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THE USE AND MISUSE OF POWERS OF ATTORNEY

by

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I. Introduction

The use of powers of attorney for property as an estate planning tool and to resolve an individual's personal needs has increased since the early seventies. This increase is attributed, in part, to the efforts made by state legislatures to create "statutory form" powers of attorney that have become readily available to the general public. Further fueling their increased use is an aging population that is continually encouraged to embrace the durable power of attorney as a guardianship avoidance mechanism. As the availability, accessibility and use of statutory powers of attorney has increased, regrettably so has the number of reported incidents of financial abuse, leading law enforcement officials in one jurisdiction to refer to financial elder abuse as "The Crime of the '90s."¹ This paper briefly reviews the evolution of the statutory form power of attorney, features of the statutory form power of attorney that facilitate abuse, and concludes with some suggested legal remedies when abuse has been detected.

II. The Evolution of the Durable Power of Attorney

A power of attorney is an instrument in writing by which one person, commonly referred to as the principal, appoints another person as his or her agent and confers upon the agent the authority

to perform certain acts on behalf of the principal. The power of attorney itself is the writing that evidences the agent's authority to act for the principal.²

A. The Power of Attorney for Property at Common Law

Historically, powers of attorney for property were hand crafted by attorneys to meet the specific needs of the client who encountered the need for the services of an agent. The attorney generally drafted the power of attorney at the direction of the client being careful to give the agent only those powers necessary to carry out the client's, i.e. the principal's goals. In addition to drafting the power of attorney, it was common practice for the drafting attorney to supervise the execution of the document and while doing so subtly assess whether the client had the requisite mental capacity to understand the nature of the transaction and whether the principal's chosen agent was qualified to serve.³ Most likely, prior to the execution of the document, the drafting attorney forewarned the principal of the agent's potential misuse of his or her authority, followed by cautionary instructions that the agent's authority would lapse with the principal's incapacity, death or written revocation.⁴

B. The Statutory Power of Attorney Movement

A gradual movement away from the handcrafted power of attorney toward the creation of a statutory form of power of attorney began in 1964.⁵ This movement started with the National Conference of Commissioners on Uniform State Laws (the drafters of the Uniform Probate Code) when it approved the Model Special Power of Attorney for Small Property Interests Act. This model act was drafted in response to a perceived need to provide an inexpensive alternative to guardianship proceedings for persons who might be facing a disabling mental or physical condition.⁶ Two

special features of this act were that the power of attorney must be approved by a judge of a court of record and the agent's authority would not be invalidated by the subsequent incompetency of the principal.

Five years later, the drafters of the Uniform Probate Code (1969) included in the Code specific sections devoted to the creation of a power of attorney for property in statutory form that would not require court review. The UPC sections dealing with the proposed statutory form power advanced three new provisions that ran contrary to traditional common law agency principals: (1) that the form power of attorney be made "durable", i.e., the agent's authority be made to survive the incompetency of the principal; (2) that the death of the principal did not end the agent's authority unless and until the agent or the person with whom they were dealing had actual knowledge of the principal's death; and, (3) a provision allowing an attorney in fact to execute an affidavit to establish that he or she did not have knowledge of the principal's death for the purpose of disproving revocation.⁷

The National Conference of Commissioners on Uniform State Laws developed the Uniform Durable Power of Attorney Act in 1979. Although not substantively different from the statutory form proposed in the Uniform Probate Code (1969), the 1979 Uniform Durable Power of Attorney Act expressly permitted a principal to delay the grant of authority given the agent until the principal was disabled or incapacitated. This retained right is commonly referred to today as a "springing" power of attorney. Subsequent amendments to the Uniform Durable Power of Attorney Act in 1984 and 1987 added a provision that permitted a statutory form power of attorney to remain in full force and effect unless a specific date of termination was indicated.⁸ A further effort by the National Conference of Commissioners on Uniform State Laws produced the Uniform Statutory Form Power

of Attorney Act in 1991, which sanctioned the use of a uniform short form power of attorney.⁹

Collectively, these efforts encouraged all fifty states and the District of Columbia to enact some type of statute authorizing durable powers of attorney for property, although the enabling statutes and the form of a durable power of attorney for property varies widely among the states.

III. The Misuse of Durable Powers of Attorney

The Government Law Center (GLC) of the Albany Law School conducted a survey in 1993 directed at ascertaining the nature and extent of durable power of attorney abuse. This survey was distributed nationally to attorneys and social service providers who work with the elderly as well as to administrators and staff persons working in Area Agencies on Aging.¹⁰ Ninety-four percent of the 410 survey respondents reported that they believed that the incidence of abuse of durable powers of attorney occurs either occasionally or frequently.¹¹ When asked about first hand encounters with abuse, 66% of the 410 respondents had encountered some degree of durable power of attorney abuse.¹² Of the incidents of abuse described by the respondents, the highest level of abuse, some 64%, was committed by an immediate family member and 19% by other relatives. Longtime friends of the elderly accounted for 6% of the abuse, lawyers 3% and new acquaintances 7% of the abuse.¹³

Fifty-seven percent of the reported incidents of abuse of the durable power of attorney occurred while the principal was either still competent or had yet to be adjudicated incompetent. Thirty-five percent of the time the abuse occurred while the principal had lost capacity and 9% when the principal's capacity was questionable.¹⁴

Respondents further estimated that in 48% of the cases, approximately 75% or more of the principal's assets were exploited, in 19% of the cases 50% of the elder's assets were misused, in 12% approximately 25% of the assets were taken and in 14% of the situations reported less than

