conduct, duties to keep complete records, and the express authorization requirement for certain types of actions are just a few of the fiduciary duties the Act imposes on agents. *Id.*

85. *See id.* § 201.

86. *See id.* §§ 116, 117.

87. Unif. Law Comm'rs, *Why States Should Adopt the Uniform Power of Attorney Act (2006)*, [http://www.nccusl.org/Update/uniformact\\_why/uniformacts-why-upoaa.asp](http://www.nccusl.org/Update/uniformact_why/uniformacts-why-upoaa.asp) (last visited Dec. 11, 2008) [hereinafter *Why States Should Adopt the UPOAA*].

88. Unif. Law Comm'rs, *A Few Facts About the Uniform Power of Attorney Act (2006)*, [http://www.nccusl.org/update/uniformact\\_factsheets/uniformacts-fs-upoaa.asp](http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-upoaa.asp) (last visited Dec. 11, 2008).

agents; and a statutory form.<sup>89</sup> The clear benefits of the new UPOAA make it a significant improvement over the hodgepodge of nonuniform durable power of attorney statutes that states currently use; however, it still does not effectively address the agency problem that stems from the inability of incapacitated principals to control their agents.

### III. Current Conditions

Although laws pertaining to durable power of attorney are constantly evolving, and recent proposals, if adopted, could improve pro-

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89. *Why States Should Adopt the UPOAA*, *supra* note 87. The NCCUSL specifically claims that every state should adopt the Uniform Power of Attorney Act because it:

- Preserves the effectiveness of durable powers as a low-cost, flexible, and private form of surrogate decision making.
- Provides mandatory provisions that provide safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority.
- Modernizes the various areas of authority that can be granted to an agent and requires express language authorization by the principal where certain authority could dissipate the principal's property or alter the principal's estate plan.
- Provides step-by-step prompts [ ]for designation of agent, successor agents, and the grant of authority through an optional statutory form.
- Offers clearer guidelines for the Agent, who is often a trusted family member, such as:
  - Recognizes that an agent who acts with care, competence and diligence for the best interest of the principal is not liable solely because he or she also benefits from the act or has conflicting interests
  - Permits a Principal to include in the power of attorney an exoneration provision for the benefit of the agent.
  - Provides ways for the Agent to give notice of resignation if the Principal is incapacitated.
- Encourages acceptance of a power of attorney by third parties.
  - Provides broad protections for the good faith acceptance or refusal of an acknowledged power of attorney.
  - Recognizes portability of powers of attorney validly created in other states.
  - Offers an additional protective measure for the Principal by providing that third persons may refuse the power if they have the belief that "the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the Agent or person acting for or with the agent, make a report to the appropriate adult protective service agency."

*Id.*

tection for some vulnerable adults, current proposals in the United States fail to adequately address the specific problems faced by principals that lack capacity. This Part begins by detailing the widespread use and abuse of durable powers of attorney and how better oversight would benefit all principals. It then analyzes how provisions that claim to improve protection of vulnerable principals fall short, especially when it comes to principals who lack capacity.

#### A. Abuse of Durable Power of Attorney Is a Widespread Problem

The popularity of the durable power of attorney as a simple and flexible tool for estate planning is well-established.<sup>90</sup> A study by the AARP in 2000 found that 45% of Americans over the age of fifty have executed a durable power of attorney.<sup>91</sup> And the older Americans are, the more likely they are to have a durable power of attorney: nearly three-quarters of Americans over the age of eighty have executed one.<sup>92</sup> In addition to age, three factors appear to relate closely to the likelihood that a principal will execute a durable power of attorney: education, income, and mental health status.<sup>93</sup> Highly educated people,<sup>94</sup> people with higher income,<sup>95</sup> and people experiencing cognitive decline are more likely to have executed durable powers of attorney.<sup>96</sup>

Given the large numbers of competent Americans that have a durable power of attorney, one might question whether modifications that seem to specifically address problems unique to incapacitated principals are beneficial enough to offset the inconvenience to the remainder.<sup>97</sup> For example, there is a possibility that creating "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, which was deemed inad-

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90. See, e.g., Hafemeister, *supra* note 31, at 426; Boxx, *supra* note 55, at 14; Desin, *supra* note 38, at 584; Mosiman, *supra* note 25.

91. Kohn, *supra* note 37, at 7 (citing AARP RESEARCH GROUP, WHERE THERE IS A WILL . . . LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY (2000), <http://assets.aarp.org/rgcenter/econ/will.pdf>).

92. *Id.* at 7 (citing AARP RESEARCH GROUP, *supra* note 91).

93. AARP RESEARCH GROUP, *supra* note 91.

94. *Id.*

95. Christopher B. Rosnick & Sandra L. Reynolds, *Thinking Ahead: Factors Associated with Executing Advance Directives*, 15 J. AGING & HEALTH 409, 422 (2003).

96. Kohn, *supra* note 37, at 8.

97. See Boxx, *supra* note 55, at 46 (noting that the lack of monitoring is both a disadvantage and an advantage of durable power of attorney).

quate years ago.”<sup>98</sup> However, even principals with decision-making capacity can be taken advantage of by agents abusing durable powers of attorney.

Recall the stories of Elaine, Louis, Elizabeth, and Wesley.<sup>99</sup> In all four cases money was stolen by someone they knew who acted as their agent under a durable power of attorney.<sup>100</sup> In two of the four cases the money was stolen by a close family member,<sup>101</sup> and only two of the cases involved an incapacitated principal.<sup>102</sup> Financial abuse of the elderly is a widespread problem,<sup>103</sup> and durable power of attorney contributes to it by granting agents broad authority to act on behalf of principals with little or no supervision.<sup>104</sup> The Nova Scotia Department of Seniors found that the elderly in general are more vulnerable to financial exploitation, and that “[w]hile declining mental and physical ability increases a person’s vulnerability to abuse, the fact is that most older adults who experience financial abuse are mentally competent and able to make decisions for themselves.”<sup>105</sup>

Durable power of attorney agreements often give agents an enormous amount of power, including power to sell principals’ homes and other assets, to make investments, to cancel insurance policies or name new beneficiaries, and even to empty bank accounts.<sup>106</sup> What makes cases involving abuse of durable power of attorney even more distressing is that “only a small fraction of financial exploitation cases involving power of attorney appear to be referred to District Attorneys” and only one-seventh of the small number of referred cases are actually prosecuted.<sup>107</sup>

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98. *Id.*

99. *See supra* Part I.

