

## NOTES

# THE NOT-SO-GOLDEN YEARS: POWER OF ATTORNEY, ELDER ABUSE, AND WHY OUR LAWS ARE FAILING A VULNERABLE POPULATION

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*Note to Retirees: Beware the Family*<sup>1</sup>

### INTRODUCTION

Abuse of the elderly is an escalating problem, due in part to the rising number of elderly people.<sup>2</sup> Like child abuse, exploitation of the elderly is difficult to identify and prosecute.<sup>3</sup> As a demographic, the elderly share characteristics that make them particularly susceptible to abuse.<sup>4</sup> The elder population, for example, is largely plagued by impaired hearing and vision, “slowed motor and mental responses, decreased coordination,”

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<sup>1</sup> Jeff D. Opdyke, *Intimate Betrayal: When the Elderly Are Robbed by Their Family Members*, WALL ST. J., Aug. 30, 2006, at D1.

<sup>2</sup> See *Boyce v. Fernandes*, 77 F.3d 946, 948 (7th Cir. 1996); see also *In re Marshall*, No. 500095, 2006 WL 2546192, at \*5 (N.Y. Sup. Ct. Aug. 29, 2006) (“[Elder abuse] is a matter of increasingly public concern as the demographics promise a greater percentage of older Americans in the next thirty years.”); Jane Gross, *New Techniques Used to Fight Elder Abuse*, PITTSBURGH POST-GAZETTE, Oct. 1, 2006, at A7 (stating that “the fastest growing segment of the American population” are those who are 85 years of age and older); Mary Laney, *Many Steps Can Be Taken to Stop Abuse of the Elderly*, CHI. SUN-TIMES, Aug. 21, 2006, at 35 (“Through life-sustaining medical procedures, new medicines and better health care, people are living longer than ever before.”).

<sup>3</sup> See *Boyce*, 77 F.3d at 948; see also Laney, *supra* note 2 (reminding that, like child abuse, elder abuse “is committed against those least able to defend themselves [and] is often a hidden problem”).

<sup>4</sup> Robert A. Polisky, *Criminalizing Physical and Emotional Elder Abuse*, 3 ELDER L.J. 377, 379 (1995).

and other physical, mental, and emotional impairments.<sup>5</sup> Due to such deterioration, the elderly are often largely dependent on caregivers, whether it be family members or employed help.<sup>6</sup> Alternatively, many grow isolated from friends and family, becoming lonely and more susceptible to fraudulent solicitation practices.<sup>7</sup>

Abuse of the elderly cuts across class lines and economic strata.<sup>8</sup> According to congressional findings, somewhere between 500,000 and 5 million elderly persons are abused, neglected, or exploited each year—with most instances going unreported.<sup>9</sup> In a 2004 survey prepared for the National Center on Elder Abuse, reported cases of such abuse increased nearly 20 percent from 2000.<sup>10</sup> States reported that 65.7 percent of elder abuse victims were female.<sup>11</sup> Of the victims aged 60 years and older, 42.8 percent were 80 years of age and older.<sup>12</sup> The vast majority of elder abuse reports, 89.3 percent, occurred in domestic settings.<sup>13</sup> The most common relationship of victims to alleged perpetrators was parent/child and other family members.<sup>14</sup> The fact that the elderly population, which generally includes those aged 65 years and older, controls 70 percent of the nation's wealth makes them tempting targets for the unscrupulous.<sup>15</sup> Perhaps most

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<sup>5</sup> *Id.* at 379–80.

<sup>6</sup> *Id.* at 380.

<sup>7</sup> For example, in *People v. Hasslinger*, 4 A.D.3d 564, 564, 771 N.Y.S.2d 589, 590 (3d Dep't 2004), the court affirmed the defendant's conviction for conspiracy, grand larceny, and money laundering, in connection with his role in stealing over one million dollars from an elderly woman who suffered from Alzheimer's disease and dementia. The defendant, aware of the victim's diminished mental capacity and hefty wealth, masterminded a plan that began with charging her exorbitant fees for unneeded home repairs. *Id.* After fraudulently obtaining the woman's power of attorney, he liquidated all of her bank accounts, stocks, and bonds, and established a check cashing scheme to cover his trail. *Id.*

<sup>8</sup> *Exploitation of Seniors: Cong. Testimony Before the S. Special Comm. on Aging*, 109th Cong. (2006) (statement of Ira Salzman, attorney for Brooke Astor's grandson).

<sup>9</sup> *Id.*; Opdyke, *supra* note 1 (“By some estimates, as many as five million senior citizens are victimized each year.”).

<sup>10</sup> NAT'L CTR. ON ELDER ABUSE, THE 2004 SURVEY OF STATE ADULT PROTECTIVE SERVICES: ABUSE OF ADULTS 60 YEARS OF AGE AND OLDER 5 (2006), <http://www.nasua.org/pdf/2-14-06%20FINAL%2060+REPORT.pdf>.

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Gross, *supra* note 2.

disturbing is that victims of elder abuse, neglect, and exploitation are three times more likely to die at an earlier age than elders who were not victims of abuse.<sup>16</sup>

Financial exploitation of the elderly is the third most common category—and fastest growing form—of elder abuse.<sup>17</sup> Such exploitation is defined as the illegal or improper use of an older person's funds, property, or assets.<sup>18</sup> Specifically, financial abuse is usually “manifested as: (1) theft, including burglary and robbery; (2) fraud, including homeowner, lottery, and telemarketing scams; (3) intentional misuse of assets by a fiduciary or caregiver; [and] (4) negligent use of assets, such as mistakenly depleting assets to become Medicaid eligible.”<sup>19</sup> For example, a daughter uses her power of attorney over Mom's bank accounts to withdraw her life savings; a niece coerces her elderly aunt to designate her as the beneficiary of her life insurance policy; a nephew dupes an elderly uncle into signing a power of attorney and the nephew makes thousands of dollars worth of “gifts” to himself each month from the uncle; a son caring for Dad pays for substandard care to preserve assets he stands to inherit.

The preceding scenario is analogous to a recent happening that has splashed philanthropist Brooke Astor's picture across American news media—and left many wondering how a legendary New York humanitarian “could move from the highest social circles of Park Avenue to squalor.”<sup>20</sup> In a July 2006 petition filed in New York State Supreme Court, Astor's grandson accused his father of neglecting Astor's care while enriching himself with millions from the former socialite's forty-five million dollar fortune.<sup>21</sup> The grandson, Phillip Marshall,

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<sup>16</sup> Elder Justice Act, S. 2010, 109th Cong. § 2(4) (2005).

<sup>17</sup> NAT'L CTR. ON ELDER ABUSE, *supra* note 10, at 5–6 (stating that 20.8 percent of reported abuse was financial exploitation, making it the third most common category); *see also* Opdyke, *supra* note 1. Self-neglect was the most common category of investigated reports (26.7 percent), followed by caregiver neglect (23.7 percent). NAT'L CTR. ON ELDER ABUSE, *supra* note 10, at 5.

<sup>18</sup> NAT'L CTR. ON ELDER ABUSE, *supra* note 10, at 10.

<sup>19</sup> Charles Pratt, *Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California*, 40 CAL. W. L. REV. 195, 196 (2003).

<sup>20</sup> *See Good Morning America* (ABC television broadcast July 27, 2006).