25%.¹⁵

IV. The Features of a Durable Power of Attorney that Facilitate Abuse

Although the GLC survey did not ask the survey respondents to identify the specific features of the durable power of attorney that they believe contribute to the abuse of the document, it focuses on the four features of the durable power of attorney as possible sources of abuse; (1) the durability of the document, (2) the wide availability and ease of execution of statutory short form power of attorney, (3) the protection from liability given to third parties to encourage its acceptance; and, (4) the introduction of the concept of a springing power of attorney.¹⁶

A. The Durable Feature

One of the principle goals of the power of attorney movement was to increase the usefulness of the document by providing by statute that the agent's authority survived the incapacity of the principal.¹⁷ The addition of this "durable" feature was suggested as a way to make a power of attorney for property an effective guardianship avoidance mechanism. While a laudable goal, the addition of this durable feature has stripped away the common law rule that an agent's authority terminated with the onset of the principal's incapacity. The common law rule was fostered by the long held belief that a continuation of the agency relationship under such circumstances was imprudent.¹⁸ With the development of the durable feature, the agent's authority continues during the period of time when the principal lacks the capacity to challenge the actions of the agent or to even recognize and understand the need for such a challenge.¹⁹

B. The Short Form Feature

A second feature of the durable power of attorney movement that has facilitated abuse is the

creation of the statutory “short form” power of attorney which has increased the public’s accessibility to the document.²⁰ Within the body of the standard form there appears a wash list of potential powers to be given an agent which are created by statute and described in short phrases such as “business operating transactions” and “insurance and annuity transactions.” What is not provided in the body of the short form is a detailed description of the scope of authority actually being given to the agent under each loosely described power. For example, without being provided with the full definition of the authority given an agent under the general power to conduct “insurance and annuity transactions,” does the principal fully understand that the agent is being given the authority to change the beneficiary designation in a contract of insurance or annuity?²¹

Furthermore, to ease execution of the statutory “short form,” it contains detailed instructions on how the document is to be executed, thereby minimizing the involvement or need for oversight by an attorney. Unfortunately, by minimizing or eliminating the participation of lawyers, the first line of protection for the principal has also been eliminated. Now, a statutory form power of attorney can be placed in front of an aging, ailing or disabled principal to sign without the protection of a lawyer to assess the competency of the principal, explain the scope of authority being given, and the risks associated with the durable feature.

Yet another short form feature that facilitates ease of execution but also makes the document susceptible to misuse is the method by which a principal selects the powers to be given the agent. Under the short form all thirteen (13) enumerated powers are automatically given to the agent unless the principal makes a deliberate effort to eliminate a power by crossing through the power to be withheld. This procedure presupposes that the principal knows what powers the agent needs to be given to carry out the specific tasks the principal wants the agent to undertake. Additionally, with the

absence of definitions of each power it presupposes that the principal knows to look for, how to find, and even understand the definitions set forth in the Probate Code. The trusting aspects of human nature coupled with a lack of attorney guidance allow the reasonable inference that none of the thirteen (13) powers will be struck through, thus often leaving an agent with far more authority than they should be entrusted with.

C. Third Party Acceptance

A third feature of the durable power of attorney that facilitates abuse by an agent are the statutory provisions that shield third parties from liability.²² This statutory feature was added to encourage the acceptance of the document by third parties, in particular financial institutions, who are always concerned that they may be transacting business with an agent who no longer has or who has never had the authority to act for the principal. While the addition of this feature has had the intended result of facilitating the ease of acceptance of the statutory durable power of attorney, it has also stripped the principal of his last line of available protection in the form of a wary third party, who is motivated by the risk of potential liability, to confirm the document's validity and whether or not the principal is even still alive. Remember, a third party is not liable to the principal under current statutory law so long as he relies in good faith on the agent's acts within the scope of the power of attorney.

D. The Springing Power

A fourth feature of the statutory durable power of attorney that encourages potential principal acceptance by providing a false sense of security and control is the concept of the "springing"

power.²³ This feature permits a principal to execute the power of attorney appointing an agent while simultaneously specifying in the document that the agent's authority is not effective until such time the principal suffers some type of disability or incapacity. Regrettably, this "springing" power of attorney provision offers a false sense of security for the hesitant principal by permitting him to include his own definition of incapacity or disability.²⁴ Hence, all the agent has to do is execute an affidavit that the defined condition of disability or incapacity exists and this affidavit stands as conclusive proof that the principal is disabled or incapacitated as defined by the power. Furthermore, once an agent exercises their authority under a springing power, the question then arises as to how a principal reclaims his right to make his own decisions when he is free of the subject disability or incapacity.

Collectively, these four features of the statutory durable power of attorney have had the intended result of facilitating the availability and use of powers of attorney for property by the general public. Unfortunately, with ease of execution has come the unintended consequence of increased abuse. While the GLC report does not provide specific case studies of the misuse of powers of attorney, a few cases drawn from the appellate courts shed light on the activities of some unscrupulous agents.²⁵

V. Some Cases of Misuse of an Agent's Authority

The reported cases of durable powers of attorney abuse that have reached the appellate courts paint a sad picture of blatant violations of trust. As reported in the GLC study, the principal abusers are immediate family members, although as some of the cases reveal, acquaintances and neighbors are active participants.