100. *See* HILLIARD, *supra* note 1, at 1; Gutner, *supra* note 20; Mosiman, *supra* note 25; Press Release, Pa. Office of Attorney Gen., *supra* note 16.

101. *See* HILLIARD, *supra* note 1, at 1; Gutner, *supra* note 20.

102. *See* Mosiman, *supra* note 25 (indicating that Wesley was diagnosed with Alzheimer’s); Press Release, Pa. Office of Attorney Gen., *supra* note 16 (indicating that Louis suffered from dementia).

103. *See* HILLIARD, *supra* note 1, at 1 (noting that financial exploitation of the elderly is “by no means unusual in the United States, particularly among senior citizens”).

104. Kohn, *supra* note 37, at 22.

105. N.S. Dep’t of Seniors, About Financial Exploitation, <http://www.gov.ns.ca/scs/aboutfinancialex.asp> (last visited Dec. 11, 2008).

106. *See* Russ *ex rel.* Schwartz v. Russ, 734 N.W.2d 874, 888 (Wis. 2007) (Abrahamson, J., concurring).

107. HILLIARD, *supra* note 1, at 3.

## B. The Uniform Power of Attorney Act Fails to Improve Protection of Incapacitated Principals

The UPOAA makes great strides toward resolving many of the issues of ambiguity that have plagued courts and legislatures over the role of an agent empowered by a durable power of attorney.<sup>108</sup> However, the UPOAA does not improve mechanisms to protect incapacitated principals from unscrupulous agents who unexpectedly take advantage of them. Three provisions in the UPOAA supposedly protect principals, but in reality fall short.

The first provision designed to protect principals identifies the fiduciary duties of agents acting pursuant to a durable power of attorney.<sup>109</sup> The UPOAA specifies mandatory duties, including that agents shall "(1) act in accordance with the principal's reasonable expectations . . . ; (2) act in good faith; and (3) act only within the scope of authority granted in the power of attorney."<sup>110</sup> The Act also creates default fiduciary obligations that can be modified by the power of attorney, indicating that agents shall:

(1) act loyally for the principal's benefit; (2) act so as not to create a conflict of interest . . . ; (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances; (4) keep a record of all receipts, disbursements and transactions made on behalf of the principal; (5) cooperate with the person that has the authority to make health-care decisions for the principal . . . ; [and] (6) attempt to preserve the principal's estate plan.<sup>111</sup>

While clearly laying out the duties of agents does no harm, merely listing fiduciary duties that already exist at common law does not actually add new protection for principals.<sup>112</sup> Moreover, even where the UPOAA creates or modifies common-law fiduciary duties, the absence of a mechanism that monitors agents means that incapacitated principals are still at grave risk of abuse with no remedy. Incapacitated principals are less likely to notice a breach of fiduciary duty

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108. See Dessin, *supra* note 38, at 584–87 (discussing the problems created by not having a well-defined role for agents acting pursuant to durable power of attorney).

109. UNIF. POWER OF ATTORNEY ACT § 114 (amended 2006), 8B U.L.A. 40–41 (Supp. 2008).

110. *Id.* § 114(a).

111. *Id.* § 114(b).

112. RESTATEMENT (THIRD) OF AGENCY §§ 8.02–.08 (2006) (listing the general duties agents owe to principals).

and less likely to take the necessary steps to remedy a breach or file a lawsuit for damages.<sup>113</sup>

The second provision in the UPOAA meant to be protective of principals restricts the scope of a general grant of authority by requiring a principal to expressly grant specific authority to an agent for that agent to engage in certain transactions.<sup>114</sup> Some transactions that require express authority include “making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations.”<sup>115</sup>

This provision is similar to the fiduciary duties mentioned above in that many of the restrictions also already exist at common law.<sup>116</sup> Their inclusion in the UPOAA will create nationwide uniformity for authority granted under a power of attorney if states choose to adopt the Act as written, but will only provide additional protection in states that have not already adopted similar provisions. Furthermore, recovery for a breach would only be available if someone noticed a violation and brought a lawsuit. When the principal lacks capacity, it is less likely that a violation will be noticed and a lawsuit will be filed.

The third protective provision gives several broad categories of people standing to “petition a court to construe a power of attorney or review the agent’s conduct and grant appropriate relief.”<sup>117</sup> Most states already have similar standing provisions, so the increased protection for incapacitated principals will be limited to those few states where there is limited standing.<sup>118</sup> Furthermore, the comment to this provision indicates that the provision provides what “may be the only

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113. See *UPOAA Summary*, *supra* note 80 (indicating that individuals who lack capacity are “uniquely vulnerable to financial abuse”).

114. See UNIF. POWER OF ATTORNEY ACT § 201.

115. UNIF. POWER OF ATTORNEY ACT § 201 cmt. The UPOAA requires an agent to have specific authority to:

- (1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; (5) delegate authority granted under the power of attorney; (6) waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or] (7) exercise fiduciary powers that the principal has authority to delegate; or (8) disclaim property, including a power of appointment].

UNIF. POWER OF ATTORNEY ACT § 201(a).

116. See, e.g., CAL. PROB. CODE § 4128 (West Supp. 2006); KAN. STAT. ANN. § 58-654(f) (2005); MO. ANN. STAT. § 404.710 (West 2001); WASH. REV. CODE ANN. § 11.94.050 (West Supp. 2006).

117. UNIF. POWER OF ATTORNEY ACT § 116.

118. See *id.* § 116 cmt.

means to detect and stop agent abuse of an incapacitated principal."<sup>119</sup> Giving a broader group of people standing to petition the court is a step in the right direction, but it does not do anything to actively encourage supervision of the agents of incapacitated principals. The fact that it "may be the only means to detect and stop agent abuse" shows how woefully inadequate current legislation is.

The prevalence of abuse of durable power of attorney that harms both competent principals and principals that lack capacity means that better oversight would benefit many, if not most, of the people that execute a durable power of attorney. At the very least, as long as the oversight is not unnecessarily burdensome, the prevalence of the problem suggests that oversight would do more good than harm. The challenge now is to craft an oversight mechanism that increases the likelihood that a third party will look out for the principal without making requirements so onerous that they defeat the simplicity and flexibility of durable power of attorney.

