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Elder Financial Exploitation: How Jurisdictional Uniformity will Aid in the Prevention and Punishment of Abuse

I. INTRODUCTION

Recently, my grandmother received a phone call from a stranger claiming to be me. He invented a story, telling her that my brother and I were in jail for drunk driving and asked her to wire bail money (discreetly of course) so that our mother would not find out. The caller knew our names, birthdays and other information sufficient to establish a basic rapport. He utilized a blocked phone number. Fortunately my grandmother remained true to form and was inclined to leave her grandchildren in jail rather than financially contribute to their bad behavior. My personal anecdote highlights a growing concern; financial exploitation of the elderly is a serious social problem that requires long-term solutions in the form of increased public education as well as better legal and societal safeguards. In addition, common estate planning tools can do much to reduce risk factors for serious financial abuse of the elderly by their caregivers and fiduciaries. With proper education and careful implementation the durable power of attorney and the revocable trust can provide security for an elderly client while still preserving as much independence as possible during advancing age and incapacity.

Americans are not getting any younger. In 1900, persons aged 65 and older made up 4% of the total U.S. population.[1] By 2011 that number jumped to 13.3%.[2] From the year 2000 to 2011 the U.S. population under the age of 65 increased by 9.4% whereas the population over 65 increased 18%.[3] This trend is not slowing down; the U.S. Department of Health and Human Services projects that by 2040 21.4% of the U.S. population will be over the age of 65.[4] A person in the United States who reaches 65 today can look forward to an average of 20.4 additional years.[5]

While Americans enjoy increasingly longer lives; this miracle of modern medicine is mirrored by an ugly reflection in the form of financial exploitation. Americans over the age of 65 lose an estimated $2.9 billion to financial abuse annually.[6] It is not surprising that the elderly are considered choice targets for financial abuse given that persons over the age of 50 control over 70 percent of the wealth in the United States.[7] Individual increases in susceptibility due to loss of physical and/or mental capacity, loss of friends and family, social isolation, and dependence on family or commercial care providers further exacerbates their vulnerability of the elderly as a class.

Abusers wear many guises. Financial abuse can occur from acts as simple as inappropriate mail solicitations or they can be as insidious as exploitation by trusted caregivers and fiduciaries.

State governments can best address this problem through uniformity. In recent years new laws as well as needed reforms and updates to existing statutes have appeared across state jurisdictions in various forms, encouraged by the federal government. Many state legislatures have enacted statutes specifically penalizing the financial abuse of the elderly or vulnerable adults; yet there is still a debate across jurisdictions on a definition for "elderly" or "vulnerable adults." Jurisdictions also differ on the remedies offered to victims and the penalties imposed on abusers. State laws vary on reporting requirements for those who suspect abuse. Variation can be a benefit, allowing a jurisdiction to experiment and meet the specific needs of its citizens. Conversely, a lack of uniformity among jurisdictions perpetuates confusion and enables exploitation. It is crucial that states clearly define and protect the elderly as a class because they are already being targeted as a class. Several states have enacted promising legislation and other jurisdictions must follow suit.

Prevention is more effective than punishment. Estate planning will help reduce elder financial abuse in the short term. A myriad of tools are available to elderly persons planning for incapacity. Unfortunately, some of these simple options can actually open an elderly person to further abuse. Proper use of the durable power of attorney coupled, whenever possible, with a revocable trust can greatly reduce risk factors for abuse. The revocable trust is a proven alternative to probate and, with little alteration, can serve as an excellent guard against abuse. Though not foolproof, the accounting requirements, well defined fiduciary limits, and wide acceptance in the business and legal communities make the revocable trust a much more secure alternative to guardianship or a simple durable power of attorney in the prevention of abuse.

Though preferable, revocable trusts are not practical if a person does not have enough assets to fund and maintain the trust. In these situations a durable power of attorney will need to be in place in the event of incapacity. States need to update and reform laws regulating the durable power of attorney. Many legal scholars and practitioners have raised the point that the durable power of attorney is a double-edged sword. On one hand it provides a flexible, easy tool for dealing with incapacity and avoiding guardianship. However its ease coupled with lack of oversight permit pillaging by the very fiduciaries it empowers. Thirteen states have already adopted the Uniform Powers of Attorneys Act (UPOAA).[8] Though it does not solve every issue with the power of attorney, adoption of the Act will provide foundational uniformity across jurisdictions that will enhance education and foster future reforms. Even with the implementation of needed reforms, more education is needed. Principals and agents alike are often misinformed, or do not fully understand just how much authority a power of attorney bestows. Better education will lead to more responsible fiduciary relationships tailored to individual needs.