A. The Case of Three Loving Sons

Case No. 1:

Mr. Hayden Strum executed a durable power of attorney to his son, Gary Strum.²⁶ The powers given to his son thoroughly enabled him to manage his father's business and conduct his father's day to day affairs. These affairs included access to his father's real and personal property. Mr. Strum appointed his son as his agent on April 27, 1991 and revoked the power of attorney on September 6, 1991. Mr. Strum's son managed his father's business solely for his own benefit during this short five-month period. Gary Strum expended sums from his father's business accounts, converted and disposed of business assets for personal gain and caused the estate to suffer approximately \$66,000.00 in damages. Mr. Strum sued his son and a jury awarded him his actual damages plus \$35,000.00 in punitive damages and approximately \$21,000.00 in attorney fees.

Case No. 2:

Edward and Patricia Hagan each executed durable power of attorney forms naming their son Gerry as their agent.²⁷ Shortly after his appointment and utilizing their power of attorney, he procured a \$100,000.00 loan and secured it with a promissory note and trust deed on his parents' home. Subsequently, Gerry borrowed an additional \$95,000.00 from another individual and secured that loan with a note and trust deed which he signed as attorney-in-fact for his father. Mr. Hagan filed suit seeking a declaration that both promissory notes and trust deeds were unenforceable when he discovered the existence of the loans. The requested relief was granted.

Case No. 3:

Mr. Ernest Kotsch executed a durable power of attorney to his son when he was eighty-five years of age and in good health.²⁸ He had recently remarried after losing his wife of some forty-five

years. On October 25, 1990, Mr. Kotsch's son, acting under the power of attorney, created an irrevocable inter vivos trust to which he transferred \$700,000.00, representing the bulk of his father's assets. The trust instrument designated the son as the sole trustee and the grantor father, as an inter-vivos beneficiary. The trust named the son's three children as additional beneficiaries with the right to withdraw up to \$10,000.00 from principal and accumulated trust interest. The trust further provided for a testamentary deposition of the trust estate to the son (70%) and his three children (30%). The trust was made irrevocable. Mr. Kotsch sued to have the trust declared void and prevailed.

B. The Case of the Loving Caretaker

Mr. Lawrence White moved in with Ms. Clortis Roberts in January 1992 and lived with her until September 1992, some nine months.²⁹ Mr. White had been diagnosed with AIDS when he took up residency. He was also the beneficiary of a large estate, a fact known to his caretaker, Ms. Roberts. Mr. White executed a durable power of attorney appointing Ms. Roberts as his agent after moving in together. With Mr. White's power of attorney in hand, Ms. Roberts began spending Mr. White's inheritance on herself, at all times contending that the transfer of assets to herself were gifts, by the dying Mr. White. Mr. White's money ran out in September, 1992 and shortly thereafter Ms. Roberts ordered Mr. White from her home. Mr. White sued to recover his spent inheritance and the jury returned a verdict for Mr. White in the amount of \$55,000.00 plus \$180,000.00 in exemplary damages.

C. The Case of the Loving Neighbor

Mrs. Fambrough appointed her neighbor and close friend Mr. Krevatas as her agent under a

durable power of attorney.³⁰ Mrs. Fambrough changed her checking account to a survivorship account during a hospital stay the following month. The account was held jointly in the names of herself, one of her nieces, and her neighbor and agent, Mr. Krevatas. Thereafter, Mr. Krevatas used the power of attorney to transfer large sums of money from Mrs. Fambrough's other accounts that were without survivorship into the new survivorship account wherein he was a joint tenant. Mrs. Fambrough's survivorship account rapidly increased from an average balance of \$6,000.00 to the sum of \$120,000.00 at the time of Mrs. Fambrough's death. Mr. Krevatas, using the power of attorney, also changed Mrs. Fambrough's \$25,000.00 certificates of deposit into joint accounts with right of survivorship naming himself, Mrs. Fambrough's niece and Mrs. Fambrough as joint owners. After Mrs. Fambrough's death, a suit was filed by her personal representative which resulted in a verdict for the estate in the amount of \$77,000.00.

D. The Case of the Loving Husband and Daughter

Pauline Crider, suffering from Alzheimer's Disease, executed a durable power of attorney appointing her husband Robert Crider and their daughter Sherry Gutzler as co-agents.³¹ This was Mrs. Crider's second marriage and her daughter Sherry Gutzler was born to this marriage. Mr. Crider, acting under this power of attorney, closed out several of his wife's bank accounts and transferred the funds to another account in his and Sherry's names as joint tenants. Sherry also used the durable power of attorney to transfer by deed Mr. and Mrs. Crider's marital property, including their homestead, to herself and Mr. Crider. Ostensibly, these transfers were made in an effort to artificially impoverish Mrs. Crider so that she would qualify for public nursing home assistance through Medicaid.

Mr. Crider and his daughter filed a joint application to be appointed guardian of the person and estate of Mrs. Crider after completing multiple asset transfers. A competing application was filed by James Deason, Mrs. Crider's son from her first marriage. The court appointed Mr. Crider and his daughter as co-guardians of the person of Mrs. Crider and Mrs. Crider's son, James, was appointed guardian of her estate.

Subsequently, James, as guardian of the estate, brought a proceeding to locate his mother's assets. He discovered that her assets had been used by Mr. Crider to purchase three vehicles, a Mercury Cougar, a Plymouth Voyager, a GMC truck, plus a wide-screen television and a satellite television system. James also learned that the transferred assets had been used by Mr. Crider to buy his half sister, Sherry, a satellite television system and a swimming pool. Additionally, James learned that his half sister had used \$11,000.00 of his mother's estate to pay off her credit cards; had taken a \$5,000.00 Florida vacation; and, squandered \$29,000.00 on her general cost of living expenses. Sherry Gutzler was on public welfare during this entire period of time. This tragedy was resolved by a court order setting aside the transfer of the ward's real property and bank accounts and a money judgment against her daughter, Sherry Gutzler.

