EMPOWERING THE WICKED: HOW SOME AGENTS USE A POWER OF ATTORNEY TO COMMIT THE CRIME OF FINANCIAL EXPLOITATION

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Kevin Hansen became our friend through his passion and interest in the rights of older people. Not only was he smart, insightful, and dependable, but also, he was comedic and kind. He was one of those rare people with whom we loved to work early and as often as possible. We are saddened at the sudden passing of our good colleague. Surely, a flame for great good in the world was extinguished far too soon. We will miss you, Kevin. This Article goes out authored by and dedicated to you.

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In this Article, the authors examine criminal appellate cases where it was clear that a power of attorney was used to commit the crime of financial exploitation. They use these cases to support examples of the misuse of powers of attorney and offer their insights into the common factors of these cases. The authors also provide their views about the scope of the problem, the way the legal system has addressed these crimes, and offer some opinions about options going forward.

I. Introduction[1]

Financial exploitation of older adults is a serious problem.[2] It can have devastating financial and psychological effects on the victim. One factor of the seriousness of the problem is how the amount of loss correlates to the victim's age,[3] especially when compared with younger victims.[4] Not only are losses greater for victims who are older,[5] but

1. We dedicate this Article to the memory of our good friend, Lori Stiegel, who died in 2020 after a fight with cancer. Lori was a tireless advocate for elder justice and nationally known for her work in fighting elder abuse. She taught us much, gave tirelessly, and will always be remembered.

2. CONSUMER FIN. PROT. BUREAU, SUSPICIOUS ACTIVITY REPORTS ON ELDER FINANCIAL EXPLOITATION: ISSUES AND TRENDS, 15 (2019) [hereinafter SAR], https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf; *see also* Stephen Deane, U.S. SEC. & EXCH. COMM'N, *Elder Financial Exploitation:* WHY IS IT A CONCERN, WHAT REGULATORS ARE DOING ABOUT IT, AND LOOKING AHEAD 1 (2018) [hereinafter SEC], https://www.sec.gov/files/elder-financial-exploitation.pdf (discussing the seriousness of this problem).

> The data lead to two conclusions. First, the numbers are as compelling as they are alarming. They have led some prominent experts to call elder financial exploitation "a burgeoning public health crisis" and "a virtual epidemic." Second, for all the data points found in various studies, perhaps the larger point is how much we do not know. There is a glaring lack of adequate research into numerous key questions involving elder financial exploitation, from solid national statistics on costs, to the causes of abuse, to empirical evidence of the most effective treatments.

SEC at 8 (citations omitted).

3. SAR, *supra* note 2, at 16–17 (noting that those age 70–79 lost an average of $45,300 and those age 80 and older lost an average of $39,200).

4. *Id.* at 17 (showing that the losses sustained by these two oldest age groups is almost $20,000 higher than that for those between ages 50–59 and 60–69).

5. The current thinking is to refer to the victim as the vulnerable adult, recognizing that victims can be adults with disabilities as well as elders who meet the vulnerability definition of the statute. We use vulnerable adult throughout the article, but we use victim when we think it is necessary for clarity. *See, e.g.*, FLA. STAT. ANN. § 415.102(28) (2021) ('Vulnerable adult' means a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging."); *see also* 43 S.C. CODE ANN. § 43-35-11 (2012) (using "vulnerable adult" and contains essentially the same elements).

perhaps even more significantly, and definitely more traumatically, the risk of financial exploitation is higher when the victim either knows the perpetrator or the perpetrator is a fiduciary.[6]

It has become an article of faith that the Power of Attorney ("POA")[7] is the vehicle by which a perpetrator may steal the assets of the victim.[8] This mechanism was referenced in our initial article addressing the issue over the last three decades.[9] Financial exploitation is a crime, even when the perpetrator is a fiduciary. It is perhaps even

6. SAR, *supra* note 2, at 18. The SAR notes that the chance of financial exploitation is more likely when the victim knows the perpetrator, and in the case of fiduciaries like agents under powers of attorney, the amount lost was more in cases where the perpetrator was a fiduciary. The SAR reported nearly seven percent of the perpetrators were fiduciaries. *Id.*

7. We use the phrase power of attorney here, recognizing that for many cases of planning for incapacity, a durable power of attorney will be the document used. We see power of attorney as broader, encompassing durable powers of attorney. For convenience we use the acronym POA rather than the full phrase. But see, UNIF. DURABLE POWER OF ATT'Y ACT § 102, 104, prefatory note, (U.L.A. 2006).

> The sponsoring committee considered and rejected the suggestion that the word "durable" be omitted from the title. While it is true that the act describes "durable" and "non-durable" powers of attorney, this is merely the result of use of language to accomplish a purpose of making both categories of power more reliable for use than formerly. In the case of non-durable powers, the act extends validity by the provisions in Section [4] [5-504] protecting agents in fact and third persons who rely in good faith on a power of attorney when, unknown to them, the principal is incompetent or deceased. The general purpose of the act is to alter common law rules that created traps for the unwary by voiding powers on the principal's incompetency or death. The act does not purport to deal with other aspects of powers of attorney, and a label that would result from dropping "durable" would be misleading to the extent that it suggested otherwise.

The Uniform Power of Attorney Act defines power of attorney as "a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used" and in § 102(1), agent as "a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated." Note that the Uniform Act presumes durability of POAs unless the POA provides to the contrary. UNIF. POWER OF ATT'Y ACT § 104.

8. *See, e.g.*, Rebecca C. Morgan & Randolph Thomas, *Financial Exploitation by Agents Under Powers of Attorney: It is a Crime!,* 34 CRIM. JUST. 33–34 (2020) (containing specific examples of the POA being used to commit a crime and the comments of career prosecutors reflecting on the need to hold offenders accountable); See also, *e.g.*, Kim Vu-Dinh, *Reforming Power of Attorney Law to Protect Alaskan Elders from Financial Exploitation,* 27 ALASKA L. REV. 2 (2010).

9. Rebecca C. Morgan, Pamela B. Teaster, & Randolph Thomas, *A View from the Bridge: A Brief Look at the Progression of Cases of Elder Financial Exploitation Prosecutions*, 25 ELDER L.J. 271, 311–12 (2018) [hereinafter Morgan, Teaster, & Thomas].

more egregious when the perpetrator *is* a fiduciary, however, given the inherent relationship of trust between the victim and the perpetrator.[10] We previously examined reported criminal appellate opinions to determine whether we could detect a rise in prosecutions of financial exploitation.[11] Now, in this Article, we have again chosen to examine reported criminal appellate opinions, but this time we refined our search to those opinions where a POA was used to commit financial exploitation.[12]

In order to provide the necessary context for a discussion on the importance of powers of attorney and their relationship to financial exploitation of the elderly, we ran a search for the phrases "powers of attorney" and "financial exploitation" in a commercial database limited to reported criminal appellate opinions.[13] Although this is not a rigorous study of the issue, it provides a foundation for further discussion[14] and supports the view held by many who work in the field that the POA is a potent vehicle for exploitation.[15] We each approach this subject from different points of view.[16] Our observations, although from various disciplines, share commonalities regarding the factors in financial exploitation of older adults and the issues demonstrated by these cases.

10. Consider the definition of fiduciary: "[s]omeone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure. . . [s]omeone who must exercise a high standard of care in managing another's money or property." *Fiduciary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

11. Morgan, Teaster, & Thomas, *supra* note 9.

12. *See id.* at 310.

13. *See id.* The results would exclude any cases where there was a conviction but no appeal, or a plea that was entered.

14. *See id.* (exploring almost thirty years of criminal appellate opinions in an attempt to determine whether there was an increase in the number of prosecutions of financial exploitation cases).

15. *See id.* We recognize that our results are neither scientific nor exhaustive. We simply ran a search in a commercial database limited to criminal appellate opinions for cases that concerned financial exploitation where the perpetrator utilized a power of attorney. We then eliminated cases where it was clear that the POA was not used in the commission of financial exploitation by the perpetrator or where the opinion had insufficient facts for us to make such a determination. We recognize that there are likely more opinions that exist than those we found, given plea deals, settlements, convictions that were not appealed, and more.

16. *See id.* Retired law enforcement officer, professor of gerontology, former victim advocate and attorney who was a professor of gerontology and health care, and law professor.

II. Why Focus on Powers of Attorney?

The Power of the POA

From an elder law perspective, a POA is an important document used in planning for a client's potential incapacity.[17] The idea of durability has,[18] over time, made the instrument even more valuable for planning purposes.

A Brief History of the POA

The utility and functionality of a power of attorney are well established,[19] having been derived from the common law of agency.[20] The

17. *See, e.g.*, Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 2–3 (2006). ("Durable powers of attorney ("DPOAs") are attractive planning tools for elders who wish to protect their independence, but anticipate the possibility of future decline in their mental or physical capacities. The DPOA allows elders to select a particular person, commonly a spouse or an adult child, to act on their behalf. This not only provides elders with the possibility of obtaining valuable assistance, but also, decreases the likelihood that they will subsequently require a court-appointed guardian or find themselves without assistance in a time of need.").