#### **IV. The English Model: The Mental Capacity Act of 2005 and Lasting Powers of Attorney**

England has taken more dramatic action than the United States to protect people who lack capacity from financial exploitation. The Mental Capacity Act of 2005,<sup>120</sup> which received Royal Assent on April 7, 2005,<sup>121</sup>

provides a statutory framework to empower and protect vulnerable people who are not able to make their own decisions. It makes it clear who can make decisions, in which situations, and how they should go about this. It enables people to plan ahead for a time when they may lose capacity.<sup>122</sup>

This Part will outline the major provisions of the Mental Capacity Act, discuss the specific provisions designed to help reduce financial ex-

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119. *See id.*

120. Mental Capacity Act, 2005, c. 9 (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

121. Provisions of the Mental Capacity Act first began to come into force in April 2007; as of October 1, 2007, the entire Act is in force in England and Wales. Press Release, Ministry of Justice, Public Guardian Starts Work on Protecting Vulnerable People (Sept. 28, 2007), <http://www.justice.gov.uk/news/newsrelease280907a.htm>.

122. DEPT OF HEALTH, MENTAL CAPACITY ACT 2005—SUMMARY 1 (2008) [hereinafter MCA SUMMARY], available at [http://www.dh.gov.uk/en/Publicationsandstatistics/Bulletins/theweek/Chiefexecutivebulletin/DH\\_4108436](http://www.dh.gov.uk/en/Publicationsandstatistics/Bulletins/theweek/Chiefexecutivebulletin/DH_4108436) (link to PDF at bottom of page).

plotation, and analyze how the Mental Capacity Act is similar to and different from the Uniform Power of Attorney Act.

### A. Major Provisions of the Mental Capacity Act

The Mental Capacity Act (MCA) recognizes that incapacity can affect people in many areas of their life and sets out guidelines and methods of decision making in the areas of finance, personal welfare, and health care.<sup>123</sup> The MCA applies to both day-to-day decisions and major life-changing events.<sup>124</sup> The entire Act is centered around five key guidelines.<sup>125</sup> First, there is a presumption that every adult has decision-making capacity, unless it is proved otherwise.<sup>126</sup> Second, individuals are entitled to appropriate help making decisions before anyone concludes that they lack decision-making capacity.<sup>127</sup> Third, individuals have the right to make decisions that might be perceived as unwise or eccentric.<sup>128</sup> Fourth, anyone acting for or on behalf of a person without capacity must act in that person's best interest.<sup>129</sup> And finally, anyone acting for or on behalf of a person without capacity should choose an intervention that is the least restrictive of the person's basic rights and freedoms.<sup>130</sup> The goals of the statutory guidelines are to "protect people who lack capacity and help them to take part, as much as possible, in decisions that affect them."<sup>131</sup>

To achieve its goal of empowering and protecting vulnerable people who are unable to make their own decisions, the Mental Capacity Act introduces several new roles, bodies, powers, and procedures.<sup>132</sup> The MCA first deals "with the assessment of a person's capacity and acts by carers of those who lack capacity."<sup>133</sup> The MCA also provides for appointment of agents under a "lasting power of at-

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123. See DEP'T FOR CONSTITUTIONAL AFFAIRS, MENTAL CAPACITY ACT 2005 CODE OF PRACTICE 15 (2007) [hereinafter MCA CODE OF PRACTICE], available at <http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf>.

124. See *id.*

125. *Id.* at 19.

126. MCA SUMMARY, *supra* note 122, at 1.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. MCA CODE OF PRACTICE, *supra* note 123, at 20.

132. *Id.* at 16.

133. MCA SUMMARY, *supra* note 122, at 1. The word *carer* is the British equivalent of the word *caregiver* in the United States. Jennifer Margrave, *An Overview of the Law in England and Wales Relating to the Elderly*, 2 NAELA J. 175, 176 (2006).

torney."<sup>134</sup> Lasting powers of attorney include important safeguards to deter improper use of power of attorney before it occurs.<sup>135</sup> In addition, the MCA establishes a new Court of Protection that deals with all types of decision making for adults who may lack capacity.<sup>136</sup> Finally, the MCA creates "Independent Mental Capacity Advocates" to help particularly vulnerable people who lack the capacity to make important decisions and who have no family or friends that it would be appropriate to consult.<sup>137</sup>

The MCA establishes a single clear test for assessing whether a person lacks capacity.<sup>138</sup> The test has two stages and is decision specific.<sup>139</sup> The first stage asks whether the person has "an impairment of the mind or brain, or . . . some sort of disturbance affecting the way their mind or brain works."<sup>140</sup> If the answer is yes, the second stage of the test asks whether "that impairment or disturbance mean[s] that the person is unable to make the decision in question at the time it needs to be made."<sup>141</sup> Because the test is decision specific, it does not matter whether the impairment is permanent or temporary.<sup>142</sup> However, the guidelines underlying the MCA suggest that, if possible, it would be ideal to postpone the decision until such time as the principal has capacity because allowing the principal to make the decision would be the least restrictive of his or her basic rights and freedoms.<sup>143</sup> The MCA also explicitly states that "[a] lack of capacity cannot be established merely by reference to (a) a person's age or appearance, or

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134. MCA CODE OF PRACTICE, *supra* note 123, at 16.

135. *Id.*

136. *Id.* at 137–38. Unlike the old Court of Protection, which could only deal with decisions about property and financial affairs, the new Court of Protection will also deal with health care and personal welfare matters and is a superior court of record able to establish precedent. *Id.*

137. *Id.* at 178. Involvement of Independent Mental Capacity Advocates (ICMAs) is mandatory in certain situations, such as when making a decision about serious medical treatment or a long-term move when the person has no other friends or family with whom to consult. *Id.* at 179. While not required, ICMAs may also be involved in decisions concerning care reviews or adult protection cases, and ICMAs may be appointed in adult protection cases even when there are family members or others available with whom a vulnerable person could consult. *Id.*