<sup>21</sup> *See* Serge F. Kovaleski, *Judge Orders Astor Legal Papers Turned Over for Tests on Writing*, N.Y. TIMES, Sept. 26, 2006, at B5. The transactions being disputed by the grandson totaled approximately eighteen million dollars. Justice Stackhouse, *Brooke Astor's Temporary Property Custodian Denied Expanded Powers to Conduct Discovery*, N.Y. L.J., Sept. 28, 2006, at 30. They included a nine-million-dollar

filed, by order to show cause, “a petition seeking to remove his father . . . , Anthony Marshall, as primary caregiver of Astor, and to void the power of attorney over her finances and health care proxy he obtained in 2004.”<sup>22</sup> The lawsuit included allegations that his father, Astor’s attorney-in-fact, failed to fill her prescriptions, curbed her physical therapy sessions, and reduced the woman—whose lifetime charitable donations totaled almost two-hundred million dollars—to living almost in penury.<sup>23</sup> In late July 2006, a Manhattan Supreme Court justice removed Marshall as her legal caretaker, putting Astor’s care in the hands of longtime friend Annette de la Renta and her finances under the control of JPMorgan Chase bank.<sup>24</sup>

Also scrutinized by the court was a series of codicils<sup>25</sup> Astor made to her will in the years before her death.<sup>26</sup> One such codicil shifted control of millions of Astor’s fortune to her son after her death.<sup>27</sup> Although the codicils bear Astor’s signature, questions abound concerning Astor’s competency at the time these documents were prepared.<sup>28</sup> Amidst accusations of forgery, in September 2006 a New York State Supreme Court justice

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transfer of Astor’s real property and securities as gifts to himself, and the use of her funds to pay for his personal, residential, and household expenses. *Id.*

<sup>22</sup> *In re Marshall*, No. 500095, 2006 WL 2546192, at \*1 (N.Y. Sup. Ct. Aug. 29, 2006). The Court stated:

The petition contains serious and disturbing allegations of a pattern of neglect and mistreatment of Mrs. Astor over the last several years. The petition alleges that Anthony Marshall has not provided for his elderly mother and, instead, has allowed her to live in less than adequate living conditions and has cut back on necessary medication and doctor's visits, while enriching himself with income from her estate.

*Id.*

<sup>23</sup> See James Barron & Anemona Hartocollis, *As Mrs. Astor Slips, the Grandson Blames the Son*, N.Y. TIMES, July 27, 2006, at A3.

<sup>24</sup> Erika Hayasaki, *The Nation: Life at a Funeral*, L.A. TIMES, Aug. 18, 2007, at 11; Neil Weinberg, *The Father, the Son and High Society*, FORBES, Oct. 9, 2006, at 46.

<sup>25</sup> A codicil is defined as “[a] supplement or addition to a will, not necessarily disposing of the entire estate but modifying, explaining, or otherwise qualifying the will in some way. When admitted to probate, the codicil becomes a part of the will.” BLACK’S LAW DICTIONARY 275 (8th ed. 2004).

<sup>26</sup> See Serge F. Kovalski & Mike McIntire, *Lawyers for Brooke Astor’s Son Defend Changes to Her Will*, N.Y. TIMES, Sept. 15, 2006, at B2.

<sup>27</sup> *Id.*

<sup>28</sup> See Kovalski & McIntire, *supra* note 26 (reporting that in September 2006, Astor’s court-appointed lawyer filed legal papers in which she expressed doubt over whether her client “was competent when she signed the codicils to her will in late 2003 and early 2004”).

ordered the documents to be examined by handwriting experts.<sup>29</sup> As part of a settlement in October 2006, Marshall and his wife relinquished their status as co-executors of Astor's estate, and in exchange, JPMorgan Chase, as guardian, "agreed not to pursue litigation to recover millions of dollars it believes [Marshall] may have improperly obtained while managing [Astor's] finances."<sup>30</sup> In December 2006, the judge overseeing the case said that claims of elder abuse against Marshall were unsubstantiated.<sup>31</sup>

Following months of declining health and family infighting over her care and financial legacy, Astor died of pneumonia in August 2007 at the age of 105.<sup>32</sup> The following day in Westchester County Surrogate's Court, de la Renta and JPMorgan Chase filed papers asking a judge to appoint them as temporary co-administrators of the estate, "valued at more than \$130 million, in addition to a trust estimated to be worth over \$60 million."<sup>33</sup> In the petition, de la Renta and JPMorgan Chase argued that Astor was not mentally competent or was unduly influenced when she signed her last will in 2002 and several amendments to it benefiting her son, and the will she signed in 1997 should be the valid one.<sup>34</sup> The documents also challenged a will Astor signed in February 2001 and an amendment dated in November of that year.<sup>35</sup>

Under Astor's 1997 will, Marshall was a principal beneficiary of his mother's fortune.<sup>36</sup> He was, however, to receive "significantly more of her [] estate in the 2002 will, and even more under a later amendment that modified the will" in 2004.<sup>37</sup> The administrator will have the fiduciary responsibility of distributing Astor's assets "in accordance with her will, subject to court supervision."<sup>38</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> Serge F. Kovaleski, *Astor's Guardians Challenge Her Later Wills, Citing Incompetency*, N.Y. TIMES, Aug. 16, 2007, at B5.

<sup>31</sup> *In re Marshall*, No. 500095, 2006 WL 2546192, at \*4 (N.Y. Sup. Ct. Aug. 29, 2006).

<sup>32</sup> Hayasaki, *supra* note 24.

<sup>33</sup> Kovaleski, *supra* note 30.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Astor's situation is by no means unique.<sup>39</sup> A widespread form of elder abuse is "the misuse of the power of attorney that an elderly person has granted."<sup>40</sup> Yet it is not the unscrupulous financial expert, scam artist, or morally hollow caregiver who, statistically, appears to be the biggest threat—it is family.<sup>41</sup> Children, grandchildren, siblings, nieces, and nephews are the people most likely to cheat the elderly.<sup>42</sup> One reason for this is because an elderly person is more likely to choose a family member to handle his or her financial affairs—retirees often want a trusted relative to manage these aspects of their lives when they anticipate not being able to manage it themselves.<sup>43</sup> And since many of these crimes generally depend upon manipulating an elderly person's emotions,<sup>44</sup> who better to do so than those closest to the elderly victim. Unlike the public spotlight that the Astor case has assumed, most elderly victims try to keep such troubles private in order to avoid embarrassment.<sup>45</sup> Many victims will refuse to acknowledge the

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<sup>39</sup> See *Exploitation of Seniors: Hearing Before the S. Special Comm. on Aging*, 109th Cong. (2006). Even court opinions have started to recognize the pervasiveness of this specific problem. See, e.g., *In re Marshall*, No. 500095, 2006 WL 2546192, at \*5 (N.Y. Sup. Ct. Aug. 29, 2006) ("The contrast between Mrs. Astor's extensive wealth and public importance and her living conditions at the time of the commencement of this proceeding show that elder abuse can be present in all socioeconomic communities in the United States.").

<sup>40</sup> Amanda A. Thilges, *Abuse of a Power of Attorney: Who Is More Likely to Be Punished, the Elder or the Abuser?*, 16 J. AM. ACAD. MATRIMONIAL LAW, 579, 579 (2000).

<sup>41</sup> Opdyke, *supra* note 1.

<sup>42</sup> *Id.*; see Marilyn Gardner, *Love and Money and Fraud: Financial Exploitation of the Elderly is Growing—and Family Members Are Often the Culprits*, CHRISTIAN SCI. MONITOR, Aug. 9, 2006, at 14.