18. *See, e.g.*, FLA. STAT. ANN. § 709.2104 (West 2011). If the POA is durable, that means it has language indicating the principal's intent for it to survive the principal's subsequent incapacity. *But see* UNIF. POWER OF ATT'Y ACT § 104 (2006). The UPOAA, however, takes the opposite approach. Under the UPOAA, a power of attorney is assumed to be durable absent language to the contrary. UPOAA § 104 provides that "[a] power of attorney . . . is durable unless it expressly provides that it is terminated by the incapacity of the principal." The comment to § 104 explains the reasoning for this change: "This default rule is the reverse of the approach under the Uniform Durable Power of Attorney Act and based on the assumption that most principals prefer durability as a hedge against the need for guardianship." *See also e.g.*, GA. CODE ANN. §§ 10-6B-2,4 (2018) MASS. GEN. LAWS ch. 190B, § 5-501 (2009), MINN. STAT. § 523.07 (2021); UTAH CODE ANN. §§ 75-9-102, 104 (West 2016).

19. *See, e.g.*, Earbee v. Craig, 1 Ala. 607 (Ala. 1840) (noting the existence and construction of power of attorney); *In re* Keys' Estate, 137 Pa. 565 (Pa. 1890) (noting the scope of power of attorney); Keyes et al. v. Metropolitan Trust Co. of City of New York, 115 N.E. 455 (N.Y. App. 1917) (discussing, among other things, validity, scope and purpose of power of attorney); Catherine Seal, *Power of Attorney: Convenient Contract or Dangerous Document*?, 11 MARQ. ELDER'S ADVISOR 307, 308 (2010) (citing to an example of agency from 452 B.C.)

20. *See, e.g.,* Restatement (Third) Of Agency § 1.01, Comment (c)–(d) (AM. L. INST. 2006) (discussing among other matters, common law agency and its elements); *see also* Andrew H. Hook & Lisa V. Johnson, *The Virginia Uniform Power of Attorney Act*, 44 U. RICH. L. REV. 107, 107 (2009) ("The laws related to Durable Powers of Attorney ("DPAs") have largely evolved from the common law of agency and are steadily moving toward a statutory framework."); Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 4–5 (2001)

ability of someone with authority (the "principal") to give that authority to another (the "agent") has become an integral part of commerce, whether used in business or personal relationships. Some years ago, the Uniform Law Commissioners acted on a "special" power of attorney,[21] as a cheaper alternative for those with smaller estates who wanted to plan for incapacity.[22] This Model Act contained a number of restrictions[23] that made its utility limited[24] when viewed in light of the uses of Durable Powers of Attorney today.

Subsequently, the Uniform Law Commissioners chose a different approach to codify the concept of a power of attorney document to be used for planning for incapacity by incorporating it into the Uniform Probate Code Chapter 5-501 et seq.[25] The movement by the Uniform Law Commissioners was in recognition for the need for an agency relationship that would be an effective tool for a principal in planning for the possibility of future incapacity.[26] As the prefatory comments to the Uniform Probate Code explain:

(discussing, among other things, shortcomings of common law powers of attorney in planning for incapacity).

21. *See, e.g.*, Seal, *supra* note 19, at 309–10 (2010).

> ("The National Conference of Commissioners on Uniform State Laws . . . promulgated the Model Special Power of Attorney for Small Property Interests Act . . . in 1964, stating that the purpose of the act was to: provide a simple and inexpensive legal procedure for the assistance of persons with relatively small property interests, whose incomes were small, such as pensions or social security payments, and who, in anticipation or because of physical handicap or infirmity resulting from injury, old age, senility, blindness, disease or other related or similar causes, wish to make provision for the care of their personal or property rights or interests, or both when unable adequately to take care of their own affairs.
>
> The Act was designed to be a less expensive alternative to guardianship or conservatorship, allowing a principal to make a delegation of authority to an agent, where the delegation would not be revoked by the later incapacity of the principal. It is apparent from the restrictive provisions in the Model Act that the commissioners had concerns about creating a durable power of attorney.")

(citations omitted).

22. *Id.* at 310.

23. *See, e.g.*, Boxx, *supra* note 20, at 7–8 (among other provisions, to be "durable" the power of attorney had to be signed in front of a judge, was limited in the amount of money, filed with the clerk, and provide "annual income and the nature and extent of any property" subject to the power of attorney).

24. *See also id.* at 10 (discussing that few states adopted the Model Act).

25. The 2019 Uniform Probate Code contains the Durable Power of Attorney Act in Article 5B. UNIF. PROB. CODE art. 5B (UNIF. L. COMM'N 2019).

26. *See* UNIF. L. COMM'N, ADOPTION OF UNIFORM DURABLE POWER OF ATTORNEY ACT (1979) [hereinafter DPOA Prefatory Note], https://www.uniform

The National Conference included Sections 5-501 and 5-502 in the Uniform Probate Code (1969) (1975) ("UPC") concerning powers of attorney to assist persons interested in establishing non-court regimes for the management of their affairs in the event of later incompetency or disability. In their prefatory note, the National Conference explained that the purpose of including the durable power of attorney sections was to "recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts for persons who are unwilling or unable to transfer assets as required to establish a trust."[27]

The provisions included in the original UPC modify two principles that have controlled written powers of attorney.[28] Section 5-501 (UPC (1969) (1975)), creating what has come to be known as a "durable power of attorney," permits a principal to create an agency in another that continues in spite of the principal's later loss of capacity to contract.[29] The only requirement is that an instrument creating a durable power contain language showing that the principal intends the agency to remain effective in spite of his later incompetency.[30]

Section 5-502 (UPC (1969) (1975)) alters the common law rule that a principal's death ends the authority of his agents and voids all acts occurring thereafter including any done in complete ignorance of the death.[31] The new view, applicable to both durable and non-durable instruments, validates a post-mortem exercise of authority by agents who act in good faith and without actual knowledge of the principal's death.[32] The idea here was to encourage the use of powers of attorney by removing a potential trap for both agents in fact and third persons who decide to rely on a power at a time when they cannot be certain that the principal is then alive.[33]

To the knowledge of the Joint Editorial Board for the Uniform Probate Code, the only statutes resembling the power of attorney

laws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d6df01e7-d294-bcd2-6e4e-6dc3e64dd634&forceDialog=1. *See also* Hook & Johnson, *supra* note 20, at 109. ("Under the common law, a power of attorney became ineffective upon the principal's incapacity. It was not a useful tool to manage the affairs of an incapacitated principal because the principal's loss of capacity terminated the agent's actual authority. In 1954, states began to change this common law rule by statute. Virginia became the first state to provide for the continuation of the agency relationship if the instrument expressly stated that it survived the principal's incapacity. With the promulgation of the Uniform Probate Code in 1969 and the Uniform Durable Power of Attorney Act ("UDPAA") in 1979, the adoption of DPA statutes became widespread.") (citations omitted).

27. *See* DPOA Prefatory Note, *supra* note 26; *see also* UNIF. PROB. CODE §§ 5–501 to 5–505, 8A U.L.A. 275 (1990).

28. DPOA Prefatory Note, *supra* note 26.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

> sections of the UPC (1969) (1975) that had been enacted prior to the approval and promulgation of the Code were Sections 11-9.1 and 11-9.2 of Code of Virginia [1950].[34] Since then, a variety of UPC inspired statutes adjusting agency rules have been enacted in more than thirty states.[35]

The use of the power of attorney, specifically the durable power of attorney, has become widely adopted as an inexpensive way to plan for potential incapacity. It serves as a less restrictive alternative to, and may eliminate the need for, a court-appointed guardianship.[36]

The Risks of Using a POA

Not only is a POA an important and convenient document, but it is also a powerful one.[37] As one court said:

> A durable gifting power is a particularly dangerous power in that it survives the principal's personal ability to monitor its exercise.

34. *Id.*

35. *Id.* The DPOA Prefatory Note continues with this bit of history: "This [Act] [Section] originated in 1977 with a suggestion from within the National Conference that a new free-standing uniform act, designed to make powers of attorney more useful, would be welcome in many states."

36. Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 8–9 (2007). ("The durable power of attorney, widely used in every jurisdiction, is a statutorily sanctioned vehicle for creating an agency relationship that survives the principal's incapacity. The Uniform Probate Code first included durable power provisions in 1969 to offer an inexpensive method of surrogate decision-making. Although originally promoted as beneficial for those whose modest assets did not justify pre-incapacity planning with a trust or post-incapacity property management with a guardianship, the durable power of attorney is now used by both the wealthy and non-wealthy for incapacity planning as well as convenience.") (citations omitted).

37. UNIF. POWER OF ATT'Y ACT § 201 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2006). Since the agent's power is derivative, the agent can exercise that power the principal could exercise, if granted in the POA. Examples of the powers that can be delegated under the UPOAA include making, revising or ending an inter vivos trust, gifting, creating or revising survivorship rights or beneficiary designations, delegating authority, exercising the principal's waiver of beneficiary standing, managing content of electronic communications, and exercising disclaimers. *Id.* This first batch of powers granted under UPOAA § 201 are what is referred to as "hot powers." A specific grant of authority from the principal to the agent is required in order for the principal to delegate them to the agent. In addition the agent may be authorized to deal with real property (UPOAA § 204), tangible personal property (UPOAA § 205), stocks and bonds (UPOAA § 206), commodities (UPOAA § 207) financial institutions (UPOAA § 208), business (UPOAA § 209), insurance and annuities (UPOAA § 210), trusts, estates and other beneficial interests (UPOAA § 211), litigations and claims (UPOAA § 212), personal and family care (UPOAA § 213), government and other benefits (UPOAA § 214), retirement plans (UPOAA § 215), taxes (UPOAA § 216) and gifts, within statutory limitations and requirements (UPOAA § 217) *Id.* §§ 204–17.