138. MCA SUMMARY, *supra* note 122, at 1.

139. MCA CODE OF PRACTICE, *supra* note 123, at 41.

140. *Id.*

141. *Id.*

142. Mental Capacity Act, 2005, c. 9, § 2 (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

143. See MCA SUMMARY, *supra* note 122, at 1.

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity."<sup>144</sup>

By acting in accordance with the MCA's guidelines, carers and health- and social-care staff can "carry out certain tasks without fear of liability."<sup>145</sup> In general, an act a carer does "in connection with the care or treatment of another person" is protected as long as the carer reasonably believed that the principal lacked capacity to make a decision about the matter and that the action was in the principal's best interest.<sup>146</sup> Acts that generally fall into the protected category of "care" include helping with washing, dressing, personal hygiene, eating, shopping, and the like.<sup>147</sup> The health-care category encompasses actions like testing for illness, offering medication, treating in an emergency, and providing nursing care.<sup>148</sup> One situation in which the act of a carer is not protected is when the carer's action goes against the decision of a "designated decision-maker."<sup>149</sup>

Court-appointed deputies and agents appointed under lasting powers of attorney are both "designated decision-makers" who have the authority to act for or on behalf of people who lack capacity.<sup>150</sup> Court-appointed deputies are appointed only if the court is unable to make an immediate decision to resolve an issue.<sup>151</sup> However, the court may authorize deputies to make decisions regarding welfare, health care, and financial matters.<sup>152</sup> Like court-appointed deputies, agents appointed under lasting powers of attorney may be authorized to make welfare, health care, and financial decisions for or on behalf of incapacitated principals.<sup>153</sup> Unlike deputies, agents appointed under lasting powers of attorney are selected by principals, rather than

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144. Mental Capacity Act, 2005, c. 9, § 2 (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

145. MCA CODE OF PRACTICE, *supra* note 123, at 92.

146. Mental Capacity Act, 2005, c.9, § 5 (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

147. MCA CODE OF PRACTICE, *supra* note 123, at 95.

148. *Id.* at 92.

149. Mental Capacity Act, 2005, c.9, § 6 (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

150. MCA CODE OF PRACTICE, *supra* note 123, at 70.

151. *Id.* at 144.

152. *Id.* at 147-48.

153. *Id.* at 115.

by the court.<sup>154</sup> Also, agents may be granted broader decision-making authority than deputies.<sup>155</sup>

### **B. Provisions of the Mental Capacity Act that Combat Financial Exploitation**

The Mental Capacity Act specifically targets the problem of financial abuse of vulnerable adults in several of its provisions.<sup>156</sup> First, it replaces enduring powers of attorney with lasting powers of attorney.<sup>157</sup> Both enduring and lasting powers of attorney allow competent principals to select agents to manage their affairs in the event they lose capacity to do so in the future, but lasting powers of attorney include mandatory requirements designed to safeguard principals from being financially exploited by their agents.<sup>158</sup> The MCA also creates the Office of the Public Guardian, which monitors the actions of agents acting on behalf of incapacitated principals and maintains a register of lasting powers of attorney.<sup>159</sup> In addition, the MCA creates the Court of Protection, a court of superior record able to set precedents and make determinations relating to the property and affairs of people who lack capacity.<sup>160</sup> Finally, in adult protection cases, the Court of Protection may assign an Independent Mental Capacity Advocate to help vulnerable adults who lack the capacity to make important decisions, even when they have friends and family around that they could consult.<sup>161</sup>

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154. *Id.*

155. For example, a deputy's authority to make decisions does not include the power to refuse consent to life-sustaining treatment, whereas a principal may explicitly authorize an agent to refuse life-sustaining treatment in a lasting power of attorney agreement. *See id.* at 122, 151.

156. The discussion, *infra*, of provisions in the Mental Capacity Act that target financial abuse is by no means exhaustive. *See* DEP'T FOR CONSTITUTIONAL AFFAIRS, THE MENTAL CAPACITY BILL: FULL REGULATORY IMPACT ASSESSMENT 8-10 (2004), available at [http://www.dca.gov.uk/consult/powerattorney/lpa\\_consult\\_full.pdf](http://www.dca.gov.uk/consult/powerattorney/lpa_consult_full.pdf) (listing the provisions in the Mental Capacity Act that help protect vulnerable individuals).

157. Mental Capacity Act, 2005, c. 9, § 66 (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

158. OFFICE OF THE PUBLIC GUARDIAN, LASTING POWERS OF ATTORNEY: A GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LASTING POWER OF ATTORNEY 12, [http://www.publicguardian.gov.uk/docs/LPA102\\_web\\_1007.pdf](http://www.publicguardian.gov.uk/docs/LPA102_web_1007.pdf) (last visited Dec. 11, 2008) [hereinafter GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA].

159. *Id.* at 7.

160. Office of the Public Guardian, Court of Protection, <http://www.publicguardian.gov.uk/about/court-of-protection.htm> (last visited Dec. 11, 2008).

161. MCA CODE OF PRACTICE, *supra* note 123, at 178.

The majority of the safeguards built into the lasting power of attorney are prophylactic measures to deter improper use of power of attorney before it occurs. One such provision is the requirement that a lasting power of attorney be registered with the Office of the Public Guardian before it can be used by an agent.<sup>162</sup> Unlike enduring powers of attorney, which could only be registered with the Public Guardian after the principal started to lose capacity, lasting powers of attorney can be registered either by the principal shortly after they are made or by the agent at any time.<sup>163</sup> Because a lasting power of attorney cannot be used until it is registered, registering early ensures that there will not be any delays when it needs to be used.<sup>164</sup> One benefit of early registration is that it encourages communication and cooperation between the principal and the agent while the principal has decision-making capacity.<sup>165</sup> Establishing a collaborative relationship should enable the agent to better make decisions on behalf of the principal in the event that the principal does become incapacitated.<sup>166</sup>

To create and register a lasting power of attorney, a principal fills out a standard form with several requirements that also serve as protective measures.<sup>167</sup> Principals can name up to five people who will be notified when an application is made to register the lasting power of attorney, or indicate that they do not want anyone to be notified.<sup>168</sup> Naming parties is an important safeguard because it ensures that there are people other than the agent who know the principal and are aware that an agent may be acting on the principal's behalf.<sup>169</sup>

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162. See Mental Capacity Act, 2005, c. 9, sched. 1 (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

163. MCA CODE OF PRACTICE, *supra* note 123, at 116.

164. *Id.* at 119.

165. See *Power of Attorney Rules Revamp*, BBC NEWS, Sept. 19, 2006, [http://news.bbc.co.uk/go/pr/fr/-/1/hi/programmes/working\\_lunch/5361240.stm](http://news.bbc.co.uk/go/pr/fr/-/1/hi/programmes/working_lunch/5361240.stm).