<sup>43</sup> See, e.g., Opdyke, *supra* note 1. Lawyers who hold powers of attorney for their elderly clients have also been defendants in many cases brought in criminal court. See *In re Essepien*, 267 A.D.2d 769, 769–70, 700 N.Y.S.2d 506, 506–07 (3d Dep't 1999) (censuring attorney defendant, an administrative law judge, for neglect of legal matters and failing to act competently and maintain records as attorney-in-fact for an elderly, infirm woman); *In re McGinn*, 252 A.D.2d 660, 660–61, 675 N.Y.S.2d 392, 392 (3d Dep't 1998) (disbarring attorney defendant for issuing to himself 105 checks totaling \$141,000 from his elderly, wheelchair-bound, aphasic client); *In re McLaughlin*, 223 A.D.2d 197, 197, 644 N.Y.S.2d 966, 967 (1st Dep't 1996) (suspending attorney defendant from practice in the State of New York for charges including the depletion of \$300,000 from an elderly client's bank account, to "invest in her husband's business"); *In re Contino*, 205 A.D.2d 1, 2–3, 617 N.Y.S.2d 105, 105–07 (4th Dep't 1994) (disbarring attorney defendant for issuing to himself the property and \$281,000 of stocks and bonds of two elderly clients).

<sup>44</sup> See Opdyke, *supra* note 1.

<sup>45</sup> See Gardner, *supra* note 42.

betrayal of those who are closest to them. Additionally, these victims are less likely to come forward due to their failing memories or deteriorating mental capacity.<sup>46</sup>

Part I of this Note provides a look at cases that exemplify the how and why of financial abuse of the elderly by the holder of a power of attorney. Part II of this Note discusses the current laws and regulations in place to target instances of financial elder abuse. Part III of this Note critiques the weaknesses in these laws and regulations, which allow for such abuse to take place. Part IV of this Note concludes by proposing solutions aimed at preventing and effectively prosecuting such abuse.

### I. A SILENT DEVASTATION: CASES IN POINT<sup>47</sup>

Glaring misuse of power of attorney is documented in our legal system through case law. Power of attorney is defined as “[a]n instrument granting someone authority to act as agent or attorney-in-fact for the grantor.”<sup>48</sup> The “ordinary power of attorney creates an agency relationship whereby the agent becomes attorney-in-fact for the principal, though the agent may not be (and often is not) a lawyer.”<sup>49</sup> There are two main types of power of attorney: general and specific.<sup>50</sup> A general power of attorney is a very broad power which allows the agent to act on the principal’s behalf in a vast variety of matters, such as making gifts,<sup>51</sup> borrowing money, signing papers checks, title documents, contracts, and handling bank accounts.<sup>52</sup> A specific power of attorney grants powers that limit the freedom of the agent by specifying just what he or she may do, such as selling a piece of

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<sup>46</sup> See Nancy Weaver Teichert, *Abuse of the Elderly Is a Growing Problem*, SACRAMENTO BEE, Aug. 7, 2006, at B1; see also Gross, *supra* note 2 (noting that half of those in the age group 85 years and older “suffer from dementia and are often incapable of informed consent”).

<sup>47</sup> See JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 349 (7th ed. 2005). (“[A] disturbing number of cases litigate misappropriation by the agent—usually a friend or relative of the principal.”).

<sup>48</sup> BLACK’S LAW DICTIONARY 1209 (8th ed. 2004).

<sup>49</sup> DUKEMINIER ET AL., *supra* note 47, at 346.

<sup>50</sup> Law Dictionary, Law.com, <http://dictionary.law.com> (search “power of attorney”) (last visited Oct. 10, 2007).

<sup>51</sup> Not all general powers of attorney include gift-giving powers. Some states, in fact, exclude such powers, unless specifically authorized. See Julie A. Lemke & Seymour Moskowitz, *Protecting the Gold in the Golden Years: Practical Guidance for Professionals on Financial Exploitation*, 7 MARQ. ELDER’S ADVISOR 1, 9 n.30 (2005).

<sup>52</sup> Law Dictionary, Law.com, <http://dictionary.law.com> (search “power of attorney”) (last visited Oct. 10, 2007); see Teichert, *supra* note 46.

real estate.<sup>53</sup> A “springing” or “durable”<sup>54</sup> power of attorney specifies the conditions under which the agent may act on behalf of the principal. An example of this includes a power of attorney that becomes or remains effective in the event that the principal should later become disabled or incapacitated.<sup>55</sup> Once executed, it is a very powerful document—so powerful that it often leads to the types of abuses seen in the following cases.<sup>56</sup>

A. *Undue Influence: In re Estate of Cumbee*

An abuser will often exert undue influence<sup>57</sup> on an elderly victim whose ailing health necessitates dependence on a close family member, as was the case in *In re Estate of Cumbee*.<sup>58</sup> Lillian Cumbee and her husband executed a joint will in 1987, providing that upon their simultaneous deaths or upon the death of the survivor, their estate was to be distributed to their son Calvin, to be held in trust for the lifetime care of their disabled daughter.<sup>59</sup> Upon the daughter's death, the remainder was to be divided equally among Cumbee's eight other children.<sup>60</sup> The

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<sup>53</sup> Law Dictionary, Law.com, <http://dictionary.law.com> (search “power of attorney”) (last visited Oct. 10, 2007).

<sup>54</sup> Virtually all powers of attorney are durable, which means that they continue to be effective even after incompetence of the principal. A durable power of attorney is created when a writing contains the words: “This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time,” or similar words that show the principal's intent that the authority conferred is exercisable notwithstanding the principal's subsequent incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument. UNIF. DURABLE POWER OF ATTORNEY ACT § 1 (1984).

<sup>55</sup> See Marshall Loeb, *Best Time to Protect Your Nest Egg Is Now*, TIMES LEADER (Pa.), Aug. 14, 2006, at C1; see also Teichert, *supra* note 46 (quoting Ed Corey, an attorney who works with a team of financial abuse specialists: “A durable power of attorney for finances gives you the license to steal. And durable power of attorney for health care gives you the license to kill.”).

<sup>56</sup> See *DUKEMINIER ET AL.*, *supra* note 47, at 349 (“[I]t can be an extremely powerful document, authorizing an agent to perform virtually any act with respect to the principal's property that the principal could perform. This breadth of power coupled with few required execution formalities creates a fear of overreaching by unscrupulous agents.” (quoting Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney*, 75 NEB. L. REV. 574, 582 (1996))).

<sup>57</sup> Undue influence is defined as “the amount of pressure which one uses to force someone to execute a will leaving assets in a particular way, to make a direct gift while alive or to sign a contract.” Law Dictionary, Law.com, <http://dictionary.law.com> (search “undue influence”) (last visited Oct. 10, 2007).

<sup>58</sup> 511 S.E.2d 390 (S.C. Ct. App. 1999).

<sup>59</sup> *Cumbee*, 511 S.E.2d at 392.