> According to one commentator, the current widespread financial exploitation of the elderly is directly attributable to durable gifting powers and their inherent potential for fraud and abuse. This commentator has called the abuse of powers of attorney an "invisible epidemic" because the victims, who are usually elderly and infirm, may be unaware of what is happening or too embarrassed or frightened to assert their rights.[38]

The POA can give the agent significant powers[39] and, in many instances, circumstances dictate that the agent be provided with broad authority.[40] This is especially true when the POA is intended to authorize the agent to act when the principal has lost capacity to do so. That, in itself, becomes a double-edged sword—the agent needs to have broad authority to act for a principal who is now incapacitated,[41] and because the principal is incapacitated, the principal is unable to oversee the actions of the agent to make sure the agent is not abusing those powers.

In some jurisdictions, to address the lack of oversight from an incapacitated principal, laws grant principals the ability to appoint multiple attorneys-in-fact (i.e., co-agents) under a validly executed POA so that more than one person may exercise the authority granted in the POA.[42] In so doing, the co-agents in such jurisdictions often have oversight authority over the other co-agents when given the power to act independently from one another, or the principal can require all to act in tandem and agree on any decision to be made, which presents unique challenges with such an approach. [43]

In our view, the most important safeguard in protecting against abuses is the choice of person to serve as agent.[44] We are not alone in

38. Praefke v. Am. Enter. Life Ins., et al., 655 N.W.2d 456, 461 (Wis. Ct. App. 2002) (citations omitted).

39. *See, e.g.*, Seal, *supra* note 19, at 330–31.

40. *See, e.g.*, Lori A. Stiegel & Ellen Van Cleve Klem, AARP, POWER OF ATTORNEY ABUSE: WHAT STATES CAN DO ABOUT IT 5 (2018), https://assets.aarp.org/rgcenter/consume/2008_17_poa.pdf (noting that "broad decision-making authority is one of three features that can facilitate an agent's commission of financial exploitation through the power's exercise").

41. Although the powers can be limited, for planning purposes, there is always a risk in doing so. If the principal is incapacitated, the agent needs the authority to do what needs to be done, the breadth of which may not be known until the agent starts to act. And if the agent lacks the authority needed to perform a particular act, the principal lacks capacity to sign a new power of attorney authorizing the agent and this may necessitate other legal maneuvers (e.g., guardianship or conservatorship, which may be less desirable an option). Thus, a double-edged sword.

42. *See, e.g.*, MINN. STAT. ANN. § 523.23 (2021).

43. *See, e.g.*, UNIF. POWER OF ATT'Y ACT § 111 (2006).

44. *See also* Whitton, *supra* note 36, at 17–18.

our view. Professor Linda S. Whitton, the reporter for the Uniform Power of Attorney Act, previously noted "a power of attorney is only as protective as the agent is trustworthy."[45] We also believe that most agents do the job as agent as it was intended, and that those who misuse the power are few in number, but we have no evidence to support our belief.[46] As mentioned earlier in this Article, the cases we reviewed in our analysis highlight the instances where a POA has been used to commit a crime and exploit a vulnerable individual, whether just once or spanning multiple occasions and transactions, and do not account for such altruistic agents acting in good faith.

With attention given to agent abuses of the power of attorney, statutory reforms to date have focused on punishment,[47] prevention or, simply, better defining the role and duties of the agent.[48] It also would appear that a variety of responses have been taken,[49] but their efficacy

45. *Id.* at 10–12 ("Contrasted with guardianship and trust law, power-of-attorney statutes generally do not provide even theoretical monitoring of the agent by anyone other than the principal. The principal-agent relationship is intentionally private, operating under the judicial radar screen and away from the direct scrutiny of those who might stand to benefit from the principal's estate.
The unsupervised nature of durable powers is justified by the premise that persons with legal capacity can autonomously choose a trusted individual to serve as a surrogate decisionmaker. One of the continuing dilemmas of guardianship is how to protect persons with diminished capacity without truncating the legal rights they are still capable of exercising. The informality of the power of attorney avoids this dilemma because there is no adjudication of the principal's incapacity and the agent needs only assume the degree of surrogate management that the principal's condition requires. Given that a trustworthy agent is the cornerstone of an incapacitated principal's protection, what can or should be done to prevent and redress abuse by an agent?") (citations omitted).

46. *Id.* at 12 ("[W]e must first consider how much power-of-attorney abuse occurs and whether the potential harm from power-of-attorney abuse justifies undercutting the benefits of a low-cost, flexible, and private means for surrogate property management. Unfortunately, there currently exists no national mechanism to track or evaluate the prevalence of financial exploitation in general, let alone exploitation through abuse of durable powers in particular.") (citations omitted).

47. *See, e.g.*, FLA. STAT. ANN. § 825.103(1)(c)(2021) (including breach of fiduciary duty by an agent in the crime of financial exploitation); *see also* Boxx, *supra* note 20, at 48–50 (providing examples of some state statutes that impose criminal or enhanced civil penalties).

48. Boxx, *supra* note 20, at 4 ("Part V applies fiduciary principles to the durable power of attorney and points out the numerous ambiguities regarding the attorney-in-fact's duties. This section then makes recommendations to clarify the scope of those duties in order to serve purposes of both curbing abuse of powers of attorney and making them more useful.") (citations omitted).

49. *See id.* at 12–13

("The simplicity and ease of use of the durable power of attorney, the lack of restrictions and limitations on its use, and the inclusion of

remains unknown. We cannot stress enough that not every agent uses the power of attorney to steal;[50] the POA is used as intended and remain a valuable and effective planning tool.

statutory provisions protecting third parties, such as banks and other financial institutions, when accepting durable powers of attorney led to increasing use of the document. That expansion in turn led to increased instances of abuse, where an attorney-in-fact would use his or her authority to misappropriate the principal's property. The power of attorney's greatest advantage, its ease of use and informality, is also its greatest flaw since it becomes easy to abuse in the hands of a dishonest person. Articles appeared in the press, detailing stories of dishonest attorneys-in-fact, and by the early 1990's, studies began to be conducted investigating the frequency and severity of abuse. Although the general response was that abuse was unusual when compared to the frequency of use of durable powers of attorney without problems, commentators began to discuss the possibility of abuse as a planning consideration as well as a consideration for legislative reform.

"Later in the 1990's, elder abuse in general became a prominent concern, and legislatures responded with a variety of statutory penalties. Because the durable power of attorney was sometimes a method of financial abuse, some states adopted provisions that would impose enhanced penalties when a durable power of attorney is abused, and other states adopted significant oversight mechanisms.").

50. *See, e.g.*, *id.* at 61.

("The vast majority of attorneys-in-fact carry out their duties faithfully, and those attorneys-in-fact deserve a safe harbor from the abuse penalties and from second guessing by other family members on how they resolve the too numerous ambiguities associated with the role. Without a corresponding clarification of the fiduciary duties, the pressure of the abuse reforms will make the power of attorney too unattractive to be useful, and we will return to the situation of the early 1960's where no legal device was available to deal efficiently with disability planning.

"Legislatures can attack abuse by oversight provisions and enhanced penalties, if those provisions are mindful of retaining the efficient use of the document without turning it into a de facto guardianship and mindful of the well-meaning fiduciary. That well-meaning fiduciary should be sufficiently comfortable with understanding the scope of duties so that she need not fear inadvertently triggering the criminal penalties or loss of inheritance and other punitive civil damages. That can be accomplished by clarifying the scope of the attorney-in-fact's unique role and by clarifying that the penalties are triggered only by intentional violation of duties. The specific reforms should include some oversight mechanism, although they must be carefully tailored so that the usefulness is not undermined.").

(citations omitted).

III. The Crime of Financial Exploitation

The Elder Justice Act[51] provides a definition of exploitation that includes language that addresses the illegal actions of a fiduciary.[52] The statute defines exploitation as

> the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets.[53]

This is the key to looking at the POA as an instrument of exploitation. It provides the agent with a legal means to access the principal's assets and is recognized by most financial institutions,[54] insurance companies, and brokerage firms. An agent under a POA is a fiduciary.[55] This is relevant—and important—because of the duties imposed on a fiduciary.[56] Many state statutes that authorize the creation of a POA reference the fiduciary duty of the agent when they address financial exploitation through available civil remedies.[57] The criminal aspect of

51. Elder Justice Act of 2009, Pub. L. No. 111-148, 124 Stat. 782 (codified in scattered sections of 42 U.S.C.).

52. 42 U.S.C. § 1397j(9) defines fiduciary as "a person or entity with the legal responsibility—(i) to make decisions on behalf of and for the benefit of another person; and (ii) to act in good faith and with fairness; and (B) includes a trustee, a guardian, a conservator, an executor, an agent under a financial power of attorney or health care power of attorney, or a representative payee."

53. 42 U.S.C. § 1397j(8).

54. *See, e.g.*, UNIF. POWER OF ATT'Y ACT §§ 120–21.

55. *See, e.g.*, Whatley v. Hunt, No. F075342, 2018 WL 5784556 *9–10 (Cal. Ct. App. Nov. 5, 2018) (unreported).

> Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another.' "[A] confidential relationship may exist whenever a person with justification places trust and confidence in the integrity and fidelity of another." '[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law.'
>
> The trial court concluded the Hunts set themselves up as fiduciaries; "throughout the period from 2005 when the Power of Attorney and particularly the document 'Personal and Financial Administrator' were executed, and from February 2008 when . . . Hunt was appointed, accepted appointment and acted as Trustee of the LJE Trust, [the Hunts] were in a fiduciary relationship with Petitioners." The evidence and the trial court's findings support that conclusion.

(citations omitted); *see also* 42 U.S.C. § 1397j(9).

56. *See, e.g.*, 42 U.S.C. § 1397j(9).

57. In many states a POA is only addressed in a civil case and the issue may not often be carried over to criminal acts. *But see*, FLA. STAT. ANN. § 825.103 (2021)

financial exploitation is more problematic, largely due to the elements of the crime in many state statutes and the higher standard of proof.[58] In crafting such statutes to address financial exploitation, states often rely on elements most commonly found in general theft statutes.[59]

While there has been a generally recognized lack of data that supports the linkage of the POA to financial exploitation, there is one notable, recent effort to address to surrogate decision-makers and abuse. Bolkan, Teaster, Ramsey-Klawsnik, and Gerow[60] examined abuse, neglect, and financial exploitation of adults aged sixty and older who require a surrogate decision-maker.[61] The authors conjectured that older adults who need a surrogate decision-maker are particularly vulnerable to abuse because the older adult relies upon others for care and

Exploitation of an Elderly Person or Disabled Adult. Section (1) defining exploitation includes subsection (c) which specifically encompasses powers of attorney (emphasis added):
Breach of a fiduciary duty to an elderly person or disabled adult by the person's guardian, trustee who is an individual, *or agent under a power of attorney* which results in an unauthorized appropriation, sale, transfer of property, kickback, or receipt of an improper benefit. An unauthorized appropriation under this paragraph occurs when the elderly person or disabled adult does not receive the reasonably equivalent financial value in goods or services, or when the fiduciary violates any of these duties . . . For agents appointed under chapter 709. *See also* S.C. CODE ANN. § 43-35-10 (2010) (Subd. 3(b)). Definitions: (3) 'Exploitation' means: . . .(b) an improper, unlawful, or unauthorized use of the funds, assets, property, *power of attorney*, guardianship, or conservatorship of a vulnerable adult by a person for the profit or advantage of that person or another person."; Although not specifically mentioning POA or malfeasance by an agent, Minnesota has a civil right of action for financial exploitation that allows a suit against the alleged/confirmed perpetrator of financial exploitation for $10K or treble damages based on the amount stolen, whichever is greater. MINN. STAT. ANN. § 626.557(20) (2020). Another Minnesota statute which provides for treble damages, discusses liability of an agent for "improper execution of affidavits and signature," where agents who knowingly executes a false affidavit or acts when the agent knows the POA is ineffective (death of principal or petition for dissolution of marriage if agent is the spouse. MINN. STAT. ANN. § 523.22 (West).

58. *See, e.g.*, John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard,* 44 U. BALTIMORE L. REV. 407, 425–27 (2015) (discussing hurdles for prosecution, including lack of specific financial exploitation statutes, lack of referrals from APS, lack of understanding that it is a criminal matter, not a civil one, lack of prosecutorial resources or expertise, a victim's diminished capacity, a victim's unwillingness to press charges when the perpetrator is a family member, or the POA contains gifting authority).

59. *See, e.g.*, Morgan, Teaster, & Thomas, *supra* note 9, at 274–78.

60. *See generally* Bolkan, Teaster, Ramsey-Klawsnik, & Gerow, A*buse of Vulnerable Older Adults by Designated Surrogate Decision Makers*, *Innovation in Aging,* 4 (Supp._1), 702–03 (2020), https://doi.org/10.1093/geroni/igaa057.2467 (on file with author).

61. *Id.* at 702.

advocacy.[62] Further, they hypothesized that because powers given to surrogate decision-makers can be sweeping but poorly monitored, surrogate decision makers have the potential for abuse involving an older person.[63] The purpose of the study was to understand the nature, extent, and impact of abuse, neglect, and financial exploitation by perpetrators who were, or alleged that they were, agents under a POA, guardians, and representative payees.[64]

Using substantiated reports of adult protective services ("APS"), the authors collected 175 cases over a ten-month period involving community-dwelling older adults in selected counties in California, Florida, Nevada, New Hampshire, North Carolina, and Texas. The study explored characteristics of the victims and perpetrators and how surrogate decision-maker perpetrators harmed the older adults.[65] Of the 102 substantiated reports, ninety involved agents under a POA, five were guardians, and seven were representative payees.[66] Also, during the study period, APS received seventy-three substantiated reports of "claimed" surrogate decision-maker perpetrators (e.g., no formalized legal proof was located, but the perpetrator claimed to be the surrogate).[67] The mean age of the 102 victims was eighty-two years old; 59.8% were women, 61.8% were white, and 21.5% were African American.[68] Over half (66.6%) had incomes less than $50,000 and over a fourth (27.5%) lived alone. The most frequent form of abuse was financial exploitation (34.2%), followed by caregiver neglect (19.3%).[69] Victims suffered physical harm (e.g., bruises, cuts, black eyes, weight loss, broken bones), financial harm (e.g., loss of home, loss of savings, loss of other financial resources, deprived of entitlements or social security benefits), and emotional harm (e.g., post-traumatic stress disorder, depression, loss of self-esteem).[70]

More than a fourth (27.3%) of cases in the current study involved "polyvictims,"[71] who experienced a combination of emotional and

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *See* Pamela B. Teaster, *A Framework for Polyvictimization in Later Life*, 29 J. ELDER ABUSE & NEGLECT 289 (2017).

physical abuse followed by financial exploitation and emotional abuse, which was a phenomenon higher among victims with surrogates as compared to a comparison group without them (54%).[72] Three types of abuse were documented in 14% of the polyabuse cases.[73] All cases of self-neglect were represented in the polyabuse category.[74] The most common impact on the polyvictims was physical harm.[75] Proportionally, more *claimed* surrogate perpetrators had prior substantiated abuse than the surrogates APS could prove.[76] The most common remedy was none (28.4%) followed by non-legal separation (19.6%).[77] This study clearly links abuse with surrogate decision-makers—particularly POAs—and emphasizes a definite need to conduct more research in this area.[78]

IV. Cases and Issues on Appeal

The cases we used in this current analysis illustrate various, distinct legal issues on appeal rather than one homogenous issue to be reviewed.[79] In this section, rather than providing an extensive discussion of the facts of each case we chose to include,[80] we focus on the issues on appeal and the court's discussion of financial exploitation as a crime or the role of the POA in committing the crime in the various cases. In Section VI, we further discuss these cases and provide our analysis and takeaways from the various cases.

72. *See* Bolkan, *supra* note 60.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *See, e.g.*, State v. Thompson, 153 Wash. App. 325, 223 P.3d 1165 (2009) (witness tampering); State v. Crowder, 102 Wash. App. 1022 (2000) (unreported) (sufficiency of evidence); Wheeler v. Commonwealth, No. 2012-CA-001397-MR, 2013 WL 4511946 (Ky. Ct. App. Aug. 23, 2013) (unreported) (error in ordering restitution); People v. Fenderson, 188 Cal. App. 4th 625 (2010) (sufficiency of the evidence, jury instruction); Easley v. Commonwealth, No. 2013-CA-001407-MR, 2016 WL 99124 (Ky. Ct. App. Jan. 8, 2016) (unreported) (ineffective assistance of counsel); Whatley v. Hunt, No. F075342, 2018 WL 5784556 (Cal. Ct. App. Nov. 5, 2018) (unreported) (statute of limitations in fiduciary relationship); People v. Phillips, No. A142990, 2016 WL 4366771 (Cal. Ct. App. Aug. 16, 2016) (sufficiency of evidence).
80. We discuss the facts of the cases in Part VI and use those facts to offer some conclusions.

The agent as the caregiver is illustrated in the case of *People v. Fenderson*.[81] The defendant was the caregiver who, after the death of the victim for whom she was providing care, removed $300,000 from the victim's financial account.[82] The facts are somewhat complicated because of the lengthy relationship between the victim and caregiver.[83] In this case, we focused on the defendant's withdrawal of funds from the victim's account at the financial institution after the victim's death.[84] The appellate court discussed two different arguments: whether the withdrawal was authorized pursuant to the POA (which contained language noting it could be viewed as having survived the principal's death) and whether the principal made a gift to the defendant of the funds in the specific accounts.[85] The appellate court upheld the defendant's conviction for grand theft by larceny.[86] The perpetrator was found

81. *Fenderson*, 188 Cal. App. 4th 625.

82. *Id.* at 628.

83. *Id.* at 631–32. The relationship started in 1996 and continued for ten years until the victim's death in 2006. The defendant's caregiving responsibilities varied and diminished over time as the victim's health declined and she moved to facilities that provided more care.

84. *Id.* at 632.