VI. The Nature of the Agency Relationship

Due to the ease with which the principal-agent relationship is created through the availability of statutory form durable powers of attorney, the parties entering into this agency relationship, more specifically the agent, are unaware of the strict rules of conduct that govern the agency relationship, the breach of which may serve as the basis for the imposition of liability. A basic understanding of the fiduciary nature of this relationship is essential to understanding the various courses of conduct

available to remedy its breach.

A. The Fiduciary Nature of the Relationship

The individual appointed under a statutory form durable power of attorney by accepting or acting under the appointment assumes the fiduciary and other legal responsibility of an agent.³² The term “fiduciary” is derived from the civil law and contemplates fair dealing and good faith, rather than a legal obligation as the basis of the transaction.³³

Upon appointment, the agent, as a fiduciary, owes a duty of loyalty, good faith, strict integrity, fair and honest dealing, and strict accountability to his or her principal.³⁴ Underlying this relationship is the general prohibition against the fiduciary using the relationship to benefit his or her personal interest, except with the full knowledge and consent of the principal.³⁵ Even when the exercise of an agent’s duties is placed in the agent’s absolute discretion, the agent still must use good faith and act reasonably in the discharge of his discretion, or he can be held liable to the principal for the resulting damages.³⁶

B. Presumptions of Fraud, Unfairness or Undue Influence

In light of the fiduciary nature of this relationship, whenever an agent receives a benefit or makes a profit from transactions with his principal there arises a legal presumption of fraud, unfairness or undue influence.³⁷ It then becomes the burden of the profiting agent to show that the transactions were fair, honest, equitable and most importantly, benefitted the principal³⁸ This is an extremely difficult burden of proof and it is a burden of proof that agents at times fail to understand that they must meet at the time of trial.³⁹

C. Breach of a Formal Fiduciary Duty Equals Constructive Fraud

When an agent breaches his fiduciary duty to his principal this act amounts to a fraud upon the principal.⁴⁰ This type of fraud is considered “constructive fraud” or “legal fraud” not “actual” fraud. Whereas actual fraud involves dishonesty of purpose or intent to deceive, constructive fraud is the breach of some legal or equitable duty, which irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.⁴¹

D. Breach of a Formal Confidential Relationship Equals Constructive Fraud

In addition to a formal fiduciary relationship, arising from the execution of a statutory form durable power of attorney, an informal confidential relationship may exist between the same principal and agent giving rise to an informal fiduciary duty. Such an informal fiduciary duty may arise from a moral, social, domestic or purely personal relationship of trust and confidence.⁴² A confidential relationship is considered to exist when influence has been acquired and abused, and confidence has been reposed and betrayed.⁴³

Where a fiduciary duty arises based on an informal confidential relationship, and an individual obtains substantial benefits as a result of trust reposed in him or her, under such circumstances, equity recognizes that the beneficiary in the transactions is a fiduciary and under an obligation to establish the fairness of the transactions.⁴⁴ When this relationship is established, the same claims that can be asserted for the breach of a formal fiduciary duty arising under a power of attorney, may be asserted relative to a breach of duty arising from this informal confidential relationship.

E. Statute of Limitations

As is often the case, the principal may not discover the misuse of the agent's authority until well after the abuse has occurred raising a question of limitations. While it is well settled that fraud begins to run from the time the fraud is discovered or, with reasonable diligence, could have been discovered, the existence of a fiduciary relationship affects the application of this rule.⁴⁵ The existence of the fiduciary relationship is one of the circumstances to be considered in determining whether the fraud could have been detected by the exercise of reasonable diligence because it may excuse the defrauded principal from taking action that would be required in an arm's length transaction or from making as prompt or searching an investigation as might otherwise be expected.⁴⁶ While the burden to exercise reasonable diligence is not negated by the existence of a confidential relationship, the trust and confidence involved in the relationship are evidentiary matters bearing on the issue of whether the defrauded principal acted as would a person of ordinary prudence in discovering the fraud.⁴⁷ The existence of the fiduciary relationship may eliminate any obligation on the part of the defrauded party to inquire about the truth of the representations made by the agent and may even excuse the principal's failure to read documents provided by the agent for his or her execution.⁴⁸

VII. Strategies for Dealing with the Misuse of a Statutory Form Power of Attorney

There are a number of case strategies that may be employed to deal with misuse of a statutory form power of attorney. The case strategy employed will in large measure be dictated by the timing of the abuse relative to the principal's current state of competency.

A. Case Strategies for the Competent Principal

When a principal is still competent and discovers the abuse of a power of attorney, the principal should immediately revoke the power of attorney, per the terms of the original instrument. Keeping in mind that revocation does not terminate the agency as to the agent or other person who without actual knowledge of the termination of the power by revocation continues to act in good faith or reliance under the power.⁴⁹ Suit should then be filed for breach of fiduciary duty seeking a set aside of any unauthorized transactions as well as damages. Injunctive relief should also be requested to enjoin further acts by the agent in the name of the principal. Injunctive relief will give the principal time to discover the names of the third parties the agent has been transacting business with so these third parties can be given actual notice of the revocation of the agent's authority.⁵⁰ The principal should also consider asserting civil claims for larceny, embezzlement and defalcation should the facts warrant such claims.⁵¹

While the focus of this litigation will be on the act and conduct of the agent, the principal should not ignore the possibility of third party liability. Although a third party who relies in good faith on the acts of an agent in general is not liable to the principal for the acts of the agent, a third party does have potential liability if the agent was operating outside the scope of the agent's authority and the third party carried out the agent's instructions.⁵² This may require further pleadings for declaratory relief.