166. See *id.* See generally Kohn, *supra* note 37, at 42–48 (discussing the benefits of communication between principals and agents).

167. Office of the Public Guardian, Property and Affairs LPA, <http://www.publicguardian.gov.uk/arrangements/property-affairs-lpa.htm> (last visited Dec. 11, 2008).

168. See Mental Capacity Act, 2005, c. 9, sched. 1, § 2(c) (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf); GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA, *supra* note 158, at 27.

169. GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA, *supra* note 158, at 12.

Once they have been notified, named parties can object to the registration if they have concerns.<sup>170</sup>

Principals executing lasting powers of attorney must also have certificate providers complete a portion of the lasting power of attorney form.<sup>171</sup> The certificate provider's job is to ensure that lasting powers of attorney are not the result of coercion or duress and that principals understand the purpose of the lasting power of attorney and the scope of authority their agent will have.<sup>172</sup> Principals who designate parties to be notified upon registration only need one certificate provider, but if no one is to be notified about registration then the principal is required to have two separate certificate providers.<sup>173</sup>

Finally, the Mental Capacity Act requires that a witness sign the lasting power of attorney form.<sup>174</sup> The witness must confirm that she witnessed both the principal and the agent signing and dating the lasting power of attorney form.<sup>175</sup> Anyone over the age of eighteen who is not an agent appointed in the lasting power of attorney may witness the principal's signature.<sup>176</sup> Any person over the age of eighteen, including other agents appointed in the lasting power of attorney, may witness the signatures of agents.<sup>177</sup> Requiring the signatures of both principals and agents to be witnessed helps ensure that both parties understand the significance of the lasting power of attorney: for principals, the fact that they are putting an enormous amount of

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170. *Id.* at 27.

171. See Mental Capacity Act, 2005, c. 9, sched. 1, § 2(e) (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

172. GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA, *supra* note 158, at 30. There are additional restrictions on who may serve as a certificate provider. *Id.* at 31. Certificate providers must either have known a principal personally for at least two years or must have relevant professional skills and expertise that enable them to certify the lasting power of attorney. *Id.* Also, there are several groups of people who are not permitted to be certificate providers: for example, family members, business partners, or employees of either the principal or the agent. *Id.* at 32.

173. *Id.* at 29.

174. *Id.* at 42.

175. OFFICE OF THE PUBLIC GUARDIAN, LASTING POWERS OF ATTORNEY: A GUIDE FOR CERTIFICATE PROVIDERS AND WITNESSES 12, [http://www.publicguardian.gov.uk/docs/LPA107\\_web\\_1007.pdf](http://www.publicguardian.gov.uk/docs/LPA107_web_1007.pdf) (last visited Dec. 11, 2008) [hereinafter GUIDE FOR CERTIFICATE PROVIDERS AND WITNESSES].

176. *Id.* at 13.

177. *Id.* at 12. Agents may not witness their own signatures, only the signatures of other agents. *Id.*

power in the hands of another person; for agents, the fact that they are taking on a large responsibility for the welfare of another.<sup>178</sup>

Although the safeguards of the Mental Capacity Act help protect vulnerable principals from financial exploitation, the MCA also has some disadvantages. First, lasting powers of attorney are expensive and complicated to set up.<sup>179</sup> The fee to register a lasting power of attorney, set at £150 (approximately \$300), may be more than many citizens can afford.<sup>180</sup> Also, because the lasting power of attorney can be registered immediately without notice to other persons, there is no guarantee that anyone other than the agent will be aware of when it is put into effect.<sup>181</sup> Furthermore, agents that agree to act pursuant to a lasting power of attorney are legally required to be informed about the provisions in the MCA and its accompanying code of practice.<sup>182</sup> Thus, agents are responsible for a significant amount of information, and “[t]here are real worries that with such responsibility, people simply won’t agree to take on the role of an attorney.”<sup>183</sup> Finally, because lasting powers of attorney have only been available since October 2007, they are still relatively untested and it is unclear to what extent they will actually improve protection of vulnerable principals.

### C. Comparing the United Kingdom’s Mental Capacity Act with the United States’ Uniform Power of Attorney Act

Both the Mental Capacity Act and the Uniform Power of Attorney Act claim to be improvements on prior law relating to powers of attorney.<sup>184</sup> The acts contain some similar provisions. For example,

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178. See GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA, *supra* note 158, at 30.

179. See *Concern over Power of Attorney Change in Law*, WORCESTER NEWS, Feb. 21, 2007, <http://archive.worcesternews.co.uk/2007/2/21/450794.html> (comparing the new lasting power of attorney and the enduring power of attorney previously used in the United Kingdom, which was simpler and less expensive to execute).

180. OFFICE OF THE PUBLIC GUARDIAN, COURT OF PROTECTION AND OFFICE OF THE PUBLIC GUARDIAN: FEES, EXEMPTIONS AND REMISSIONS 6, <http://www.publicguardian.gov.uk/docs/opg506-web-1007-1.pdf> (last visited Dec. 11, 2008). The cost to register an enduring power of attorney, which the lasting power of attorney replaces, is slightly lower at £120. *Id.*

181. *Concern over Power of Attorney Change in Law*, *supra* note 179.

182. *New Legal Powers Are Complicated*, SALISBURY J., Oct. 18, 2007, <http://archive.thisiswiltshire.co.uk/2007/10/18/345206.html>.

183. *Id.*

184. See DEP’T FOR CONSTITUTIONAL AFFAIRS, *supra* note 156, at 8–10; *Why States Should Adopt the UPOAA*, *supra* note 87.

both contain a statutory form for people to use to grant a power of attorney.<sup>185</sup> Both also clarify the duties that agents owe to principals and include basic agency duties like care, good faith, and acting within the scope of authority.<sup>186</sup> However, that is where the similarities end. While the UPOAA focuses on clarifying and modernizing divergent state laws,<sup>187</sup> the MCA “enshrines in statute current best practice and common law principles concerning people who lack mental capacity and those who take decisions on their behalf.”<sup>188</sup>

There are several key differences between the Mental Capacity Act and the Uniform Power of Attorney Act. First, the UPOAA pertains to durable power of attorney only for finances and property, and not for health care decision making.<sup>189</sup> By contrast, the MCA creates two different types of lasting powers of attorney: one for personal welfare and another for property and affairs.<sup>190</sup> A personal-welfare lasting power of attorney allows an agent to make decisions relating to personal welfare on behalf of a principal who lacks capacity, such as consenting to medical treatment or deciding where the principal will live.<sup>191</sup> A property-and-affairs lasting power of attorney allows an agent to make decisions about a principal’s property and affairs, such as buying or selling property, paying bills, accessing bank accounts, and managing income.<sup>192</sup> Unlike with a personal-welfare lasting power of attorney, an agent managing property and affairs may be given permission to act while the principal still has capacity.<sup>193</sup>

A second key difference between the MCA and the UPOAA is the standard by which agents are expected to make decisions on behalf of principals. The UPOAA imposes a standard of “substitute judgment,” which requires the agent to “act in accordance with the principal’s reasonable expectations to the extent actually known by

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185. See *UPOAA Summary*, *supra* note 76; Office of the Public Guardian, *supra* note 10.