85. *Id.* at 631–36. The defendant argued on appeal that the power of attorney had not terminated at death because of the language in the power of attorney that the "power of attorney . . . remain[s] in effect until *this office* of Wells Fargo receives actual notice of my death, or the accounts are closed, or this office receives from me written revocation of this power of attorney and has provided me with written acknowledgement of such revocation.' (Italics added.)"(citations omitted); *see also id.* at 634. "Fenderson argues that the power of attorney was still in effect on April 7, 2006, because Kruse 'had notified a different bank branch of her client's death, but not the branch where the power of attorney was lodged.'" (citations omitted).
Id. at 633. As far as the issue of whether the victim had gifted the Wells Fargo accounts to the defendant, the owner of the facility where the victim was residing at her death overheard a conversation between the victim and the defendant where the victim said "'When I pass away . . . I'd like you to have the rest of what is left in this account.'"; *Id.* at 632. This testimony was in addition to that of the defendant, who testified that the victim had told her, "[w]hen she passed away, . . . everything that was in her Wells Fargo accounts" would then become the property of the defendant. Several months after that conversation, the victim named the defendant as the agent under a power of attorney for those specific accounts. Notably, the defendant, testifying about the POA, indicated that her understanding of the creation of the POA was so that the defendant could manage the victim's financial affairs when the victim became unable to do so. *Id.* at 632.

86. *Id.* at 637–42. The appellate court discusses at length whether the proper charge was grand theft by larceny or by embezzlement. A significant portion of the opinion is devoted to this discussion. *Id.* at 637. "[W]hether or not larceny was the proper theory of theft in this instance, [the defendant's] convictions may nonetheless be affirmed even if based on substantial evidence of theft by embezzlement."

> Even if we assume that [the defendant] lawfully acquired possession of money from the accounts under the authority of a valid power of

to not have taken the funds as a gift from the owner, since she took the funds *after* the death of the victim, when the owner was the estate at that point,[87] and she was not authorized to transfer the funds to herself pursuant to the provisions within the POA.[88]

In *Easley v. Commonwealth of Kentucky*,[89] the defendant appealed his conviction of a total of twenty counts of financial exploitation in cases where both his mother and his aunt were the victims.[90] The defendant argued that he was taking the money to reimburse himself for his out-of-pocket expenditures at the direction of his aunt and mother.[91] One of the defenses asserted was that an agent was not required to "act in the principal's best interest," but instead, could act in a way that was not objectionable to the principal.[92] The defendant argued that, because his mother gave him carte blanche as to how her funds were used, there was no way he could have been found guilty.[93] According to the court:

> The power-of-attorney document imposed a fiduciary duty upon Easley as [his] Mother's attorney-in-fact to act in her best interests rather than in his own personal interests. "As a general rule, we can conclude that such a [fiduciary] relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another's benefit in matters connected with such undertaking." Therefore, the power-of-attorney required Easley to handle

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> attorney, substantial evidence establishes that [the defendant] immediately deposited the money in her own bank account and immediately diverted it for personal purposes not permitted or contemplated by the power of attorney, which she acknowledged allowed her only to take care of [the victim's] business when [the victim] was unable to do so. Taking money from [the victim's] accounts for [the defendant's] own purposes would have been theft while [the victim] was alive, and was theft from her estate, whatever her "criminal acquisitive technique." Thus, there is substantial evidence in the record to support a theory of theft by embezzlement. The evidence further supports the inference that [the defendant] had the intent to appropriate the money from the Wells Fargo accounts for her own purposes when she entered the Wells Fargo branch to withdraw the funds, providing substantial evidence to support the burglary conviction.

Id. at 641 (citations omitted).

87. *Id.* at 637.

88. *Id.*

89. Easley v. Commonwealth, No. 2013-CA-001407-MR, 2016 WL 99124 (Ky. Ct. App. Jan. 8, 2016) (unreported).

90. *Id.* at *1–2.

91. *Id.* at *4.

92. *Id.* at *5.

93. *Id.*

> Mother's finances in her best interest, not simply in a manner to which she would not object.[94]

In *Washington v. Crowder*,[95] again the perpetrator was the caregiver.[96] The victim experienced physical and cognitive deterioration, and there were a series of financial transactions, some occurring before the signing of the POA and some after.[97] On the question of the perpetrator's conduct, the appellate court, in affirming the conviction, found that:

> The evidence here is very strong that Crowder's actions were unauthorized. First, her reliance on the durable power of attorney is entirely misplaced. Crowder was not authorized by the power of attorney to make gifts of [the victim's] property. This is specifically prohibited by statute, unless expressly provided for in the document. Second, it is undisputed that in March 1995, following the revocation of her power of attorney, and in violation of a court-ordered injunction, Crowder persuaded a mentally frail [victim] to quitclaim his. . . condominium to her. The February preliminary injunction explicitly prohibited Crowder from 'making any change in the personal or financial affairs of [the victim]. Both Crowder's persuasion of [the victim] to transfer property and her acceptance of the deed violated the injunction and were 'unauthorized.' This transfer of property alone is sufficient evidence to support Crowder's conviction for theft in the first degree.[98]

In *Wheeler v. Kentucky*,[99] the defendant, daughter and agent under her mother's POA, challenged the jurisdiction of the court to order restitution.[100] Because of the multiple transactions, the court noted that "a course of conduction may be treated as a single offense;"[101] the crime is not lessened just because the "financial loss" took place over a number of months instead of at one time.[102]

94. *Id.*
95. Washington v. Crowder, 11 P.3d 828, 828 (2000).
96. *Id.* at 829.
97. *Id.* at 829–30.
98. *Id.* at 832–33.
99. Wheeler v. Commmonwealth, No. 2012-CA-001397-MR, 2013 WL 4511946, at *1 (Ky. App. Aug. 23, 2013) (unreported).
100. *Id.* at *1.
101. *Id.* at *4. The daughter was charged with exploitation, fraudulently using a credit card, multiple counts of theft by taking, and two counts of having a forged instrument. "The charges stemmed from allegations that Wheeler, while serving as power of attorney for her elderly mother, Agnes Sheldon, abused her position for her own financial gain." *Id.* at *1.
102. *Id.* at *5–6 (stating the defendant also argued against including transactions from a joint bank account and from some not made pursuant to the power of attorney).

In *People v. Phillips*,[103] the perpetrator, over a period of time, systematically took over the victim's life, isolating her from her family, and ultimately, questions were raised about the defendant's handling of the victim's health and financial affairs.[104] The perpetrator was convicted on counts of elder abuse and creating false evidence.[105] As far as the defendant's conviction for creating false evidence (i.e., his preparation of the POA form),[106] the court affirmed because:

> The form created by Phillips in October 2013 was false because the document falsely represented that Janice had knowingly and voluntarily granted Phillips power of attorney over her affairs at a time when she did not have the mental capacity to do so. That falsity was material to the police investigation in which Phillips offered the document: an investigation into Janice's welfare. On October 4, Phillips invoked his purported power of attorney to support his claim to speak on Janice's behalf, which included a denial that Janice had any medical problems and repeatedly insisting she did not want to talk to the officers, and they should leave. That is, he invoked the power of attorney to impede investigation into Janice's welfare. Later that same afternoon, Phillips took steps to create the power of attorney document, inferably for the same purpose of impeding further police investigations into Janice's welfare. The following day, he drew police attention to the document, which was retrieved from Janice's home, and he affirmatively cited it during his interview with Byars as evidence that he had a legal right to make decisions for Janice, including financial decisions that were under investigation at that time. In sum, sufficient evidence supports a conclusion that Phillips prepared a false paper with the intent to produce it in a police investigation into potential elder abuse.[107]

In *Washington v. Thompson*,[108] in a case of theft and witness tampering which was done after the start of an investigation of their actions, the defendants prepared a statement for the victim to read and filmed the victim reading it.[109] On appeal, the court found there was sufficient evidence to uphold the conviction that:

> Thompson knew that [the victim] suffered from dementia and lacked the capacity to sign the second power of attorney, yet he obtained her signature and then used it intentionally to deprive [the victim] of hundreds of thousands of dollars that he knew was

103. People v. Phillips, No. SC079372A, 2016 WL 4366771, *1 (Cal. App. Aug. 16, 2016) (unreported).
104. *Id.* at *1–2, *5–7.
105. *Id.* at *1, 5.
106. *Id.* at *7.
107. *Id.* at *8.
108. State v. Thompson, 223 P.3d 1165, 1166 (Wash. App. 2009).
109. *Id.*

> supposed to be conserved for her daughter. Thompson devoted the money to his own purposes instead. His argument amounts to an assertion that the jury should not have believed the State's witnesses. This is not the test. The evidence of theft was sufficient.[110]

In *Washington v. Dahll*,[111] Dahll was convicted of first-degree theft and attempted first degree theft.[112] Dahll served as her father's caregiver and agent under his POA.[113] At some point, neighbors called APS, which resulted in an investigation and ultimately charges against Dahll.[114] Dahll's appeal centered around evidentiary matters, but the appellate court affirmed the conviction.[115]

The final case in this section, *Commonwealth v. Patton*,[116] concerned the conviction of Patton for theft pursuant to the use of a DPOA.[117] Patton was convicted of ninety-five counts of "theft by unlawful taking" and ninety-five counts of "theft by failure to make required disposition of funds received."[118] The appellate court, in affirming the conviction, had this to say about the defendant's argument that the broad gifting authority granted in the POA allowed him to self-gift.[119] The appellate court disagreed:

> Appellant's bold claim that the 'unlimited gift' provision in the power of attorney provided Appellant with a license to steal [the victim's] assets and use all of her money for Appellant's own benefit. To the contrary the gifting power was clearly subject to the condition that Appellant use the power 'for [the victim's] benefit'—

110. *Id.* at 1170.

111. State v. Dahll, No. 80065-5-1 2021 WL 778099, *1 (Wash. App. Mar. 1, 2021) (unpublished).

112. *Id.*

113. *Id.*

114. *Id.* at *1–2. (explaining Dahll was charged with first degree theft, attempted first degree theft, and third degree criminal mistreatment).