<sup>60</sup> *Id.*

husband died a year later, leaving Cumbee over \$140,000 in cash and property.<sup>61</sup> Cumbee, then in her 80's, moved in with Calvin, who held power of attorney, and his wife.<sup>62</sup> In 1991, Cumbee executed a second will, naming her son Melvin as executor, revoking the 1987 will, and directing that her estate be distributed equally to her children.<sup>63</sup>

Within a year of her husband's death, Calvin completely took over his mother's finances.<sup>64</sup> He transferred the money out of his mother's joint accounts into accounts held solely in his own name.<sup>65</sup> As Cumbee became less mobile, she spent most of her time in Calvin's home.<sup>66</sup> Calvin and his wife listened to all of her conversations with a baby monitor.<sup>67</sup> To avoid being heard, Cumbee developed hand signals to communicate with visitors.<sup>68</sup> She feared being placed in a nursing home if she failed to acquiesce with Calvin.<sup>69</sup> In 1994, Cumbee executed a third will, which revoked all prior wills and gave Calvin her entire estate, and one dollar to each remaining child—including her disabled daughter.<sup>70</sup> Calvin selected the two witnesses for will execution. The will was not read in their presence, nor did Calvin give a copy to his mother.<sup>71</sup> Rather, he held the will in a safety deposit box.<sup>72</sup> After executing the will, Cumbee was hospitalized.<sup>73</sup> Calvin had his wife stay with Cumbee to prevent her from being alone with her son, Melvin, for fear that he would ask his mother about the new will.<sup>74</sup> Cumbee died seven months after she executed her third will.<sup>75</sup>

The court held that the 1994 will was void because of undue influence, affirmed the probate of the 1987 will, and ruled to include within her estate the funds held by Calvin.<sup>76</sup> The court

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 392, 394.

<sup>63</sup> *Id.* at 392.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 392–93.

<sup>66</sup> *Id.* at 394.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 392.

<sup>71</sup> *Id.* at 394–95.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 395.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 396.

noted that the burden of establishing undue influence had been met, stating:

In order to void a will on the ground of undue influence, the undue influence must destroy free agency and prevent the maker's exercise of judgment and free choice . . . [undue influence] must not be the mere desire of gratifying the wishes of another . . . by importunity which could not be resisted . . . so that the motive was tantamount to force and fear.<sup>77</sup>

*B. Fiduciary Duty: In re Estate of Ferrara*

In a similar situation, the elderly principal in *In re Estate of Ferrara*,<sup>78</sup> in failing health, looked to his nephew for help with his financial affairs<sup>79</sup>—but was ultimately duped. The elderly decedent executed a 1999 will in Florida, leaving his entire estate to the local Salvation Army.<sup>80</sup> Several months later, the decedent was hospitalized and asked his nephew to serve as his power of attorney so the nephew could help his uncle with his financial affairs during his illness.<sup>81</sup> In early 2000, the decedent moved to New York and was admitted to an assisted living facility.<sup>82</sup> He was malnourished, weak, and suffered from serious chronic illnesses.<sup>83</sup> Ten days later, the nephew had the decedent sign a durable general power of attorney, which included the power for the nephew to make gifts.<sup>84</sup> He also had his uncle initial a typewritten addition to the form, which stated that the power of attorney allowed the nephew to make gifts to himself without

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<sup>77</sup> *Id.* at 394.

<sup>78</sup> 7 N.Y.3d 244, 852 N.E.2d 138, 819 N.Y.S.2d 215 (2006).

<sup>79</sup> A fiduciary relationship exists “where one person places complete confidence in another in regard to a particular transaction or one’s general affairs or business.” Law Dictionary, Law.com, <http://dictionary.law.com> (search “fiduciary”) (last visited Oct. 1, 2007). One who holds a power of attorney, moreover, is said to owe fiduciary duties to the principal:

The fiduciary relationship existing between an agent and his principal has been compared to that which arises upon the creation of a trust, and the rule requiring an agent to act with the utmost good faith and loyalty toward his principal or employer applies regardless of whether the agency is one coupled with an interest, or the compensation given the agent is small or nominal.

*Schock v. Nash*, 732 A.2d 217, 226 n.24 (Del. 1999).

<sup>80</sup> *Ferrara*, 7 N.Y.3d at 247, 852 N.E.2d at 139, 819 N.Y.S.2d at 216.

<sup>81</sup> *Id.* at 247–48, 852 N.E.2d at 139, 819 N.Y.S.2d at 216.

<sup>82</sup> *Id.* at 248, 852 N.E.2d at 140, 819 N.Y.S.2d at 217.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 248–49, 852 N.E.2d at 140, 819 N.Y.S.2d at 217.

limitation in amount.<sup>85</sup> The decedent's health deteriorated and he died about three weeks after executing the power of attorney.<sup>86</sup> During these three weeks, the nephew transferred about \$820,000 of his uncle's assets to himself, including IBM stock, \$300,000 in cash, and the sale of his Florida property.<sup>87</sup> The Salvation Army found out about the decedent's will and commenced a proceeding against the nephew.<sup>88</sup>

The court reversed the Appellate Division's dismissal of the action,<sup>89</sup> holding that the nephew did not satisfy the "best interest requirement" of his fiduciary duty to his uncle as power of attorney:

[A] power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal. Because [t]he relationship of an attorney-in-fact to his principal is that of agent and principal . . . , the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing.<sup>90</sup>

The court noted that the gifts made by the nephew to himself virtually impoverished a donor whose estate plan, as evidence by the 1999 will, was to bequeath all his wealth to charity.

*C. Unauthorized Delegation: In re Khoubesserian*

Perhaps more disturbing than where a relative abuses her power is the unimaginable situation where the holder of a power of attorney is altogether unknown to the elder. In *In re Khoubesserian*,<sup>91</sup> the principal, in failing health, granted a durable power of attorney to her sister.<sup>92</sup> The sister, also in failing health, delegated her power of attorney to her own attorney, and decided that the attorney could retain, without court approval, one-third of any funds collected on the principal's

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<sup>85</sup> *Id.* at 249, 852 N.E.2d at 140, 819 N.Y.S.2d at 217.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 249–50, 852 N.E.2d at 140–41, 819 N.Y.S.2d at 217–18.

<sup>88</sup> *Id.* at 250, 852 N.E.2d at 141, 819 N.Y.S.2d at 218.

<sup>89</sup> *Id.* at 251, 852 N.E.2d at 141–42, 819 N.Y.S.2d at 218–19.

<sup>90</sup> *Id.* at 254, 852 N.E.2d at 143–44, 819 N.Y.S.2d at 220–21 (internal quotation marks and citation omitted).

<sup>91</sup> 264 A.D.2d 599, 695 N.Y.S.2d 312 (1st Dep't 1999).

<sup>92</sup> *Id.* at 599, 695 N.Y.S.2d at 313.

behalf.<sup>93</sup> The attorney determined that the principal was entitled to a \$100,000 reimbursement towards her nursing home expenses, from which he deducted over \$33,000 as his fee.<sup>94</sup> During the course of examining the principal's finances, a court-appointed evaluator discovered the insurance recovery and the attorney's fee, which was challenged as an unauthorized disbursement from the principal's assets.<sup>95</sup>

The lower court voided the lawyer's power of attorney and overturned the attorney's fee, stating that the principal was unaware that her sister had transferred this power to the attorney, and the attorney was without any supervision of his activities.<sup>96</sup> The New York Supreme Court overturned this decision, holding that General Obligations Law section 5-150 entitled the sister to delegate her powers to the attorney.<sup>97</sup> General Obligations Law section 5-150 grants under the power of attorney "[the] full and unqualified authority . . . to delegate any or all of the foregoing powers to any person or persons whom my attorney(s)-in-fact shall select."<sup>98</sup> In effect, this court sanctioned a power of attorney relationship that was entirely unknown to the principal.

