

—| *Spotlight* |—



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# FINANCIAL ABUSE OF OUR AGING POPULATION

## *Part II*

*Editor's note: This article is Part 2 of a series of articles addressing the various facets of elder abuse as senior citizens have increasingly become targets of unscrupulous family, friends and scammers.*

### WHAT IS A DURABLE POWER OF ATTORNEY?

**W**hen most people decide to go to an attorney “to get their affairs in order” they normally think of a will and a trust, and seek advice about the best way to hold and transfer real estate. A Durable Power of Attorney (“D POA”) does not come to mind first, but it is a standard estate planning instrument that wields a great deal of power.

When used properly, a Durable Power of Attorney can spare family and friends the unpleasant task of making decisions during stressful times, but if it is not properly drafted or the powers fall into the wrong hands, it can be disastrous.

A Power of attorney for health care decisions is separate from the financial decisions. In Michigan, a medical power of attorney is called a Patient Advocate Designation and is not the subject of this article. The financial Power of Attorney can authorize someone else to act on

your behalf in a legal or business matter. When a person (“the principal”) signs a Power of Attorney, he gives another person (“the agent”) the power to act in his place to manage his assets and affairs. There are a few different types of Power of Attorney. A General Power of Attorney authorizes the agent to act on the principal's behalf in a variety of situations, whereas a Special Power of Attorney is used for only a specific circumstance, such as buying a car or selling a house. The General Power of Attorney can be made durable with certain text in the document. The Durable Power of Attorney does not lapse over time and is not affected by the subsequent disability or incapacity of the principal. The power afforded to the agent may be effective immediately or only once incapacity of the principal has been established.

### ABUSE OF THE POWER OF ATTORNEY

**T**he use of the DPOA during disability and incapacity of the principal is too often misused to the detriment of our senior citizens. Statistics on Power of Attorney abuse are hard to come by, but experts recognize it as a prevalent problem among the elderly.

A brief cautionary tale: Richard, widowed and 81 has recovered from a stroke with some lingering short-term memory loss and has one bum leg. Richard's hired caregiver, Rachel is much younger and laughs at all of his jokes. Richard and Rachel become romantically involved to the dismay of Richard's children. Rachel convinces Richard to sign a DPOA permitting her access to all of his financial accounts. Rachel gives herself a substantial raise and permits herself luxurious gifts until Richard's son catches on, but by then, thousands of dollars are gone and so is Rachel.

Richard was a victim of a “sweetheart-swindle” and if his son could find Rachel, they could pursue civil and criminal charges. The DPOA must be strictly construed. This strict construction principal is useful to an attorney with clients like Richard who have had assets stolen by his agent. Powers to borrow and gift should be particularly scrutinized. An experienced estate planner can draft language to meet the specific needs of the client.

Additionally, it is questionable whether Richard had the requisite mental capacity to sign the power of attorney due to his short-term memory loss. It is important that people have their attorney draft a DPOA when they are still

in full command of their faculties. The principal must sign and date the DPOA voluntarily and have it notarized and witnessed by two people, one of which can be the notary. If a person fails to designate someone to handle his affairs before becoming disabled or incapacitated, then family members will likely have to go to court and establish a conservatorship. Petitioning the court for conservatorship can be a costly and complicated process, and there is no guarantee that the judge will choose the person who would have been chosen for a DPOA.

### PREVENTION OF ABUSE

Considering the baby-boomer population, it is estimated by the Alzheimer's Society that by the year 2025, millions of people in the United States will have dementia. One in five people over 85 already suffers from it. Handling financial affairs while suffering from dementia becomes impossible and the financial abuse of the elderly is expected to grow in stride.

*“Evil is unspectacular and always human and shares our bed and eats at our own table.”*

– *W.H. Auden, Herman Melville (CP 200) March 1939*

While there is not one fail-safe way to protect against the financial abuse of an elderly adult through the use of a power of attorney, people can take steps to protect themselves and their loved ones. One of the most important preventative measures is to meet with an estate planning or elder law attorney to discuss the particular familial and financial circumstances so that a DPOA can be carefully crafted to meet those specific needs. For example, although it was not advantageous to Richard, the principal may want the DPOA agent to be able to make gifts to people if he or she is incapacitated. Sometimes this may be necessary for tax planning. Perhaps distributions need to be made to trusts or certain insurance premiums need to be paid. Does the principal want the agent to be able to make gifts to himself or herself? The document might spell out these powers and the specific amounts, allowing for inflation.

When used properly, the power of attorney can assure that a trusted person is handling all financial affairs for the principal, when he is not mentally or physically capable. The key of course is finding that trusted agent. Most of the

education on senior financial exploitation centers on scams perpetrated by strangers. Unfortunately, family members, friends, and neighbors are the culprits in 34% of elder financial abuse cases, according to a study by MetLife. Many elderly are afraid of answering the phone or going online, but that the reality may be that the majority of the assets are going out the back door by a trusted relative. It is essential to choose an agent wisely and to discuss the scope of the responsibility. The DPOA can be revised or revoked at any time, as long as the principal is considered competent. Otherwise, it stays in force until the principal dies.

The DPOA is somewhat vulnerable to abuse, because it is not recorded or tracked in a public system. Anyone can find and print a form from the Internet and put that in front of an older person to sign. Once a new DPOA is signed, it supersedes the old power of attorney if it addresses the same issues. One way to protect the principal is to provide the DPOA to all financial institutions and advisors and ask them to alert

you to any changes in the account. Once a DPOA is established the agent should monitor bank accounts for potential abuse once their loved one has become incapacitated.

Prosecutors and elder law attorneys agree that the number of cases of family members and caregivers purloining assets from the incapacitated elderly through the improper use of a DPOA is rising. Because of this, some banks have started rejecting financial maneuvers made under the cloak of a Power of Attorney, for fear of being parties to fraud. The lesson for anyone taking the step to sign a DPOA is that caution is essential. There are ways to bulletproof these legal documents to improve the chances that banks will honor them and that they will not be misused by family and caregivers. It does, however, take careful planning and one is best advised to meet with an attorney that specializes in estate planning or elder-law. ●

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