115. *See id.* at *2–4; *see also id.* at 6 (discussing the POA incidentally). Although the court does note that after the power of attorney had been revoked, Dahll "took [her father] into the bank and used $8,800 from is individual investment account to open a new bank account."). The court affirmed because it was shown beyond a reasonable doubt that the defendant took the victim's money without "a good faith claim of title or openly and avowedly . . . ." *Id.* at *6–7.

116. Commonwealth v. Patton, Nos. 1973 WDA 2012, 1974 WDA 2012, 2014 WL 10575182, *1 (Pa. Super. Sept. 19, 2014).

117. *Id.*

118. *Id.* at *4.

119. *Id.* at *7; *see also id.* at *2 (stating that the language of the POA in question reads "To the extent that the following powers may not explicitly be set forth hereinabove, I further hereby grant to my said agent the following powers: … [t]o make limited or unlimited gifts.").

> and Appellant clearly violated this condition when he took all of [the victim's] money and used it as if it was his own.[120]

V. How the States Address Financial Exploitation

Financial exploitation of a vulnerable adult is a crime,[121] but there are also traditional civil remedies for wrongful use of POAs. Not all states specifically include a POA as an element of criminal exploitation.[122] Florida is one of the exceptions to this.[123] Florida Statute § 825.103(c) includes in the definition of exploitation the "[b]reach of a fiduciary duty to an elderly person or disabled adult by the person's guardian, trustee who is an individual, or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property." While this definition may depend on what is determined to be property,[124] it does bring into an investigation the need to consider the misuse of POA as an element of the crime.[125] Some states that provide a definition of financial exploitation for criminal purposes only refer to general criminal statutes to provide the essential elements that must be established for a successful prosecution. Most often they rely

120. *Id.* at *7.

121. Rebecca C. Morgan & Randolph Thomas, *Financial Exploitation by Agents under Powers of Attorney: It is a Crime!*, AM. BAR ASS'N (June 29, 2020), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/winter/financial-exploitation-agents-under-powers-attorney-it-a-crime/.

122. *See, e.g.*, S.C. CODE ANN. § 43-35-10(3) (2021) (identifying misuse of a POA as an element of exploitation).

123. *See, e.g.*, FLA. STAT. ANN. § 825.103(c) (2021).

124. FLA. STAT. ANN. § 825.103(c) (2021); FLA. STAT. ANN. § 825.101(11) (2021) (defining property as "anything of value and includes: (a) Real property, including things growing on, affixed to, and found in land… (b) Tangible or intangible personal property, including rights, privileges, interests, and claims [and] (c) services.")

125. Although we could argue that the *mens rea* shows up in several sections of FLA. STAT. ANN. § 825.103 (2021), most likely the appropriate section for criminal charges against an agent under a DPOA would be FLA. STAT. ANN. § 825.103(c) (2021)

> Breach of a fiduciary duty to an elderly person . . . by the person's. . . agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property. An unauthorized appropriation under this paragraph occurs when the elderly person . . . does not receive the reasonably equivalent financial value in goods or services, or when the fiduciary violates any of these duties: . . . 1. For agents appointed under chapter 709: . . . a. Committing fraud in obtaining their appointments; . . . b. Abusing their powers; . . . c. Wasting, embezzling, or intentionally mismanaging the assets of the principal or beneficiary; or . . . d. Acting contrary to the principal's sole benefit or best interest.

on definitions of theft, forgery, embezzlement, identity theft, or larceny.[126]

Applying specific elements of financial exploitation under a state's elder abuse framework also requires that the victim meet the definition of an "elder" or "vulnerable adult," with many states utilizing an age-based threshold, typically starting at sixty or sixty-five years of age.[127] The statute may also require a finding that the victim lacked capacity[128] or had some other limitation on their ability to provide for their own welfare.[129] All these factors make the investigation of financial exploitation complex.[130] Law enforcement and prosecutors must evaluate the language of a POA to determine if it was utilized to further the crime.

The process whereby a criminal case can be pursued relies on three important steps: (1) detection of the crime as defined by statute, (2) investigation (i.e., gathering the facts to support the elements of the crime), and (3) prosecution. The complexity of a POA may prove to be a barrier to criminal prosecution, as simply identifying the act as a crime by statute can be quite difficult. There is often a lack of clarity as to what may be authorized and often requires some legal expertise not often available to law enforcement[131] or courts. While there are cases that present a clear set of facts, such as using the document to transfer bank accounts or real property from the victim to the perpetrator, other cases are far more convoluted, with the defendants claiming such

126. *See, e.g.*, CAL. PENAL CODE § 368e (West 2016). ("Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable as . . . ").

127. *See* 42 U.S.C. § 1395j(5) (using 60 or older for the definition of elder); *But see* FLA. STAT. § 825.101(4) (Florida uses at least age 60, ***plus*** "suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired." In Florida then, age alone is insufficient to bring the victim under the purview of the statute).

128. *See, e.g.*, *In re* Est. of Vackar, 345 S.W.3d 588, 597–98 (Tex. App. 2011) (discussing how the principal must have capacity at the time of signing the power of attorney; *In re* Thames, 544 S.E.2d 854, 856–57 (S.C. App. 2001); Vincent J. Russo & Marvin Rachlin, *Mental Capacity*, N.Y. ELDER L. PRAC., § 6:8 (2020 ed.).

129. *See, e.g.*, FLA. STAT. ANN. § 825.101(4).

130. *See, e.g.*, Morgan & Thomas, *supra* note 8, at 283–84.

131. *See, e.g.*, Craft, *supra* note 58, at 426 (stating that law enforcement may not know it is a crime, may not investigate or advise victim it is a civil matter.)

explanatory rationale as a gift, implied authority, consent, advanced inheritance, or debt, among several questionable excuses.[132]

Following the money trail is critical in a financial exploitation case. The path from the victim's assets to the perpetrator's pocket, however, may not be as clear when the POA contains language that, as it might be argued, permitted the transaction.[133] As noted in Section V, proving financial exploitation occurred becomes more complicated when such powers in the POA include self-gifting authority to the agent or the authority to make loans. The agent may argue reliance on that authority as a defense to show that the transaction(s) were not a crime under a state's statutory definition of financial exploitation.[134] It is this scenario that often gives rise to the statement by some prosecutors that "this is a civil case."[135] While a civil proceeding may be necessary to protect any remaining assets, financial exploitation, even that committed by an agent under a POA, is still a crime and should be criminally prosecuted as such.[136]

The other issue in analyzing the POA is the issue of vagueness. If the language in the POA document is not clear, this ambiguity creates challenges in determining the exact scope of the agent's authority to act and whether the agent acted outside of the agent's authority. While

132. *Id.* at 426 (noting that a prosecutor may not file in a case where the POA contains broad authority given to the agent) (citations omitted).

133. The UPOAA requires a specific grant of authority to make gifts under UNIF. POWER OF ATT'Y ACT § 201(a)(2) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L.). As the comment to § 201 notes, "[t]he rationale for requiring a grant of specific authority to perform the acts enumerated in subsection (a) is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advice before granting authority to an agent." Section 217 is the specific gifting authority statute. The comment notes:

> [t]his section provides default limitations on an agent's authority to make a gift of the principal's property. Authority to make a gift must be made by a specific grant in a power of attorney. The mere granting to an agent of authority to make gifts does not, however, grant an agent unlimited authority. The agent's authority is subject to this section unless enlarged or further limited by an express modification in the power of attorney.

(citations omitted). *See also* Craft, *supra* note 58, at 426.

134. *See, e.g.*, Morgan, Teaster, & Thomas, *supra* note 9, at 316.

135. *See* 24 COLO. PRAC., ELDER L., § 22:8, *Criminal Prosecution of Financial Exploitation* (reasons for lack of prosecution to include "belief that misappropriation by a family member, particularly under power of attorney, is not theft, but rather is a civil matter."). *See also* Morgan, Teaster & Thomas, *supra* note 9, at 314–15.

136. Morgan & Thomas, *supra* note 9.

some states have adopted the approach of a statutory short form POA available to residents in a given jurisdiction, which walks a principal through the many considerations inherent in granting fiduciary authority to an agent,[137] there are still numerous incidents where powers of attorney, broadly speaking, are granted in less clear-cut language or have been incorporated within other legal documents.

It is not just the abuse of the POA that is important to analyze. Consideration also must be given to how the POA came to be executed. The POA may be a product of undue influence, fraud, duress, or another wrongful act by the agent[138] such as when the principal may be cognitively impaired or "tricked into" signing.[139]

VI. Implications Drawn from Court Opinions

Turning back to the cases, we now offer our analysis and our conclusions from the court opinions we reviewed, not all of which are discussed in this paper. Of the cases we reviewed, we focused on cases where it was clear that a POA was used to commit financial exploitation. Unsurprising to us, in some cases, the defendant was the caregiver.[140] In some instances the defendant was a relative of the victim.[141]

Commonly, it also appeared to us that the perpetrator used the POA to steal the funds of the victim for the perpetrator's own benefit.[142] There was nothing altruistic with what happened; the perpetrator stole the victim's money or property for the perpetrator's own benefit or for

137. *See, e.g.*, 755 ILL. COMP. STAT. § 45/3-1 *et seq.*; 24 N.Y. GEN. OBLIG. § 5-1501 *et seq*.