186. UNIF. POWER OF ATTORNEY ACT § 114 (amended 2006), 8B U.L.A. 40–41 (Supp. 2008); MCA CODE OF PRACTICE, *supra* note 123, at 129–33.

187. See *Why States Should Adopt the UPOAA*, *supra* note 87.

188. MCA SUMMARY, *supra* note 122, at 1.

189. See UNIF. POWER OF ATTORNEY ACT § 103. Most states have separate laws that provide for appointment of a health care decision maker, but, as with financial powers of attorney, statutes vary from state to state. LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* 42 (4th ed. 2006).

190. GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA, *supra* note 158, at 9–10.

191. *Id.*

192. *Id.* at 9.

193. *Id.* at 10.

the agent and, otherwise, act in the principal's best interest."<sup>194</sup> By contrast, the MCA imposes a "best interests" standard, which requires the agent to consider reasonably ascertainable wishes, feelings, beliefs, and values that might influence the decision of the principal if the principal had capacity, but makes it clear that those factors are not determinative of best interest, and leaves the ultimate decision in the hands of the agent.<sup>195</sup>

The basic requirements to create valid powers of attorney are a third major difference between the acts. Under the UPOAA, a durable power of attorney does not need to be on a specified form; it is valid as long as it is in writing and has been signed by a competent principal.<sup>196</sup> If the principal acknowledges the signature before a notary, it is presumed to be genuine.<sup>197</sup> This is beneficial because third parties who refuse to accept an acknowledged power of attorney are subject to a court order requiring them to accept it and are liable for reasonable costs and attorneys' fees associated with the court action.<sup>198</sup>

The requirements under the MCA to create a valid lasting power of attorney are much more onerous. Principals are required to use a special form provided by the Office of the Public Guardian,<sup>199</sup> and the lasting power of attorney is not valid until it has been registered.<sup>200</sup> Before registering the document, principals must sign a statement verifying that they understand the information it contains and want it to apply when they no longer have capacity.<sup>201</sup> Agents must also sign a statement verifying that they have read the document and understand their duties,<sup>202</sup> and the signatures of both principals and agents must be witnessed.<sup>203</sup> Principals must also name people in the document who should be informed if an application is made to register the last-

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194. UNIF. POWER OF ATTORNEY ACT § 114(a)(1).

195. Mental Capacity Act, 2005, ch. 9 (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

196. See UNIF. POWER OF ATTORNEY ACT §§ 105, 106, 301 cmt.

197. See *id.* § 105.

198. See *id.* § 120.

199. GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA, *supra* note 158, at 14. The form can be downloaded free of charge from the Office of the Public Guardian's Web site. *Id.*

200. *Id.*

201. MCA CODE OF PRACTICE, *supra* note 123, at 117.

202. *Id.*

203. GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA, *supra* note 158, at 12.

ing power of attorney.<sup>204</sup> Finally, an independent third party must complete a certificate confirming that, “in their opinion, the [principal] understands the [lasting power of attorney’s] purpose; nobody used fraud or undue pressure to trick or force the [principal] into making the [lasting power of attorney]; and there is nothing to stop the [lasting power of attorney] from being created.”<sup>205</sup>

A final major difference is that the primary purpose of the Mental Capacity Act is to protect people who lack capacity,<sup>206</sup> whereas the primary purpose of the Uniform Power of Attorney Act is to standardize durable power of attorney statutes across the United States.<sup>207</sup> The portions of the UPOAA that help protect incapacitated principals are merely a side benefit of uniformity—if all states adhere to uniform minimum standards that are higher than current minimums in some states, the overall level of protection will theoretically be higher. Because of its specific focus on protection of incapacitated principals, and not just powers of attorney, the MCA creates additional protections for people who lack capacity.

One protection created by the Mental Capacity Act with no counterpart in the Uniform Power of Attorney Act is establishment of a superior court of record, the Court of Protection, that exclusively deals with issues relating to “the property and affairs and healthcare and personal welfare of adults . . . who lack capacity.”<sup>208</sup> The Court of Protection has the power to determine whether a lasting power of attorney is valid, to remove agents who fail to carry out their duties, to send out “Court of Protection Visitors” to check on the well-being of people who may lack capacity, and more.<sup>209</sup>

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204. MCA CODE OF PRACTICE, *supra* note 123, at 117. Principals may choose to indicate that there is no one to inform, but will be subject to additional requirements relating to certificate providers if they do. GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA, *supra* note 158, at 29.

205. MCA CODE OF PRACTICE, *supra* note 123, at 117. In the event that the principal does not choose to name any people to be notified upon registration of a lasting power of attorney, two certificate providers are required. GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA, *supra* note 158, at 29.

206. MINISTRY OF JUSTICE, MENTAL CAPACITY ACT EQUALITY IMPACT ASSESSMENT 3, 8 (2007), available at <http://www.justice.gov.uk/docs/mc-equality-impact.pdf>.