B. Case Strategies Where the Principal is Incapacitated

Given the fact that the statutory form power of attorney is now durable, the agent's authority surviving the incapacity of the principal, intervention by a third party may be necessary to curtail misuse by an agent.⁵³ The quickest way for a third party to intervene is by commencing a temporary

guardianship proceeding over the principal's estate.⁵⁴ This application should contain a request that the court issue an order abating or voiding all durable powers of attorney for property executed in the name of the principal and expressly identifying the power of attorney and agent in question.⁵⁵ This application should also request an order that the agent deliver to the guardian all assets of the Ward's estate and an accounting.⁵⁶ A temporary guardian should also look closely at the principal's medical history to determine if in fact the principal ever had the requisite mental capacity to execute the original power of attorney. Depending upon the circumstances surrounding the execution of the power of attorney, the temporary guardian may also be able to make a case for undue influence in the execution of the document.⁵⁷ A finding of either the absence of contractual capacity or the existence of undue influence may serve as a basis for voiding a transaction conducted by the agent.

C. Case Strategies for the Personal Representative of the Principal's Estate and Its Beneficiaries

Should the principal die before the misdeeds of the agent are discovered, the personal representative for a decedent's estate may assert the same claims that the principal or the principal's guardian could have pursued. A personal representative is at liberty to scrutinize each transaction conducted by the agent to determine whether or not the agent exceeded the scope of his authority. The personal representative should seek declaratory relief coupled with action to set aside the transaction⁵⁸ when he believes that the decedent's agent exceeded the scope of his or her authority.

Beneficiaries or heirs of the principal's estate may also assert a claim against the former agent. A beneficiary may claim that the agent's conduct constituted tortious interference with inheritance rights⁵⁹ or even a possible claim for tortious interference with an inheritance expectancy

vis-à-vis a non-probate asset such as a survivorship bank account.⁶⁰

D. Case Strategy Using Adult Protective Services

If the suspected incident of abuse of a durable power of attorney for property involves an individual 65 years of age or older, the incident should be reported to the Adult Protective Services Division (APS) of the Texas Department of Protective and Regulatory Services which is responsible for investigating abuse, exploitation and neglect of elderly persons.⁶¹ Chapter 48, Human Resources, defines “exploitation” as:

“... the illegal or improper act or process of a caretaker, family member or other individual who has an ongoing relationship with the elderly ... person using the resources of the elderly ... person for monetary or personal benefit, profit, or gain without the informed consent of the elderly ... person.”⁶²

This definition would appear to reach incidents of abuse involving the misuse of powers of attorney.

APS can investigate and seek the intervention of the appropriate court with probate jurisdiction to assist in carrying out its responsibilities when the authority of the agency is invoked. The agency can secure court orders to gain access to any and all records or documents necessary to carry out its investigation of financial exploitation.⁶³

E. Case Strategy Using Local Law Enforcement

It should not be overlooked that Texas Penal Code §22.04(a) provides that a person commits an offense if they “... intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, cause to a ... elderly individual, or disabled

individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury.” This penal code section further provides that an “omission” that causes any of the afore described constitutes an offense if the person has (1) a legal or statutory duty to act; or the person has (2) assumed care, custody or control of an elderly individual or disable person.⁶⁴ An “elderly” person for the purpose of this code section is anyone 65 years of age and older.⁶⁵ A “disabled” individual “... means a person older than 14 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect himself from harm or to provide food, shelter, or medical care for himself.”⁶⁶ Further, under this same penal code section a person is considered to have assumed the care, custody, or control of an elderly or disable person if by his or her “... acts, words or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter and medical care ... for an elderly or disabled individual.”⁶⁷

It would appear that in light of the definition of “assumption” of care, custody or control, a strong case could be made that an agent’s use of a durable statutory power of attorney for property constitutes an act of assumption of care, custody or control that could bring this penal code section to bear on the agent if the misuse of his or her authority caused bodily injury, serious bodily injury, serious mental deficiency or impairment to an elderly or disabled person. Considering the fact that most elderly or disabled individuals are not in a position to recoup their financial losses, it is conceivable that a financial loss due to the misuse of a power of attorney might dramatically alter the lifestyle of an elderly or disabled person causing a physical decline or the onset of depression which can cause serious mental deficiency, impairment or injury within the meaning of the Texas Penal

Code §22.04(a).

VIII. Recommendations

There is no simple solution to curtailing the misuse of the statutory form power of attorney so long as the basic human element of trust is involved and the principal abusers are family members. Perhaps as a first step an effort should be made to improve the method by which statistics on elder abuse are reported and recorded so that financial abuse through a power of attorney or other means can be better documented. Once such a system of reporting is in place, it is possible that the statistics will reveal what other states have already learned, that financial abuse of the elderly is a far more serious problem than previously understood.⁶⁸ There are steps that can be taken in an effort to control misuse without waiting on the statistics.