1. Types of Abuse and Risk Factors

In a recent New York case, an elderly man, diagnosed with prostate cancer and Alzheimer's disease was left in the care of a family friend while his daughter took a short vacation.[9] His daughter returned to discover that her supposed friend had married her father. It must have been a busy week because the new bride was added to her elderly husband's will and listed as the beneficiary of his retirement account before his daughter returned. The groom did not live much longer, so a third issue at trial was his dubious widow's right to an elective share.[10] This case is demonstrative of how quickly devastating financial exploitation can occur. Unfortunately what makes this case truly rare are not the outrageous facts, but rather that the abuser was challenged.[11]

Elder financial abusers come in many forms. Scams such as telemarketer swindles,[12] door to door sales fraud, mail solicitations,[13] lottery scams,[14] internet scams[15] Medicare/Medicaid fraud[16] together with more legitimate business exploitation such as bad faith mortgage loans[17] fraudulent investment advice, and many others accounted for 45% of reported abuse of elderly from 2010-2011.[18] Abuse of elderly by family members and fiduciaries accounted for 47% over the same period.[19] The latter category is of most concern because it involves abuse by actors who are often legally empowered to ensure the victim's welfare during incapacity.

Isolation is an enabler in financial exploitation.[20] Isolation can be encouraged by several factors but is commonly the result of loss mobility, and loss of friends and family. Abusers of all types prey on victims who have few connections. Courts have noted the difficulties associated with catching and preventing abusers because of their ability to secretly isolate victims. This is especially true when the abuser is a relative.[21]

Gender can also be a significant factor in exploitation. In 2010 women were twice as likely to become victims of financial exploitation as men.[22] Widows are especially vulnerable if the deceased spouse was in charge of finances.[23]

The risk of exploitation increases through advanced age and health complications.[24] Lack of capacity fosters financial abuse. When a potential victims become dependent on family or other care providers, the risk for abuse increases.[25] Furthermore, a dependent relationship lowers the chance that abuse will be reported.[26]

II. STATE RESPONSE TO ABUSE

1. Existing Framework for Reporting and Responding to Abuse

State legislatures have become increasingly cognizant of the need to protect the elderly as a class from abuse.[27] Adult Protective Services (APS) are currently in place in all of the states.[28] These agencies are tasked with investigating reports of abuse, providing services to victims, and in some cases prosecuting perpetrators.[29] Additionally, APS is authorized to test the victim's competency to make informed decisions and to intervene if necessary. In some situations the consent of the victim is not required.[30]

Though the framework is in place and generally uniform across the states, funding issues have plagued APS in many jurisdictions.[31] Congress responded to this problem with the 2010 Elder Justice Act (EJA), passed as part of the Patient Affordable Care Act. The EJA authorizes significant funding increases to state APS as well as new programs such as criminal background checks for care providers and inter-state database access.[32] While the EJA is an important step in the right direction, so far Congress has yet to appropriate any of the mandated funds.[33]

If sufficiently funded, APS can offer important services where it determines abuse has occurred. Investigation of fraud, prosecution of perpetrators and providing education about available services are among its primary functions.[34] Consequently, reporting of abuse by third parties is crucial if a state APS is to function correctly. Almost all of the states have mandatory reporting requirements, though jurisdictions differ on who is required to report and what penalties and protections a reporter can expect to encounter.[35] For example in Delaware all persons are required to report abuse to the Delaware Department of Health and Human Services.[36] Delaware also grants civil and criminal immunity to those that report in good faith.[37] Other states such as Arizona require only specified professionals to report abuse. Failure to report abuse in Arizona is a misdemeanor.[38] A few states have no mandatory reporting requirements.[39] The only universal commonality across the states is the difficulty of enforcing mandatory reporting laws.[40]

The state has the authority to recommend a guardianship using its parens patriae powers if an APS investigation reveals that a victim is no longer able to independently function.[41] A guardian is a court appointed fiduciary who is granted court-defined authority to oversee the financial and physical wellbeing of the ward. Most agree that guardianship should be avoided whenever possible. One reason for its general disfavor among legal practitioners is that guardianship robs the elderly person of independence.[42] Though guardians can be recommended by the elderly person, it is ultimately the decision of the court. The elderly person in a guardianship may lose the ability to determine where to live, how to dispose of funds as well as autonomy over daily activities.[43] Guardians act under the direction of the court, although oversight of a guardian's activities after the initial proceeding is often minimal at best.[44] Historically, many jurisdictions only required a guardian to report to the court at the termination of the guardianship.[45] More recently jurisdictions have required much more frequency and formality with respect to reports by guardians. This is in response to accounts of abuse perpetrated by court appointed fiduciaries.[46] Though there may be circumstances where a guardianship will still be necessary, the need for a guardianship can often be mitigated with an adequate estate plan.[47]

2. Criminal Prosecution of Abuse

Prosecution of elder financial abuser is far from uniform across jurisdictions.[48] In some states, elder financial exploitation is an independent statutory offense.[49] Other states prosecute elder financial abuse under general embezzlement, or theft statutes. Of the states that prosecute under broader criminal laws, some impose enhanced penalties if the victim is an elderly person.[50]