138. *See* Slade V. Dukes, Rebecca Morgan, & Randolph Thomas, *There is no Such Thing As Bullet Proof, Just Bullet Resistant: Measures for Minimizing the Potential for Fiduciary Financial Exploitation*, AM. BAR ASS'N (Oct. 20, 2020), https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2020/voice-of-experience--october-2020/measures-for-minimizing-the-potential-for-fiduciary-financial-ex/.

139. Craft, *sup*ra note 58, at 418–19; *see also* B.A. Steinman, V.B. Vincenti, & S. Yoon, *Family Dynamics and Their Association With Elder Family Financial Exploitation In Families With Appointed Powers of Attorney*, 32 J. ELDER ABUSE & NEGLECT 453–70 (2020).

140. *See, e.g.*, People v. Fenderson, 188 Cal. App. 4th 625 (2010); State v. Crowder, 102 Wash. App. 1022 (2000); State v. Dahll, No. 80065-5-1 2021 WL 778099 (Wash. App. Mar. 1, 2021).

141. *See, e.g.,* Easley v. Commonwealth, No. 2013-CA-001407-MR, 2016 WL 99124 (Ky. Ct. App. Jan. 8, 2016) (son and nephew); Wheeler v. Commonwealth, No. 2012-CA-001397-MR, 2013 WL 4511946 (Ky. Ct. App. Aug. 23, 2013) (daughter); *Dahll*, No. 80065-5-1 (Wash. App. Mar. 1, 2021).

142. *See* Part IV, *supra.*

the benefit of someone other than the vulnerable adult. For example, in *Easley v. Commonwealth*,[143] the defendant was convicted of twenty counts of knowingly exploiting an adult and sentenced to ten years in prison.[144] There were two victims, the defendant's mother and aunt, both of whom resided in nursing homes.[145] The defendant obtained powers of attorney from both victims, and over a period of years used his authority to write checks to himself on both accounts.[146]

Easley is relatively simple given the facts, and perhaps what we might envision as a typical abuse of a POA. The defendant used the POA to access the accounts of the victims, and then, over a period of two years with his mother's account and one year of his aunt's, wrote checks to himself.[147] He was charged under Kentucky's exploitation statute;[148] however, the statute makes no specific reference to misuse of a POA.[149] Despite that, the appellate court did rely upon the fiduciary relationship created by the POA to support the conviction.[150]

Easley provides a clear example of using the POA to access bank accounts, then moving funds from them to benefit the agent.[151] In this case, there was a clear line of financial transactions and that the defendant used the POA to complete these transactions makes it clear that there was a breach of fiduciary duty.[152] What is also common in cases such as this is that the agent's wrongdoing may not come to the attention of the state until the nursing home bill was not being paid.[153] Another commonality illustrated by this case is that exploitation often takes place over time and is often not just a single transaction, but rather, a series of transactions that often do not immediately call attention to the exploitation.[154]

143. *Easley*, 2016 WL 99124.
144. *Id.* at *1–2.
145. *Id.*
146. *Id.* at *3 (giving himself $82,304 from his mother's account).
147. *Id.* at *1–2.
148. KY. REV. STAT. ANN. § 209.020(9) (West 2012) (defining "'[e]xploitation' means obtaining or using another person's resources, including but not limited to funds, assets, or property, by deception, intimidation, or similar means, with the intent to deprive the person of those resources").
149. *Id.*
150. Easley v. Commonwealth, No. 2013-CA-001407-MR, 2016 WL 99124, at *8–9 (Ky. Ct. App. Jan. 8, 2016).
151. *Id.* at *3.
152. *Id.*
153. *Id.* at *3–4.
154. *Id.* at *4.

While perhaps obvious to note, the cases reviewed also indicated that most often the perpetrator is younger (and, sometimes, *significantly* younger) than the victim. As such, there is the potential that the victim, in their older age, suffers from a form of dementia or other cognitive impairment, such that the POA is not properly executed due to lack of capacity, or the cognitive impairment prevents sufficient monitoring of the agent's actions.[155] In *Johnson v. State of Florida*,[156] again, the defendant was convicted of exploiting an eighty-eight-year-old neighbor who had been involuntarily committed after exhibiting signs of dementia and who signed a POA naming the defendant as the agent.[157] The defendant then used the POA to draw funds from the victim's bank account, prompting the hospital to initiate guardianship proceedings[158] This case illustrates the situation where the agent obtains the POA when the principal lacks the capacity to sign one. Here, for example, the defendant obtained the POA while the principal was in the hospital by simply bringing the POA form, a notary, and friends to be the witnesses.[159] After the principal signed the form, the agent took the POA to the bank and added her name on the victim's accounts.[160] This case demonstrates the ease by which a POA can be obtained without the services of an attorney and the bank's unwillingness to question the document.

A common feature in many of the cases reviewed was the occurrence of multiple improper transactions over a period of time, rather than just one large transaction, where the perpetrator committed financial exploitation. For example, in *People v. Fenderson*,[161] the defendant was convicted of one count of grand theft and one count of second-degree commercial burglary.[162] As is the case in many situations, the state did not learn of the case until after the victim's death.[163] The POA was used to access the victim's funds in multiple transactions, totaling $259,000.[164] This case also illustrates the prosecution of financial exploitation under a general criminal statute, when there is not a specific

155. *See, e.g.*, State v. Crowder, 102 Wash. App. 1022 (2000); People v. Phillips, No. A142990, 2016 WL 4366771 (Cal. Ct. App. Aug. 16, 2016); State v. Thompson, 153 Wash. App. 325, 223 P.3d 1165 (2009).
156. Johnson v. State, 267 So. 3d 16 (Fla. Dist. Ct. App. 2019).
157. *Id.* at 18.
158. *Id.*
159. *Id.*
160. *Id.*
161. People v. Fenderson, 188 Cal. App. 4th 625 (2010).
162. *Id.* at 628.
163. *Id.* at 630.
164. *Id.* at 630, 632.

financial exploitation criminal statute.[165] And, even when a specific financial exploitation statute exists, prosecutors may elect to utilize a general criminal theft statute to prosecute the crime, due to a lesser set of required elements to prove and greater penalties for a convicted perpetrator than are available under the financial exploitation statute. One of the advantages of a POA is the lack of court oversight; as this case illustrates, it can also make exploitation easier to commit.[166]

In *State v. Dahll*,[167] an unreported Washington case, the daughter's POA for her father ended when a guardian was appointed. The guardian's review of the father's finances revealed that $200,000 was missing.[168] The daughter's appeal of the conviction was mostly evidentiary[169] and centered around the trial court's refusal to admit evidence that she was the main beneficiary of her father's estate.[170] The appellate court noted that the fact that the father had named the daughter as his primary beneficiary "had no effect on [the daughter's] legal interest in his money before his death" and thus such evidence had no bearing on the case.[171] The daughter took the position that she was authorized to spend her father's money on herself.[172]

We recognize that there is no one to prevent all cases of misconduct by an agent under a POA, but we do believe the choice of agent is critical. Imagine if a trustworthy, ethical individual or professional fiduciary served as the agent in all these cases. We believe that the likelihood that financial exploitation would have occurred would drop exponentially.

VI. Criminal Justice Issues

Cases of financial exploitation pose complex legal issues for the criminal justice system, beginning with the initial reporting and investigation. There are several issues that create the problem; first, financial exploitation involving a POA is an act performed by a person who is in

165. *Id.* at 638–42.
166. *Id.* at 629. (showcasing how neither the bank nor attorney knew of the principal's death until the attorney saw the obituary).
167. State v. Dahll, 16 Wash. App. 2d 1047 (Wash. Ct. App. 2021).
168. *Id.* at *2.
169. *See id.*
170. *Id.*
171. *Id.* at *3.
172. *Id.* at *5–6.

a "trusted relationship" with the victim.[173] Second, the perpetrator typically has an ongoing relationship with the victim.[174] This relationship, especially when it involves family members, presents some issues of personal dynamics that makes these cases different and more complicated than those of frauds and scams. In our previous article, material was presented by experienced prosecutors that outlined the barriers to holding offenders accountable in the criminal justice system.[175] Lack of resources (e.g., experts in this area), victim-related concerns (e.g., cognitive issues), and length of time from investigation to an actual court case using experienced investigators and prosecutors are most often mentioned. While not insurmountable, these hurdles often pose a major barrier to smaller jurisdictions lacking necessary resources. In the end, the burden of proof for a criminal case, as well as a multitude of required elements of a crime to prove in court, can pose the largest challenge.

Most states have some type of elder abuse statute,[176] which typically supports the state's intervention from a social services (i.e., APS) perspective.[177] The definition of financial exploitation included in these APS statutes, however, does not always match those found in criminal financial exploitation statutes.[178] In many cases, APS statutes focus more so on social or protective interventions rather than deterrence or punishment of potential perpetrators.[179] Another fundamental issue is who is covered by these APS statutes. Most states have age-based statutes that rely on a set of conditions that impact the individual's ability

173. *See, e.g.*, UNIF. POWER OF ATT'Y ACT § 201, *supra* note 37, at 29; *see also* FLA. STAT. ANN. § 825.103(1)(a) ("position of trust and confidence").

174. *Elder Financial Exploitation*, NAT'L ADULT PROTECTIVE SERVS. ASS'N, https://www.napsa-now.org/get-informed/exploitation-resources/ (last visited Feb. 21, 2022) (perpetrators typically those trusted individuals involved in the life of the elder.).