A. Modifications to the Statutory Form

1. Witness Requirement. The same value placed on having two attesting witnesses to a will should be applied to statutory form durable powers of attorney for property. If it is so important to have witnesses to a document that disposes of ones' property following death, why is it less important to have two attesting witnesses to a document that can be used to dispose of ones' property while still living! The form should be modified to require two attesting witnesses.
2. Accounting Mechanism. Tex. Prob. Code Ann. §491(8) states that an agent appointed under the statutory form is to keep appropriate records. Why not draft into the form a specific reporting requirement and designate a person to be referred to as

an “agent for accounting” to receive such reports at the end of a stipulated period.

For example, a paragraph could be added that reads as follows:

“Upon my incapacity, as defined under this power, my agent is to provide an accounting of my property taken into his or her possession or control to my duly appointed agent for accounting on a monthly basis. I hereby appoint _____ as my “agent for accounting.” I further authorize my “agent for accounting” to file suit to enforce this accounting requirement and to set aside or void this power of attorney should my agent fail to provide the required accounting or should the monthly accounting reflect misuse of my agent’s authority.”

3. Disclosure Statement. Professor Stanley M. Johanson proposes that a “disclosure statement” similar to that required for the execution of durable powers of attorney for health care be made part of the statutory form in order to better alert the principal as to the extraordinary power they are giving the agent. This form would require the signature of the principal before the power of attorney is executed.⁶⁹
4. Warning Statement for Agent. Perhaps at the same time the principal is signing Professor Johanson’s proposed disclosure statement, the agent should sign some type of “warning statement.” This statement should advise the agent of the fiduciary nature of their appointment, the restrictions on self-dealing along with a warning that

the misuse of the power of attorney may constitute a violation of Penal Code § 22.04(a).

B. The California Remedy

The State of California, in 1992, recognizing that its adult protection services program was being overwhelmed with cases of elder abuse, re-titled its adult protection services act the “Elder Abuse and Dependent Adult Civil Protection Act” (EADACPA) and amended the statute to permit the enforcement of the states elder abuse statute by private attorneys to encourage private civil actions. This statute provides that where it is proven by clear and convincing evidence that a defendant is liable for fiduciary abuse and the defendant has been guilty of recklessness, oppression, fraud or malice in the commission of this abuse, a court shall award the plaintiff reasonable attorney fees and costs.⁷⁰ The term “cost” includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim under this statute. “Financial abuse” is defined as “...a situation in which any person who has the care or custody of or who stands in a position of trust to, an elder or dependent adult, takes, secretes or appropriates their money or property, to any use or purposes not in the due and lawful execution of his or her trust.”⁷¹ Because the definition of fiduciary abuse includes anyone who stands in a position of trust, the civil remedies available under the act are applicable to causes of action for fraud, constructive fraud, conversion and even unfair business practices when the abuse is evidenced in a trust relationship with the elder.

CONCLUSION

The national effort to make powers of attorney more readily available to the general public through features that ease access and execution has left future principals more vulnerable than ever to potential abuse by unscrupulous agents. This is particularly true for members of the aging

population who have embraced this document as a guardianship avoidance mechanism. As the morality of an agent cannot be legislated, a better effort needs to be made to educate principals as to the risk associated with the appointment of “loving children” and others as agents. Likewise, agents need to be better informed of the high standards of accountability and fair dealings underpinning the fiduciary relationship and the severe penalties associated with any breach of duty arising from acts of self dealing or acts which exceed the scope of their authority. Unfortunately, with statutory forms designed to minimize the involvement of lawyers in the execution of these instruments, this educational effort will have to come through greater enforcement efforts in the courts. This effort will only succeed with better knowledge of the existing strategies available for remedying abuses and with the adoption of or modification of existing civil and criminal remedies.

Endnotes

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1. “NAELA News.” National Academy of Elder Law Attorneys, Inc., February 1999, 14-15.
 2. 3 Tex.Jur.2d §22-59; *Olive-Sternenberg Lumber Co. v. Gordon*, 143 S.W.2d 694,698 (Tex.Civ.App.--Beaumont 1940, no writ).
 3. As a power of attorney is a contract, at the time of execution the principal must demonstrate “contractual capacity.” In other words the principal “...must be in possession of sufficient mind and memory to understand the nature and effect of their act in executing the contract.” *Haile v. Holtzclaw*, 400 S.W.2d 603,612 (Tex.Civ.App.--Amarillo 1966, rev. on other grounds, 414 S.W.2d 916); *Daugherty v. McDonald*, 407 S.W.2d 954 (Tex.Civ.App.--Fort Worth 1966, no writ).
 4. At common law the authority of an agent terminated as a matter of law by the insanity or

incapacity of the principal even where not formally adjudicated as such. This doctrine was based on the right of the principal to supervise the agency relationship. *Jensen v. Kisro*, 547 S.W.2d 65 (Tex.Civ.App.--Houston [1st Dist.] 1977, reh'g denied); 561 S.W.2d 216.

5. This history is drawn from the Government Law Center of the Albany Law School, "Abuse and the Durable Power of Attorney: Options for Reform," March 1994.

6. *Id.* at 12-13.

7. *Id.* at 13-14.

8. *Id.* at 14-16.

9. *Id.* at 16-17.

10. Gov't Law Center of Albany Law School, *supra* note 4 at 28. Approximately seven thousand surveys were disseminated with 410 surveys returned and a majority (49%) of which came from attorneys.