#### D. *Gratuitous Transfers: Levy v. Thompson*

Another common situation, as seen in *Levy v. Thompson*,<sup>99</sup> is where an unscrupulous agent uses a power of attorney to make self-serving transfers while the principal is still alive. Levy, an elderly woman, signed a power of attorney giving her sister the right to act for her as attorney-in-fact.<sup>100</sup> Levy also executed a will leaving all of her estate to her son and her son's four children (the "Levy family").<sup>101</sup> Shortly after Levy began suffering from Alzheimer's disease, the sister used her power of attorney to sell all twenty of her sister's certificates of deposit ("CD's") and purchase three annuities naming herself as beneficiary<sup>102</sup> "per

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 600, 695 N.Y.S.2d at 314.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> No. 20641, 2006 WL 2875429 (Ohio Ct. App. Oct. 6, 2006).

<sup>100</sup> *Id.* at \*1.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

stirpes.”<sup>103</sup> The court found that Levy had never been told, nor was she aware, that such changes in the disposition of her property had ever been made.<sup>104</sup> When the sister died, Levy executed another power of attorney to the sister’s daughter (“Thompson”).<sup>105</sup> “Thompson began to pay for [Levy]’s care by using proceeds from the two annuities that primarily benefitted [sic] the Levy family, and did not use money from the annuity that benefitted [sic] Thompson’s own family.”<sup>106</sup> Accordingly, when Levy died in 2002, it was discovered that “the Levy annuities were almost completely depleted, while the annuity that primarily benefitted [sic] Thompson and her siblings . . . continued to grow.”<sup>107</sup>

The appellate court affirmed the probate court’s finding that Thompson had executed undue influence over Levy, and had converted funds to her own use in the amount of nearly \$23,000.<sup>108</sup> The court paid particular attention to the sister’s per stirpes designation, which it found had been properly invalidated on the grounds that her action in creating the annuity was improper.<sup>109</sup> Had the per stirpes designation been upheld, those annuities could have passed to Thompson’s family—not to the beneficiaries under Levy’s will.

While the preceding cases document several of the ways in which family members can abuse the elderly, scores of similar instances surely go unreported.<sup>110</sup> As these cases subtly suggest,

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<sup>103</sup> *Id.* The term per stirpes is used when an inheritance is “proportionately divided between beneficiaries according to their deceased ancestor’s share.” BLACK’S LAW DICTIONARY 1181 (8th ed. 2004). For example, T’s will says, “I leave \$500,000 to the children of A, per stirpes.” C, one of five children of A, predeceases T. The \$500,000 will be distributed to A’s children, each receiving \$100,000, with the other \$100,000 going to C’s children who survive T. Without the per stirpes designation, C’s children may not share, under applicable local law.

<sup>104</sup> *Levy*, 2006 WL 2875429, at \*2.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at \*2, \*5. The court also noted:

[A] general, durable power of attorney does not authorize attorneys-in-fact to transfer the principal’s property to themselves or to others, unless the power of attorney explicitly confers this power. An attorney-in-fact may not make gratuitous transfers of the principal’s assets unless the power of attorney from which the power is derived expressly and unambiguously grants the authority to do so.

*Id.* at \*4.

<sup>109</sup> *Id.* at \*4–5.

<sup>110</sup> See *supra* notes 3–7 and accompanying text.

the law seems to punish the abuse after it occurs, instead of preventing it in the first place.

## II. PRESENT PROTECTIONS FOR THE ELDERLY

### A. *Enhanced Penalties and Special Classifications*

While a jurisdiction's basic criminal laws—such as theft and fraud—are used to prosecute one who has committed financial abuse against an elderly person,<sup>111</sup> some state legislatures have enacted enhanced penalties for certain crimes committed specifically against elderly persons.<sup>112</sup> In Nevada, for example, crimes against those sixty years and older may carry prison sentences that are twice as long as sentences given for the same crimes if committed against a younger person.<sup>113</sup> A Louisiana law directs that all crimes of a violent nature against senior citizens must receive a minimum of five years imprisonment without the opportunity for parole.<sup>114</sup> A Georgia law prescribes an increased penalty “for unfair or deceptive business practices directed toward the elderly.”<sup>115</sup> Illinois recognizes a separate crime for financial exploitation of an elderly person, and also includes the age of the victim as a special classification under its abuse laws.<sup>116</sup> Nevada law also allows twice the actual damages to be awarded for losses incurred by an “older person” as a result of financial exploitation.<sup>117</sup> A Maine statute creates the presumption that a transfer of real estate, personal property, or money for less than full consideration by an elderly person with whom the victim has a fiduciary relationship is the result of undue influence.<sup>118</sup> In Wisconsin, “[s]tealing . . . property from a senior, regardless of the dollar value, is a felony . . . under one

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<sup>111</sup> AM. BAR ASS'N COMM. ON LAW AND AGING & NAT'L CTR. ON ELDER ABUSE, INFORMATION ABOUT LAWS RELATED TO ELDER ABUSE 3 (2005), [http://www.ncea.aoa.gov/ncearoot/Main\\_Site/pdf/publication/InformationAboutLawsRelatedtoElderAbuse.pdf](http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/InformationAboutLawsRelatedtoElderAbuse.pdf) [hereinafter ELDER ABUSE LAWS].

<sup>112</sup> *Id.*

<sup>113</sup> N.Y. CITY ALLIANCE AGAINST SEXUAL ASSAULT, FACTSHEETS: ELDER ABUSE AND THE LAW (1999), [http://www.nycagainstrape.org/survivors\\_factsheet\\_74.html](http://www.nycagainstrape.org/survivors_factsheet_74.html) [hereinafter ELDER ABUSE FACTSHEET].

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> ME. REV. STAT. ANN. tit. 33, § 1022 (2007).

felony enhancement scheme.”<sup>119</sup> Several states freeze assets that were exploited from an elderly victim.<sup>120</sup> Many states will consider the elderly age of a victim as an aggravating factor that should be taken into account for sentencing purposes.<sup>121</sup>

About ten states address financial exploitation of the elderly through statutes that specifically address misuse of power of attorney. Most of these statutes, however, will punish the offender under that state’s criminal law for that offense—fraud or theft, for example—without a penalty enhancement taking into consideration the victim’s age. An Arizona statute entitled “Unlawful Use of Power of Attorney” makes it a theft for a person to take advantage of his or her power of attorney.<sup>122</sup> This statute mandates that a person who knowingly abuses their power of attorney is punishable under the state’s theft statute.<sup>123</sup> California’s penal code classifies the misuse of power of attorney as embezzlement, and also punishes a guilty individual under the state’s embezzlement statute.<sup>124</sup>

Some states have enacted statutes that prohibit beneficiaries who have committed fiduciary abuse against the decedent from taking under a will,<sup>125</sup> by deeming the beneficiary to have predeceased the decedent.<sup>126</sup> In 2004, California’s Probate Code

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<sup>119</sup> William E. Hanrahan, *A Prosecutor’s View of Elder Abuse*, 73 WIS. LAWYER 30, 74 (2000).

<sup>120</sup> Lori A. Stiegel, *Financial Abuse of the Elderly: Risk Factors, Screening Techniques, and Remedies*, BIFOCAL (Am. Bar Ass’n Comm’n on Legal Problems of the Elderly, Wash., D.C.), Summer 2002, at 10.