207. See UPOAA Summary, *supra* note 80.

208. Office of the Public Guardian, *supra* note 160.

209. MCA CODE OF PRACTICE, *supra* note 123, at 137, 248; Office of the Public Guardian, Court of Protection Visitors, <http://www.publicguardian.gov.uk/about/visitors.htm> (last visited Dec. 11, 2008). Other examples of powers of the Court of Protection include the power to decide whether a person has decision-making capacity in a particular situation and the power to appoint deputies to

Another protective provision of the MCA that is absent from the UPOAA is the section outlining the basic guidelines on which the MCA is grounded.<sup>210</sup> The guidelines make it clear that the autonomy of principals should be preserved to the greatest extent possible. One area where this goal is clearly reflected is in the definition of incapacity, which is much narrower under the MCA than under the UPOAA. The UPOAA defines incapacity as:

inability of an individual to manage property or business affairs because the individual: (A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (B) is: (i) missing; (ii) detained, including in a penal system; or (iii) outside the United States and unable to return.<sup>211</sup>

The narrower definition of the MCA indicates that: “a person lacks capacity in relation to a matter if *at the material time* he is unable to make a decision for himself *in relation to the matter* because of an impairment of, or a disturbance in the functioning of, the mind or brain.”<sup>212</sup> By making it clear that evaluation of a person’s capacity is decision specific, the Mental Capacity Act definition better protects the autonomy of principals. It ensures that even when principals with declining mental faculties lack the capacity to make certain decisions, they will not be prevented from making other decisions for which they do still have capacity.

Adopting some of the Mental Capacity Act’s protective measures would help curb the epidemic of financial exploitation of vulnerable adults in the United States. The additional requirements for executing lasting powers of attorney would especially help enhance protection of elder adults who lack the capacity to supervise agents they appointed under durable powers of attorney. However, the requirements for creating lasting powers of attorney present several disadvantages that make it complicated and costly.<sup>213</sup> It is important to ensure that any new measures adopted in the United States do not significantly detract from the usefulness of durable powers of attorney

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make decisions for people who lack capacity. See MCA CODE OF PRACTICE, *supra* note 123, at 137.

210. See *supra* notes 121–29 and accompanying text.

211. UNIF. POWER OF ATTORNEY ACT § 102 (amended 2006), 8B U.L.A. 29–31 (Supp. 2008).

212. Mental Capacity Act, 2005, c. 9, § 2 (Eng.) (emphasis added), available at [http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga\\_20050009\\_en.pdf](http://www.opsi.gov.uk/ACTS/acts2005/pdf/ukpga_20050009_en.pdf).

213. See *supra* notes 175–79 and accompanying text.

as a simple and flexible tool that the elderly and their families can use to plan for the future.<sup>214</sup>

## V. Recommendation

To improve protection of vulnerable adults that execute durable powers of attorney, especially those who are incapacitated, states should adopt the UPOAA and implement three additional safeguards. Specifically, states should require registration to make durable powers of attorney effective, insist that third parties witness the signatures of both principals and agents to durable power of attorney agreements, and allow principals to name parties that should be notified about durable powers of attorney when an application for registration is received. States should also charge a small fee for registration of durable powers of attorney to cover the costs of registration and notification.

### A. The UPOAA

Adoption of the UPOAA will ensure that states have uniform standards and protections relating to durable powers of attorney.<sup>215</sup> Because some states have enacted protective measures while others have not, it will also improve protection of vulnerable adults in those areas that are behind the curve.<sup>216</sup> Of particular benefit in the UPOAA is the clear indication of the duties agents owe to principals and designation of a broad class of people with standing to petition courts for review of agents' actions.<sup>217</sup> An additional benefit of nationwide adoption of the UPOAA is that all states could use the same statutory short form,<sup>218</sup> hopefully resulting in easier transferability of durable powers of attorney.<sup>219</sup>

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214. See HILLIARD, *supra* note 1, at 9.

215. See *Why States Should Adopt the UPOAA*, *supra* note 87 (indicating that “[t]he Uniform Power of Attorney Act (2006) (UPOAA), if widely enacted, will clarify and modernize this now largely divergent law”).

216. See *supra* Part II.C (discussing benefits of the UPOAA).

217. UNIF. POWER OF ATTORNEY ACT §§ 114, 116 (amended 2006), 8B U.L.A. 29–31 (Supp. 2008).

218. *Why States Should Adopt the UPOAA*, *supra* note 87.

219. See UNIF. POWER OF ATTORNEY ACT § 106 cmt.

## B. Registration

Requiring registration before durable powers of attorney become effective will be advantageous in several ways. First, it enables the entity that accepts registrations to make certain that people comply with all the requirements for creating a durable power of attorney.<sup>220</sup> Second, it ensures that a copy of each durable power of attorney is on file in a central location. This sets up the possibility of offering additional services and protective measures in the future. For example, the powers of attorney could become part of a database accessible to financial institutions or an agency could be set up to randomly audit the performance of agents to ensure they are acting in accordance with their duties. Third, registration sets up a clear time at which parties named by principals would be informed about the existence of durable powers of attorney.<sup>221</sup>

Both principals and agents should have the power to register a durable power of attorney.<sup>222</sup> Allowing principals to register durable powers of attorney while they still have decision-making capacity, if they so desire, gives them control over their own destinies. It may help them feel more secure about who will care for them in the future. At the same time, it is important for agents to be able to register durable powers of attorney in case principals fail to do so before becoming incapacitated.<sup>223</sup> The purpose of a durable power of attorney is to enable principals to appoint agents to manage their financial affairs in the event they become incapacitated.<sup>224</sup> If agents cannot register durable powers of attorney on behalf of incapacitated principals, the wishes of the principal at a time when the principal had decision-making capacity will be disregarded.

## C. Witnesses

Requiring the signatures of both the principal and agent to be witnessed will make it more likely that both parties understand the

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220. See MCA CODE OF PRACTICE, *supra* note 123, at 249 (indicating that one role of the Office of the Public Guardian is to ensure that documentation is proper before registering a lasting power of attorney).

221. See GUIDE FOR PEOPLE WHO WANT TO MAKE A PROPERTY AND AFFAIRS LPA, *supra* note 158, at 17 (explaining that an application to register a lasting power of attorney triggers notification of named parties).

222. See MCA CODE OF PRACTICE, *supra* note 123, at 119.

223. See *id.*

224. HILLIARD, *supra* note 1, at 2.

significance of the agreement. This is a fairly significant change from the laws of many states at present. Though some states require that signatures be witnessed, and a few require notarization as well, the Uniform Power of Attorney Act and the laws of a number of states merely require that a durable power of attorney be in writing and signed by the principal.<sup>225</sup> Requiring that agents also sign the durable power of attorney is a clear indicator that they are willing to take on the responsibilities of an agent. Having the signature witnessed emphasizes the magnitude of the principal's choice to grant decision-making power to another person and the agent's acceptance of responsibility to make such decisions.