11. Gov't Law Center of Albany Law School, *supra* note 4 at 29.

12. Gov't Law Center of Albany Law School, *supra* note 4 at 37.

13. Gov't Law Center of Albany Law School, *supra* note 4 at 39.

14. Gov't Law Center of Albany Law School, *supra* note 4 at 39.

15. Gov't Law Center of Albany Law School, *supra* note 4 at 39.

16. Gov't Law Center of Albany Law School, *supra* note 4 at 18-25.

17. The Texas legislature introduced the durable power of attorney feature in Texas Probate Code §36A on January 1, 1972. Thereafter, §36A was amended in 1989 and on September 1, 1993 with the enactment of the Durable Power of Attorney Act (the "Act") set forth under Texas Probate Code §§481-506.

18. *Jensen*, 561 S.W.2d at 216.

19. Tex. Prob. Code Ann. §484. Professor Stanley M. Johanson recommends that a client should be required to sign a disclosure statement similar to the disclosure statement a client must sign at the time they execute a durable power of attorney for health care. Professor Johanson's suggested disclosure statement appears in Johanson's Texas Probate Code Annotated, 1998 edition at 414. These authors suggest that this excellent disclosure statement be further amended to include a warning that the authority granted to the agent may be exercised during periods of disability or incapacity.

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20. Tex. Prob. Code Ann. §490 sets forth the statutory short form.
21. Tex. Prob. Code Ann. §498(10).
22. Tex. Prob. Code Ann. §490(e) provides that “when a durable power of attorney is used, a third party who relies in good faith on the acts of an attorney in fact or agent within the scope of the power of attorney is not liable to the principal.” Tex. Prob. Code Ann. §490(a) further provides in the body of the statutory form the following acknowledgment by the principal:
- “I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.
23. Tex. Prob. Code Ann. §490(a), under paragraph “B” of the statutory form a principal is given the option of executing a “springing power.”
24. Tex. Prob. Code Ann. §487(b). The better practice to follow when a springing power is elected is to omit a definition of incapacity or disability to trigger the protection of a physician’s evaluation provided for under Tex. Prob. Code Ann. §490(a), paragraph B of the statutory form. Hence, the principal will be considered disabled or incapacitated for the purpose of the power of attorney if a physician certifies in writing upon a physician’s medical exam that the principal is mentally incapable of managing his financial affairs.
25. No agency in the State of Texas keeps statistics on elder abuse arising from the use of a power of attorney.
26. *Strum v. Strum*, 845 S.W.2d 407 (Tex.App.--Fort Worth 1992, writ refused).
27. *Hagan v. Hagan*, 140 Or.Ct.App. 393, 915 P.2d 435 (Ct. of Appeals of Oregon 1996).
28. *Kotsch v. Kotsch*, 608 So.2d 879 (Fla.2d-DCA 1992).
29. *Roberts v. White*, 1996 WL 385056 (Tex.App.--Houston [1st Dist.]).
30. *Krevatas v. Wright*, 518 So.2d 435 (Fla.1st-DCA 1988).
31. *Deason v. Gutzler*, 251 Ill. App. 3d 630, 622 N.E.2d 1276 (Appellate Court of Illinois, Fifth District 1993).
32. *Sassen v. Tanglegrove Townhouse Condominium Ass’n.*, 877 S.W.2d 489,492 (Tex.App.--Texarkana 1994, writ ref’d). Tex. Prob. Ann. §490, the statutory form contains this very warning.

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33. *Texas Bank and Trust Co. V. Moore*, 595 S.W.2d 502,507 (Tex. 1980). The term induces those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations arising by a power of attorney.
34. *Kinzbach Tool Co. V. Corbett-Wallace Corp.* 135 Tex. 565, 160 S.W.2d 509, 512-13 (1942).
35. *Hawthorne v. Guenther*, 917 S.W.2d 924, 934 (Tex.App.--Beaumont 1996, writ denied).
36. *Sassen*, 877 S.W.2d at 492.
37. *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980); *Evans v. First Nat'l Bank of Bellville*, 946 S.W.2d 367, 379 (Tex.App.--Houston [14th Dist.] 1997, writ denied).
38. *Russell v. Campbell*, 725 S.W.2d at 745; *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980).
39. *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980).
40. *Russell v. Truitt*, 554 S.W.2d 948, 951 (Tex.Civ.App.--Fort Worth 1978, writ ref'd n.r.e.); See *Douglas v. Aztec Pet. Corp.*, 695 S.W.2d 312, 318 (Tex.App.--Tyler 1985, no writ).
41. *Tuttlebee v. Tuttlebee*, 702 S.W.2d 253 (Tex.App.--Corpus Christi 1985, no writ); *Bado Equip. v. Bethlehem Steel*, 814 S.W.2d 464, 475 (Tex.App.--Houston [14th Dist.] 1991, no writ); *Greater S.W. Off. Park v. Commerce Bank*, 786 S.W.2d 386, 391 (Tex.App.--Houston [1st Dist.] 1990, writ denied).
42. *Associated Indium. Corp. v. Cat Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998).
43. *Crim Truck & Tractor Co. v. Navistar Int'l. Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992).
44. See *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502, 507-509 (Tex. 1980); *Evans v. First Nat'l Bank of Bellville*, 946 S.W.2d 367, 379 (Tex.App.--Houston [14th Dist.] 1997, writ denied).
45. *Courseview, Inc. v. Phillips Petroleum Co.*, 158 Tex. 397, 312 S.W.2d 197 (1957).
46. *Russell v. Campbell*, 725 S.W.2d 739 (Tex.App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.).
47. *Field Measurement Service, Inc. v. Ives*, 609 S.W.2d 615 (Tex.Civ.App.--Corpus Christi 1980, writ ref'd n.r.e.).