<sup>121</sup> ELDER ABUSE FACTSHEET, *supra* note 113.

<sup>122</sup> See ARIZ. REV. STAT. ANN. § 13-1815 (2007) (“An agent who holds a principal’s power of attorney . . . and who uses or manages the principal’s assets or property with the intent to unlawfully deprive that person of the asset or property is guilty of theft.”).

<sup>123</sup> See *id.*

<sup>124</sup> See CAL. PENAL CODE § 507 (2007).

Every person intrusted [sic] with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement.

*Id.*

<sup>125</sup> A beneficiary is defined as “[a] person for whose benefit property is held in trust; esp., one designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.), or to receive something as a result of a legal arrangement or instrument.” BLACK’S LAW DICTIONARY 165 (8th ed. 2004). A decedent is defined as “[a] dead person, esp. one who has died recently.” *Id.* at 435.

<sup>126</sup> See DUKEMINIER ET AL., *supra* note 47, at 387 (“All gifts made by will are subject to a requirement that the devisee survive the testator, unless the testator

was amended to include section 259, Abuse of Elder or Dependent Adult Decedent.<sup>127</sup> The statute reads in relevant part:

(a) Any person shall be deemed to have predeceased a decedent . . . where all of the following apply:

(1) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or fiduciary abuse of the decedent, who was an elder or dependent adult.

(2) The person is found to have acted in bad faith.

(3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.

(4) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence . . . .<sup>128</sup>

Arguably most effective, some states have begun to craft laws that may prevent elder abuse, rather than punish it. In Massachusetts, for example, the State Senate has approved a bill that would require unsubstantiated reports of abuse of the elderly to be retained by the state for three years instead of the three months required under current law.<sup>129</sup> Proponents of the bill assert that saving such reports may be valuable by showing a pattern of behavior if another report of abuse by the same individual is filed.<sup>130</sup>

### *B. The Critical Role of Banks*

In many cases involving financial abuse of the elderly, banking institutions are the “first line of defense” in detecting and/or preventing abuse by reporting suspicious activity to law enforcement agencies.<sup>131</sup> Oftentimes, an elderly person’s

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specifies otherwise.”).

<sup>127</sup> CAL. PROB. CODE § 259 (2007).

<sup>128</sup> *Id.*

<sup>129</sup> See *Beacon Hill Roll Call*, THE ENTERPRISE, Oct. 6, 2006. The article also notes that “unsubstantiated reports of abuse against children are currently kept for three years.” *Id.*

<sup>130</sup> See *id.*

<sup>131</sup> See Sandra L. Hughes, *Identity Theft, Bank Secrecy, and Anti-Money Laundering Compliance: Can Bank Tellers Tell? Legal Issues Related to Banks Reporting Financial Abuse of the Elderly*, 58 CONSUMER FIN. L.Q. REP. 293, 294 (2004) (noting that banks are in a position to observe (1) an unusual volume of

attorney-in-fact will make frequent trips to his or her bank in order to make deposits and withdrawals. To encourage banks to protect the elderly from financial abuse, some state Adult Protective Services agencies have lobbied successfully for state statutes that either encourage or mandate bank personnel to report suspected financial abuse of elderly clients.<sup>132</sup> However, many banks largely oppose mandatory reporting efforts, concerned about the potential legal liability.<sup>133</sup> Banks are concerned with facing civil or criminal penalties for violation of federal and state laws that regulate the disclosure of personal financial information.<sup>134</sup> Other banks fear liability for failure to report such financial abuse.<sup>135</sup> APS laws of forty-nine states and the District of Columbia encourage bank reporting by including immunity provisions for reports made in good faith.<sup>136</sup> Under the Constitution's Supremacy Clause,<sup>137</sup> however, such provisions do not provide immunity from federal laws.<sup>138</sup>

### C. *The Elder Justice Act of 2006*

Within days of Astor's story penetrating America's news wires, the Elder Justice Act of 2006 moved from the Senate Finance Committee to the full Senate on a unanimous vote.<sup>139</sup> If enacted into law, the Act would amend the Social Security Act<sup>140</sup> to include an Elder Justice program under title XX of that Act.<sup>141</sup>

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banking activity, (2) banking activity inconsistent with a customer's usual habits, (3) sudden increases in incurred debt when the elder appears unaware of the transactions, (4) withdrawal of funds to a fiduciary with no obvious benefit to the elder, and (5) implausible reasons for banking activity).

<sup>132</sup> *Id.* at 293. Some states have also developed training programs to aid bank employees in the detection of financial abuse. In Massachusetts, the Massachusetts Bank Reporting Project provides training to bank personnel in how to identify and report financial exploitation, including protocols and procedures for investigating and responding to the abuse. See Nat'l Comm. for the Prevention of Elder Abuse, *Best Practice Models*, <http://www.preventelderabuse.org/communities/best.html> (last visited Oct. 10, 2007).

<sup>133</sup> See Hughes, *supra* note 131, at 295.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.")

<sup>138</sup> See Hughes, *supra* note 131, at 295.

<sup>139</sup> See Gross, *supra* note 2.

<sup>140</sup> 42 U.S.C. §§ 301-06 (2000).

<sup>141</sup> Elder Justice Act, S. 2010, 109th Cong. (2005).

More importantly, the Act would provide federal resources to state and community officials who presently operate under scarce resources and fragmented systems.<sup>142</sup> The bill provides many value directives. Among others, it calls for the creation of an office of Elder Justice at the Department of Health and Human Services to provide elder programs with grants, policy, and technical assistance relating to elder justice, the creation of the first nationwide database on elder abuse, and an order to gain new forensic expertise in elder abuse that will promote detection and increase the capacity to prosecute offenders. In addition, it increases prosecution and penalties for failure to promptly report crimes in long-term facilities.<sup>143</sup>

#### D. Adult Protective Services

All fifty states have enacted legislation authorizing the provision of Adult Protective Services ("APS") in cases of elder abuse.<sup>144</sup> While each state's APS statute varies, these laws establish a system for the reporting and investigation of elder abuse, and for the provision of social services to help the victim.<sup>145</sup> While APS laws may deal with the abuse after it takes place, the nature of these laws will rarely prevent such abuse from occurring in the first place. Moreover, the laws vary widely in application and relevance. The age at, or circumstances under which, a victim is eligible to receive protective services, as well as the definitions and types of abuse covered, vary greatly from state to state.<sup>146</sup> Such variations among states mean that some elderly victims residing in a particular state that happens to have narrower definitions of the above may not be accorded help under APS laws.

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<sup>142</sup> Press Release, U.S. Sen. Orrin G. Hatch, Hatch's Elder Justice Act Clears Committee (Aug. 3, 2006), [http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=1640&Month=8&Year=2006](http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1640&Month=8&Year=2006).

<sup>143</sup> *Id.* See generally Nat'l Ctr. on Elder Abuse, *Elder Justice Act 2006* (on file with author) (quoting Hatch as saying: "Thousands of cases of elder abuse, neglect, and exploitation go unaddressed each day. Yet no federal employee works full-time to address elder abuse and neglect.").