175. Morgan, Teaster, & Thomas, *supra* note 9, at 309–22.

176. *Elder Abuse & Financial Exploitation Statutes*, U.S. DEP'T OF JUST., https://www.justice.gov/elderjustice/prosecutors/statutes (last visited Feb. 21, 2022).

177. *Citations to State Adult Protective Services Laws & Long Term Care Ombudsman Laws*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-aps-ia-ltcop-statutes-citations.pdf (Apr. 2020).

178. Kevin E. Hansen et al., *Criminal and Adult Protection Financial Exploitation Laws in the United States: How Do the Statutes Measure Up to Existing Research?*, 42 MITCHELL HAMLINE L.R. 897, 906–19 (2016), https://open.mitchellhamline.edu/mhlr/vol42/iss3/3.

179. *See, e.g.*, *About NAPSA*, NAT'L ADULT PROTECTIVE SERVS. ASS'N, https://www.napsa-now.org/about-napsa/ (last visited Feb. 21, 2022).

for self-care,[180] what we refer to as "age-plus criteria."[181] There are also some distinctions as to who is covered by statute beyond the ability for self-care. Some states use a vulnerability definition that relies exclusively on an adult's ability for self-care, while others use an age-plus vulnerability standard.[182] Under either approach, the investigator has to determine whether the victim falls under the purview of the statute. The investigator may then encounter an obstacle, what has sometimes been called "the guise of legality."[183] This means that the investigator is presented with a POA that, on the surface, appears to authorize the acts being investigated. In determining the likelihood of a crime having occurred, the investigator may encounter terms more common to the civil side of the justice system, such as durability, fiduciary, capacity, principal, agent, gifting, and loan.[184] Without specialized training, it can be an arduous process for the investigator to gain a clear reading and understanding of a document that is often lengthy and uses language unfamiliar to the average investigator. It may also be a challenge for prosecutors who lack training in the area of elder law, beyond what they learned in law school.

While all these issues surrounding the misuse of POAs are important, the most fundamental and critical issue is the lack of expertise in both law enforcement and prosecutor's agencies. As pointed out in the article *Financial Exploitation by Agents under Powers of Attorney*,[185] both investigators and prosecutors need expertise not only in analyzing the POA, but the ability to follow the money, interview victims with incapacity, and more.[186] Analyzing financial documents is not just looking at bank records, but often reviewing accountings for a trust, guardianship transactions, or brokerage account. Addressing this problem

180. *See, e.g.*, *Citations to State Adult Protective Services Laws & Long Term Care Ombudsman Laws, supra* note 177.

181. By this we mean the victim must be a certain age and must have some vulnerability, thus age-plus. The Florida statute illustrates this age-plus criteria, *see*, FLA. STAT. ANN. § 825.101(4) ("'Elderly person' means a person 60 years of age or older who is suffering from the infirmities of aging … or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.").

182. *See, e.g.*, *Citations to State Adult Protective Services Laws & Long Term Care Ombudsman Laws*, *supra* note 177.

183. This term has been used by those who provide training to investigators to describe how the presentation of a POA by the perpetrator is used to convince others that what was done was "legal" and acceptable under the terms of the POA.

184. *See, e.g.*, Morgan, Teaster, & Thomas, *supra* note 9, at 288–93.

185. Morgan & Thomas, *supra* note 8, at 31–37.

186. *Id.*

would require extensive training efforts for multiple personnel or access to experts in the area of elder financial exploitation, which is not often available in most jurisdictions.

VII. Conclusion

What lessons are learned from these cases? If the goal is to hold offenders accountable in the criminal justice system, then what needs to be addressed in meeting that goal? While all the cases cited demonstrate a criminal justice outcome, they do hold some insight into the challenges and the needed response to these challenges. While important to analyze the judicial proceedings around the issue of financial exploitation, we do not think there were any great insights revealed by these cases; however, we do offer some conclusions. First, it is far too easy for the perpetrator to obtain a POA from the victim. Second, the lack of oversight, one of the very things that makes a POA more attractive, makes it easier for a motivated perpetrator to commit exploitation. Third, financial institutions play a critical role in spotting and even preventing an agent from using the POA to exploit the principal[187] in the diversion of assets from the principal to the agent that violate the duty of the agent to act in the interest of the principal.

The cases can also be broken down into the three parts identified in the beginning of this Article. As noted earlier, one of the main difficulties in such cases is detecting possible financial exploitation when a POA is involved. This is not just the most critical task, but the one that may pose the most challenges. The exploitation in these cases reviewed are often initially "discovered" by agencies or persons not in law enforcement. Unlike many crimes that come to the direct attention of law enforcement, financial exploitation cases typically come into the system through an aggrieved party, social services agency, savvy financial institution employees who sense something amiss, unpaid bills in care settings (e.g., nursing homes), or other professions that identified an issue with the financial aspects of the victim's life. The most critical challenge may be understanding the language of the POA and the authority granted to the agent (e.g., self-gifting and loans can be quite problematic), as well as linking the movement of assets from the victim

187. *See, e.g., Reporting of Suspected Elder Financial Exploitation by Financial Institutions*, CONSUMER FIN. PROT. BUREAU (July 2019), https://files.consumerfinance.gov/f/documents/cfpb_suspected-elder-financial-exploitation-financial-institutions_report.pdf.

(principal) to the suspect (agent) and establishing that funds or property were used for the benefit of the suspect or another third party. Unlike many criminal acts, these cases often involve a lengthy process of financial transactions over time and require a complex investigative effort, sometimes involving multiple agencies working to sort out the pattern of transfers. An underlying issue will always be the establishment of criminal intent in these transactions, as well as proof that the agent acted outside the scope of authority granted in the POA. Another major issue for both the detection and investigative processes is the lack of clear statutory language in many states, including whether the financial exploitation statute includes abuse or misuse of a POA, how the victim is defined (e.g., age-based criteria, other criteria for vulnerability), and whether the financial exploitation statutes provide sufficient punishment for a convicted defendant rather than relegating prosecutors to the use of a general theft or fraud statute.

In the cases cited in this Article, in our view there was not a singular element that was common to all of the cases reviewed, other than the fact that all centered around a violation of an agent's fiduciary requirement to act in the best interest of the principal. Several cases involved a lack of capacity (i.e., *Crowder*,[188] *Thompson*,[189] *Johnson*[190]), relied on the general financial crimes (i.e., *Fenderson*,[191] *Crowder*,[192] and *Dahll*[193]), and most cases involved transactions to exploit the vulnerable adult over time rather than one single event or transfer of property or funds.

Ultimately, the ability to hold an offender accountable will rest upon the efforts of the prosecutor. There are elements of a case that are critical to presenting a case to a jury. The most important may be the ability to present a series of transactions that paint a clear picture of the defendant's intent to convert the victim's assets to their own use, amounting to a clear violation of the fiduciary responsibility to act in the best interests of the victim. This will be dependent on establishing a clear link of the facts to the elements of the crime, whether using a specific financial exploitation statute or a general financial crime statute. It will also require the ability to explain the language of the POA in

188. State v. Crowder, 102 Wash. App. 1022 (2000).
189. State v. Thompson, 223 P.3d 1165 (2009).
190. Johnson v. State, 267 So. 3d 16 (Fla. Dist. Ct. App. 2019).
191. People v. Fenderson, 188 Cal. App. 4th 625 (2010)
192. State v. Crowder, 102 Wash. App. 1022 (2000).
193. State v. Dahll, No. 80065-5-1 2021 WL 778099, *1 (Wash. App. Mar. 1, 2021).

a manner that provides a clear understanding to the court of how the POA was improperly used in a manner not keeping with the authority from the principal or how the agent acted outside of the authority granted within the document. This becomes even more important when the proffered defense is that the funds in question were a loan or gift or when the victim lacks sufficient capacity to testify to the nature of the transaction. This issue was clearly expressed by an experienced prosecutor in the article *Financial Exploitation by Agents under Powers of Attorney: It is a Crime*: "there are two big issues for prosecutors…especially those involving powers of attorney. The first is the capacity of the victim and the second is the need to analyze the financial documents."[194]

The cases used in this Article are illustrative of challenges in holding offenders accountable for financial exploitation utilizing a POA. What is notable is that the cases on appeal reviewed in this article align with the research conducted to date on financial exploitation and indicate that this crime against vulnerable adults continues to be perpetrated and, in many cases, still eludes detection. Despite the training that has been conducted with law enforcement, prosecutors, and judges, and even with greater awareness by the public of such malfeasance, the courts are still left to sort through legal details of POA authorities used improperly and multiple, complex transactions that leave an older adult bereft of their assets or funds that may be needed to buy food, cover the cost of care or medications, or pay for housing. There could perhaps be more done statutorily to add in protections to POAs to prevent instances of financial exploitation, as discussed in this paper, such as restrictions or prohibitions on self-gifting by the agent, routine accountings delivered regardless of whether the principal demands one, and alignment of APS and law enforcement statutes to enhance coordination and efforts to aid older adults. An ounce of prevention in this area could keep older adults and their families whole, rather than relying on the courts to attempt to sort through complex transactions and order restitution, which may be impossible given how funds are spent once improperly taken from older adults. Although the POA can be a useful tool in estate planning and end-of-life planning, its misuse and abuse—including the large sums that have been stolen from older adults—cannot be overlooked and must be appropriately addressed.

194. Morgan & Thomas, *supra* note 8, at 35–36.