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48. *Kirby v. Cruce*, 688 S.W.2d 161 (Tex.App.--Dallas 1985, writ ref'd n.r.e.); *Courseview, Inc. v. Phillips Petroleum Co.*, 158 Tex. 397, 312 S.W.2d 197 (1957).
49. Tex. Prob. Code Ann. §486(a).
50. Tex. Prob. Code Ann. §490. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation.
51. *Stum v. Stum*, 845 S.W.2d 407 (Tex.App.--Fort Worth 1992, writ refused).
Larceny occurs when an agent conveys property to themselves thereby depriving the principal of title to property despite demand by the principal that the property be returned. Embezzlement occurs when an agent misapplies fiduciary property contrary to an agreement between the agent and the principal. Defalcation occurs when an agent fails to properly account for funds held in their fiduciary capacity.
52. Tex. Prob. Code Ann. §487(e).
53. Can an incompetent principal revoke a statutory durable power of attorney? Tex. Prob. Code Ann. §481-506 does not address this issue. Interestingly, a principal who appoints an agent under the Durable Power of Attorney for Health Care Act may revoke the agent's authority whether the principal is mentally incompetent or not. CPRC §135.005.
54. Tex. Prob. Code Ann. §642. Any person has the right to commence any guardianship proceeding.
55. Tex. Prob. Code Ann. §485 provides that upon the appointment of a guardian for the estate of the principal, the powers of the attorney in fact or agent terminate on qualification of the guardian.
56. Tex. Prob. Code Ann. §485 provides that "an attorney in fact or agent shall deliver to the guardian of the estate all assets of the estate of the ward in the attorney's or the agent's possession and shall account to the guardian of the estate as the attorney or agent would to the principal had the principal terminated his powers."
57. A case for undue influence requires proof of (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the principal at the time of the execution of the power of attorney; (3) the execution of the power of attorney which the principal would not have executed but for such influence. *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex. 1963).
58. The terms of a power of attorney are strictly construed to limit an attorney in fact's authority. *Gouldy v. Mercalf*, 12 S.W. 830, 831 (Tex. 1889); *First Nat'l Bank in Dallas v. Kinabrew*, 589 S.W.2d 137, 145 (Tex.Civ.App.--Tyler 1979, writ ref'd n.r.e.).
59. *King v. Acker*, 725 S.W.2d 750 (Tex.App.-Houston [1st Dist.] 1987, no writ). A cause of

action for tortious interference exists where there is intentional interference with respect to a prospective inheritance. In *King*, the decedent's wife transferred stock to herself using a forged power of attorney and filed an application to probate a forged will.

60. *Neill v. Yett*, 746 S.W.2d 32 (Tex.App.--Austin 1988, writ den'd).

61. An individual who files a report with APS is immune from civil or criminal liability unless the person acted in bad faith or with malicious purpose. HRC 48.039(a).

62. HRC 48.002(3).

63. HRC 48.0385(a).

64. Tex. Penal Code §22.04(b)(1),(2).

65. Tex. Penal Code §22.04(c)(2).

66. Tex. Penal Code §22.04(c)(3).

67. Tex. Penal Code §22.04(d).

68. "NAELA News." National Academy of Elder Law Attorneys, Inc., February 1999, 14-15 of the 15,000 confirmed cases of elder abuse in California in 1995, nineteen percent (19%) involved financial abuse.

69. Johanson's Texas Probate Code Annotated (1998), p. 384

Disclosure Statement

Information Concerning Statutory Durable
Power of Attorney for Property Transactions
For Mary Q. Client

THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. Except for the powers that you have crossed out, you are authorizing the person named as your agent (attorney-in-fact) full legal power and authority to act on your behalf by taking any and all actions relating to the indicated transactions. Accordingly, the person you appoint as agent should be someone you trust completely. If, for example, you give your agent the power to handle real property transactions on your behalf, your agent will be able to bind you on all of the actions set out in §492 of the Texas Probate Code. A copy of the relevant Texas Probate Code provisions, containing all of the powers that you can incorporate by reference into your power of appointment, is attached hereto. In deciding whether you want your agent to have a particular power, YOU SHOULD READ THE CORRESPONDING STATUTORY PROVISION. If you have any questions about this document, or about any of the statutory powers, you should address these

questions to a member of the [...] law firm, or to some other attorney of your choice. **YOU MAY REVOKE THIS POWER OF ATTORNEY AT ANY TIME IF YOU WISH TO DO SO.**

You may wish to designate an alternate agent in the event that your agent is unwilling, unable, or ineligible to act as your agent. Any alternate agent you designate will have the same authority to make property decisions for you. Even after you have signed this document, you have the right to make property decisions for yourself as long as you are able to do so.

This document does not authorize anyone to make medical or health care decisions for you. Such decisions can be made pursuant to a Health Care Power of Attorney, if you have executed one.

Sign below to acknowledge your receipt of this disclosure statement prior to your execution of the Statutory Durable Power of Attorney, to affirm that **YOU HAVE BEEN GIVEN THE OPPORTUNITY (1) TO READ THE ACCTACHED STATUTORY POWERS and (2) TO ASK ABOUT THE SCOPE OF ANY POWERS THAT YOU DO NOT FULLY UNDERSTAND.**

Mary Q. Client

70. California Code Annotated, Chapter 11, The Elder Abuse and Dependent Adult Civil Protection Act, Art. 8.5 Civil Actions For Abuse of Elderly or Dependent Adults, §15657.

71. California Code Annotated, Welfare and Institutions, Code Section 15610.30