<sup>144</sup> ELDER ABUSE LAWS, *supra* note 111.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

## III. WEAK LAWS REAR ABUSE

Several factors often diminish the likelihood that a criminal prosecutor will take on the case of the financially abused elderly person. As stated above, the victim of elder abuse is often an unreliable witness because of limited mental capacity—impaired by the consequences of old age.<sup>147</sup> Such skepticism has been acknowledged outright by the courts. In *Boyce v. Fernandes*, the Court of Appeals for the Seventh Circuit noted that “[a]ccusations by demented persons must always be viewed with a certain skepticism, especially since paranoid suspicions are a common incident of dementia.”<sup>148</sup> Additionally, because the elderly person may have mental deficiencies, the elderly person may be unaware that the abuse has occurred, and therefore, unable to testify in court.

District attorneys may also be dissuaded to prosecute where, for example, an elderly aunt names her niece as agent under a general power of attorney, granting the niece broad powers.<sup>149</sup> The niece is authorized to take any action that the aunt could take for herself, as well as the authority to make gifts with the aunt’s property.<sup>150</sup> Suppose the aunt then suffers a stroke and is hospitalized for months.<sup>151</sup> During this time, the niece not only cashes out her life insurance policy, but also fails to pay the aunt’s mortgage, bills, and taxes—and the aunt now finds her house in foreclosure.<sup>152</sup> In this scenario, the extensive power granted to the niece could likely create a reasonable doubt in the minds of jurors that the niece had acted beyond her authority, causing a district attorney in this situation to decline moving forward with prosecution.<sup>153</sup>

Oftentimes, the elderly victim actually signs the power of attorney document seemingly in accordance with the jurisdiction’s proper procedure. The victim, however, may be unaware of what he or she is signing, or more likely, wholly

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<sup>147</sup> See *Boyce v. Fernandes*, 77 F.3d 946, 948 (7th Cir. 1996).

<sup>148</sup> *Id.* at 949.

<sup>149</sup> See Ellen J. Henningsen, *Preventing Financial Abuse by Agents Under Powers of Attorney*, WIS. LAWYER, Sept. 2000, [http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin\\_Lawyer&template=/CM/ContentDisplay.cfm&contentid=49302](http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=49302).

<sup>150</sup> See *id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

trusts the holder, only to subsequently be abused. The fact that the victim signed the document on his or her own volition undoubtedly strengthens the defense's case.

As noted above, if a state lacks a specific statute authorizing criminal prosecution for elder abuse, a jurisdiction's basic criminal law code may be used to prosecute one who has abused an elderly person.<sup>154</sup> Without enhanced sentencing guidelines for acts committed against victims of an elderly age, however, a state's criminal law code offers little, if any, added deterrence for such crimes against older persons. Thus, our system fails to recognize the especially egregious nature of such crimes against a population who is, arguably, the least likely to defend themselves.

#### IV. PROPOSED SOLUTIONS

##### A. *Drafting the Power of Attorney Document*

Often, the original power of attorney is drafted by an attorney, who may also have drafted a will and a health care proxy or living will for the client-principal. In such cases, abuse may be averted by drafting the power of attorney document with built-in safeguards. Indeed, agents who are aware of their powers are more likely to not misuse that power.<sup>155</sup> A responsible drafting attorney, therefore, will educate the agent about his or her responsibilities as power of attorney.<sup>156</sup> Not only will this make the agent conscious of his or her limitations, but such discussions between the drafting attorney and agent (if documented or transcribed) also will provide evidence that can be used in civil or criminal cases to prove that the agent was fully aware of the document's bounds.<sup>157</sup>

Additionally, many agents are unaware that the "common law imposes a fiduciary duty on the agent."<sup>158</sup> As a fiduciary, an agent must act for the benefit of the principal "on all matters within the scope of their relationship" and in good faith.<sup>159</sup> By including a description of this duty in the power of attorney

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<sup>154</sup> See *supra* note 111 and accompanying text.

<sup>155</sup> Henningsen, *supra* note 149.

<sup>156</sup> See *id.*

<sup>157</sup> See *id.*

<sup>158</sup> *Id.*

<sup>159</sup> BLACK'S LAW DICTIONARY 658 (8th ed. 2004).

document or having the agent acknowledge this duty by signing the document, a principal has additional evidence to provide in a civil or criminal case in the event of a misuse of power.<sup>160</sup>

Unlike the situation mentioned above in Part III, when an agent has an unlimited or broad authority,<sup>161</sup> abuse may be avoided by having the agent grant only those powers needed.<sup>162</sup> If, for example, an elderly woman wants her daughter to have authority to make her monthly mortgage payments in the event that the woman undergoes long-term hospitalization, a general power of attorney should not be executed. Instead, a special or limited power of attorney would specify that the daughter is only authorized to make such payments in the event of her mother's incapacitation—and not to cash checks, withdraw money, or sell her property beyond making the mortgage payments. Thus, drafting attorneys should question their elderly clients to find out exactly what he or she wishes the agent to do.<sup>163</sup>

The power of attorney document is less likely to incite abuse if it requires affirmative action by the principal in its execution. Up until the mid-1990s, the rules governing New York powers of attorney granted all listed powers to the attorney-in-fact unless the principal drew a line through the text of a specific power and initialed the corresponding box.<sup>164</sup> If the principal did not strike anything, the agent received the authority to exercise all the powers listed.<sup>165</sup> When the statute was amended in 1994, instead of striking particular powers of attorney, the principal became required to grant each power by initialing them.<sup>166</sup> In addition to

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<sup>160</sup> See Henningsen, *supra* note 149.

<sup>161</sup> See *supra* notes 149–53 and accompanying text.

<sup>162</sup> See *DUKEMINIER ET AL.*, *supra* note 47 (“If a lawyer drafts a durable power of attorney, the lawyer should carefully examine the use of the power in the particular client’s estate plan. The power should be tailored to the client’s needs and wishes.”).

<sup>163</sup> Henningsen, *supra* note 149. The drafting attorney should meet with the elderly client alone. *Id.* Often times, an elderly person will want a family member to be present for such a discussion, out of trepidation for attorneys or a lack of familiarity with the legal process. However, this may be difficult to distinguish from the situation where the family member who stands to benefit from such document insists upon being present for such conversations. It is more likely that an elderly client will be able to truly express his or her own wishes in a confidential environment. See Henningsen, *supra* note 149.

<sup>164</sup> Sanford J. Schlesinger & Steven Lavner, *Changes in New York’s Short Form Power of Attorney Statute*, N.Y. L.J., Sept. 13, 1994, at 1.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*; see also N.Y. GEN. OBLIG. LAW § 5-1501 (McKinney 2007) (“Initial . . . any one or more of the subdivisions as to which the principal WANTS to

providing more warnings on the face of the document that detail the powers being conveyed,<sup>167</sup> the revised statute requires more participation of the principal and attorney. The old method of striking powers could likely confuse the average elderly person, who would assume that he or she should merely initial the boxes which correlate to the powers he or she wished to convey. Alternatively, the elderly person must give attention to each power listed now that the action of "checking" a box is required.<sup>168</sup> This Note argues that such a statute requiring affirmative action of the principal will increase communication between attorney and client, and more importantly, increase the likelihood that the agent will know exactly what powers he or she is granting to the attorney-in-fact.

*B. Involving Neutral Third Parties*

Involving an unbiased third-party in power of attorney relationships will increase the likelihood that a misuse of power will be detected at an early stage in the principal/agent relationship. Financial institutions such as banks, mortgage companies, and investment services should be required to send duplicate copies of trading records and account statements to an independent third party.<sup>169</sup> These third parties may include a court-appointed overseer or an attorney who was uninvolved in the original document drafting. In the alternative, having such records sent to the care of a relative who does not seek to benefit from the principal's will may cut costs that would likely be associated with the involvement of a third-party professional.