Like the requirement for witnesses to a lasting power of attorney under the MCA,<sup>226</sup> the witness to a principal's signature should be a person over the age of eighteen that is not an agent appointed in the durable power of attorney. Requiring that witnesses not be appointed agents increases the probability that witness will look out for principals that may be taken advantage of by unscrupulous agents, like Louis from the introduction who was duped by Robert and Catherine.<sup>227</sup> Hopefully, the witness requirement will also deter agents from attempting to get incapacitated people to sign durable powers of attorney. Although such powers of attorney are invalid because principals must have capacity to execute valid durable powers of attorney,<sup>228</sup> it is difficult to ensure that capacity requirements are met when no supervision of any kind is required. Requiring a witness for the agent's signature is primarily meant to drive home the weight of responsibility he or she is taking on. As such, any person over the age of eighteen, including other agents appointed in the power of attorney, may witness the signatures of agents.<sup>229</sup>

#### D. Notification

The third protective provision recommended for adoption is notification. Principals should have the option to name up to five persons to be contacted at the time their durable power of attorney is reg-

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225. See MedLawPlus.com, *supra* note 45.

226. GUIDE FOR CERTIFICATE PROVIDERS AND WITNESSES, *supra* note 175, at 13.

227. See Press Release, Pa. Office of Attorney Gen., *supra* note 16; *supra* Part I.

228. See Dessin, *supra* note 38, at 581.

229. GUIDE FOR CERTIFICATE PROVIDERS AND WITNESSES, *supra* note 175, at 12. Agents may not witness their own signatures, only the signatures of other agents. *Id.*

istered. The five named parties would also have standing to petition courts for review of any actions of the agent that they believe are contrary to the agents' fiduciary duties.<sup>230</sup> Regardless of whether powers of attorney are registered by principals while they still have capacity or by agents after principals become incapacitated, notifying parties that care about principals' best interests is beneficial.

Parties who are notified while principals still have decision-making capacity would be able to discuss principals' intentions with them and express any concerns they have about designated agents or the scope of the powers granted. As long as principals have decision-making capacity, they are able to modify or revoke a power of attorney. If the named parties are notified when agents register powers of attorney (presumably after principals lose capacity), the notification serves as a warning that principals are no longer capable of managing their own affairs. This should encourage any named party concerned for the welfare of a principal to stay apprised of decisions the agent is making on the principal's behalf.

#### E. Fees

A registration fee would need to be charged to make registration and notification of durable powers of attorney economically feasible. Entities that accept registrations and send notifications would be responsible for a significant amount of information and would require staff and other resources to operate. However, it is important to ensure that durable powers of attorney are available to the majority of the population and that the fee is not excessively high. A high registration cost would preclude economically disadvantaged Americans from using this valuable tool to plan for the future.

Under a basic service plan that involves only registration and notification, costs could easily be kept at a relatively low level, similar to the cost to record a mortgage.<sup>231</sup> The additional cost of notification

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230. The UPOAA broadens the group of people who have standing to challenge the decision of an agent such that, under the UPOAA, named parties would likely be found to have standing. See UNIF. POWER OF ATTORNEY ACT § 116 (amended 2006), 8B U.L.A. 43 (Supp. 2008). However, this recommendation would explicitly give named parties automatic standing they need for judicial determinations.

231. The cost to record a mortgage varies somewhat from state to state. For example, in Wisconsin, the first page costs \$11 and each additional page costs \$2. Wisconsin Register of Deeds Ass'n, Fee Schedule for Recording a Document, <http://www.wrdaonline.org/RecordingDocuments/rodfees.html> (last visited

would be minimal: just the cost of a piece of paper, an envelope, and postage. To ensure that the price of durable powers of attorney do not become too expensive for economically disadvantaged residents in states that choose to implement additional services, a two-tier system would be ideal. Such a system would remain low cost for basic registration and notification, but would enable principals, agents, or named parties to pay an additional fee to opt in to additional services.

## VI. Conclusion

Under traditional agency theory, “agents should represent only competent people. Agency is a consensual relation; it is premised on the principal’s ability to understand and either approve or disapprove of the agent’s acts.”<sup>232</sup> Durable powers of attorney depart from the traditional rationale for agency by allowing for continuation of an agency relationship even after a principal loses capacity.<sup>233</sup> Because the rationale for traditional agency relations is premised on the principal’s ability to oversee and control the agent, it is logical that when principals lack capacity and therefore are unable to oversee agents, there should be an alternate supervisory scheme that helps ensure that agents are acting to benefit principals. The laws today fall short of where they need to be to adequately protect incapacitated principals from financial exploitation. Additional oversight is needed, but any method adopted must be balanced so as not to destroy the usefulness of durable powers of attorney by making them overly difficult to create.

The recent creation of the lasting power of attorney in the United Kingdom suggests three changes that, in combination with adoption of the Uniform Power of Attorney Act, would better protect principals without complicating durable powers of attorney to the point that they lose their usefulness. The first change is registration, which would enable states to make sure that durable powers of attorney

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Dec. 11, 2008). The costs in San Francisco, California, are similar: the cost to record a deed is \$9 for the first page and \$3 for each additional page. Office of the Assessor-Recorder, Recorder Information, [http://www.sfgov.org/site/assessor\\_index.asp?id=93](http://www.sfgov.org/site/assessor_index.asp?id=93) (last visited Dec. 11, 2008). One of the more expensive locations, Sussex County, New Jersey, charges \$30 to record the first page, and each additional page costs \$10. Sussex County Clerk’s Office, Recording Fees, <http://www.sussexcountyclerk.com/feeinfo.html> (last visited Dec. 11, 2008).

232. Alexander M. Meiklejohn, *Incompetent Principals, Competent Third Parties, and the Law of Agency*, 61 *IND. L.J.* 115, 115–16 (1986).

233. Dessin, *supra* note 38, at 587–88; Lapping, *supra* note 30, at 144 n.3.

comply with regulations before they are used and to maintain them in a central location. The second change, requiring the signatures of principals and agents to be witnessed, would help ensure that principals are not being coerced by agents and that agents understand the seriousness of the obligation they are taking on. Finally, the third change, notification, would make it more likely that third parties would pay attention to what agents are doing and act to protect principals' interests. By selectively adopting these provisions of the Medical Capacity Act, the United States can maintain the simplicity and flexibility of durable powers of attorney while improving protection of vulnerable adults.