One way to involve a third party is to have the drafting attorney include specific oversight clauses in the document. These provisions would detail the proper titling of bank accounts,<sup>170</sup> the records that need to be kept, and the third

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give the agent authority. . . . If . . . NOT initialed, NO AUTHORITY WILL BE GRANTED for matters that are included in that subdivision.").

<sup>167</sup> See Schlesinger & Lavner, *supra* note 164. The new law added a requirement that the document be written in at least twelve-point font and expanded the notice provision at the beginning of the form. *Id.*

<sup>168</sup> *Id.* ("This method requires at least minimal participation in the choices rather than passive acceptance of what is on the form.").

<sup>169</sup> See Opdyke, *supra* note 1.

<sup>170</sup> For example, an oversight clause could state that all of the principal's bank accounts must be held solely in his or her name. This would prohibit the power of attorney from having the authority to go to the principal's bank and have his or her

parties to whom these records should be sent.<sup>171</sup> The very absence of such oversight makes the power of attorney concept appealing to a less-than-honest family member, or at the very least, easy to misuse.<sup>172</sup>

*C. Fragmented State Laws Highlight the Need for a Comprehensive Approach*

The proposed Elder Justice Act points out that “[f]or over 20 years, Congress has been presented with facts and testimony calling for a coordinated Federal effort to combat elder abuse, neglect, and exploitation.”<sup>173</sup> Yet, no federal law to date has been enacted to comprehensively deal with the issues of elder abuse.<sup>174</sup> This Note argues that federal laws targeting this abuse are needed to replace the current system of splintered state laws.

As noted above, some states have enacted statutes that mandate increased sanctions for elderly victims of crimes.<sup>175</sup> Federal legislation mandating such sanctions, however, would implement a cohesive system of combat against such predators, instead of the loose, fragmented system that is currently in place.<sup>176</sup> This legislation would be advantageous because it would compliment laws already in existence.<sup>177</sup> Thus, “they require no additional manpower or administration that would impact the judicial system.”<sup>178</sup> Under a directive from the United States Sentencing Commission, guidelines for appropriate sentencing of persons convicted of federal crimes became effective in 1987.<sup>179</sup> These guidelines[, now discretionary,] start with a base level of punishment for a particular crime, and add numerical units to increase a sentence based on characteristics of

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name added jointly to the account[s].

<sup>171</sup> See Henningsen, *supra* note 149.

<sup>172</sup> See *DUKEMINIER ET AL.*, *supra* note 47, at 349.

<sup>173</sup> Elder Justice Act, S. 2010, 109th Cong. § 2 (2005).

<sup>174</sup> *Id.*

<sup>175</sup> See *supra* text accompanying notes 111–21.

<sup>176</sup> See S. 2010 (“Differences in State laws and practices in the areas of elder abuse, neglect, and exploitation lead to significant disparities in prevention, protective and social services, treatment systems, and law enforcement, and lead to other inequities.”).

<sup>177</sup> Shelby A.D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 527 (2004).

<sup>178</sup> *Id.* at 531.

<sup>179</sup> See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. background (2006).

the offense.<sup>180</sup> For example, amount of loss, the vulnerability of the victim, and whether the perpetrator abused a position of public or private trust are all factors that can add years to a sentence.<sup>181</sup> Judges have discretion to further “depart” from the sentencing guidelines if they find that certain circumstances exist that may call for an increased or decreased sentence from the baseline.<sup>182</sup> In some states, the age of the elderly victim alone can trigger sentencing enhancement.<sup>183</sup>

For example, in *United States v. Kaye*,<sup>184</sup> the Second Circuit imposed a sentence beyond the enhancement guidelines for a defendant who was convicted of defrauding his great-aunt of nearly \$900,000—her life’s savings.<sup>185</sup> The court held that upward departure based on the degree of harm inflicted by the perpetrator was justified despite the fact that the base offense level of the sentence had already been enhanced for “targeting of a vulnerable victim,” “abuse of [] position of trust,” and due to “the extent of monetary loss.”<sup>186</sup> While many states have taken these guidelines into consideration when enacting laws on elder abuse, a federal law mandating increased sentencing for crimes that specifically target the elderly would increase deterrence levels for perpetrators and ensure that, regardless of jurisdiction, targeting of the elderly will be uniformly punishable by increased sanctions.

As noted above, all fifty states have statutes against abuse of the elderly. These laws, however, vary greatly among each jurisdiction. While these laws signify the states’ recognition of elder abuse as a grave problem, these efforts combine to form a fragmented system of inconsistency. Some states, for instance, only consider an act abusive if it results in “actual harm” to the

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<sup>180</sup> Moore & Schaefer, *supra* note 177, at 528.

<sup>181</sup> *See id.*

<sup>182</sup> *See id.* As part of the Act, Congress authorized a court to depart from the range imposed by the guidelines where “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b) (2000).

<sup>183</sup> *See* Moore & Schaefer, *supra* note 177, at 528.

<sup>184</sup> 23 F.3d 50 (2d Cir. 1994).

<sup>185</sup> *See id.* at 51, 54.

<sup>186</sup> *See id.* at 53–54.

elderly victim, while other states find abuse in the commission of the prohibited act.<sup>187</sup>

Although more states have begun to criminalize acts directed against the elderly, such protection is often inherently flawed. For example, Florida has criminalized the financial abuse of elderly or disabled adults.<sup>188</sup> While the statute imposes strict liability on predators because it does not allow a defense that the accused did not know the victim's age, "it defines elderly adults as persons who are physically or mentally disabled to the extent that they are unable to provide adequately for their own care."<sup>189</sup> Thus, an elderly person who lives alone, or who is not diagnosed with a "disability," for example, may not fall under the protection of this statute.<sup>190</sup> This Note argues that comprehensive federal laws on elder abuse, in addition to federally-imposed mandatory increased sentences, will better serve this abused population.

#### CONCLUSION

While the allegations of financial abuse and neglect involving Astor may never be proven, the Park Avenue socialite's story brings to the forefront one of the gravest legal issues affecting the elderly in the twenty-first century. The selection of who will hold one's power of attorney is, undoubtedly, one of the most significant decisions an older individual will make. Depending on the type of power granted, such an individual has the ability to thwart the elderly's desired disposition of money after death, or worse, infuse fear, helplessness, and deceit into the final years of an elderly person's life.

Without immediate action by lawmakers though, there is no indication that financial exploitation of the elderly will subside. Abuse is certain to swell as longevity increases, technology improves, and the lines of communication become easier to cross. As evidenced from the cases and statistics above, the day has

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<sup>187</sup> Moore & Schaefer, *supra* note 177, at 522–23.

<sup>188</sup> See FLA. STAT. §§ 825.101–06 (2007).

<sup>189</sup> Moore & Schaefer, *supra* note 177, at 526. The Florida statute reads in part: "Elderly person" means a person 60 years of age or older who is suffering from the infirmities of aging 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.

§ 825.101(5).

<sup>190</sup> See Moore & Schaefer, *supra* note 177, at 526.

passed where the American legal system can fail to recognize elder abuse as a widespread attack on the most vulnerable members of our population. To combat these abuses, federal and state legislatures need to enact uniform laws and sanctioning mechanisms to create a legal system with a hard stance against abuse of the elderly.