States also differ on how to define victims of elder financial abuse. For example Texas defines "elderly person" simply as "a person 65 years of age or older."[51] Florida specifically criminalizes financial abuse of the elderly but its reach is limited because "elderly person" is defined, in pertinent part as "a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age. . . to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired."[52] Other states decline to specifically protect the elderly as a class, instead criminalizing abuse of anyone over the age of 18 who qualify as "vulnerable adults."[53] These differences can have drastic impacts. In a recent Florida case, the defendant was charged with abuse of the elderly, a third degree felony.[54] The defendant forcibly entered the home of an older gentleman, beat him until he was unconscious, then stole his wallet.[55] The defendant's conviction was reversed on appeal.[56] The court held that the victim did not fit Florida's definition of an elderly person, despite his age meeting the statutory requirement, because his ability to care for himself was not impaired.[57]

Even if convicted, abusers can expect to face different penalties depending on where the crime is committed. For example, in Illinois financial exploitation of an elderly person (defined simply as anyone over the age of 60) by one who is in a position of trust constitutes a class 4 felony if the value of the exploited property is $300 or less.[58] In Delaware financial exploitation against an "impaired adult" is punishable as a class A misdemeanor if the value of the property is under $500.[59] Unlike Illinois, the Delaware statute is chargeable to "any person" rather requiring a "relationship of trust."[60] Consider the myriad of potential differences just from these two statutes. The two jurisdictions employ different definitions for the victim (age 60 and above v. impaired adult), different definitions of a perpetrator (one in a relationship of trust v. any person) and apply different penalties in the prosecution of essentially similar offenses.

3. Civil Remedies for Abuse

Civil remedies stemming from elder financial exploitation reflect the desire of many state legislatures to empower abused victims to seek restitution.[61] For example, Arizona encourages litigation against those who financially exploit vulnerable adults by providing for increased incentives such as treble damages and the award of attorney's fees.[62] Delaware similarly incentivizes private action but expands its statutory protections beyond the impaired to any adult over the age of 65.[63] Furthermore, Delaware permits a $10,000 fine payable to a state fund for each act of abuse or exploitation in addition to private damage awards.[64]

As in the criminal sphere, jurisdictions lack crucial commonalities in how civil redress of elder financial abuse is handled. States apply different standards as to who, in addition to the victim, has standing to bring a claim. This is troubling because victims are often not in a position to pursue a claim on their own. For example, in Tennessee an action can only be brought by the victim, the conservator or a "next friend."[65] Conversely, in Arizona and

California anyone who meets the definition of an "interested person" may petition for permission to bring an action.[66] These subtleties can be fatal to cases.[67] In a 2010 California case several grandchildren, beneficiaries to their deceased grandmother's trust, petitioned to succeed as successors in interest to a claim for elder abuse against their father who was the personal representative of the decedent's estate.[68] The court barred the claim holding that because the grandchildren's interest in the trust was not affected by the alleged abuse, they did not meet California's definition of "interested persons."[69]

4. Need for Jurisdictional Uniformity

More uniformity in how states address elder financial exploitation is critical. As two legal scholars note, "Under current laws, abusers can adapt their actions to circumvent a limited law, switch to types of abuse the laws fail to address, or simply move to a jurisdiction that is more amenable to their operations. To eliminate financial abuse, uniform laws from state to state are especially needed."[70]

This statement underlines an important point with which much of the emerging scholarship concurs; the elderly are being specially targeted by abusers whose exploitation largely goes unpunished. It is estimated that only 3% of elder financial abuse cases are even reported let alone prosecuted.[71] A common framework for reporting and responding to abuse could remedy this statistic by transforming the hodgepodge of under-utilized mandatory reporting and criminal statutes into widely recognized norms.

The same applies to the civil sphere. As previously noted, the legislatures recognize that civil litigation can often be far more effective then criminal prosecution. Uniformity will lead to a better understanding among the public of what constitutes abuse, what relief is available and how to report it. More reports result in more data which translates into better policymaker understanding which again enhances public awareness.

Demanding uniformity is simple. It is more difficult to make relevant recommendations appropriate for uniform adoption. While this author does not pretend to have the expertise to make all of those specific recommendations, it is clear that whatever framework that is put in place must incorporate a policy of deterrence. A would-be abuser is less likely to act where the result is likely civil or litigation or criminal prosecution. Deterrence in the sphere of elder financial abuse is especially important because a lengthy litigation limits how much real respite and restitution the legal system can offer elderly plaintiffs. Even in the rare case that full restitution is obtained, it is possible that only the victim's beneficiaries will derive any benefit from the ordeal.

All states should adopt a uniform definition of "elderly person" based solely on age and offer increased protections for the elderly as a class. A uniform definition of elderly persons would create a bright line rule that puts would-be abusers on notice and provide a foundation for even more jurisdictional uniformity in the future. This is not to say that younger persons who meet a state definition of "vulnerable adults" do not also merit protection; but there is a clear need to afford seniors automatic protection. In addition to better potential for deterrence, this change would clarify mandatory reporting requirements, and allow prosecutors and plaintiffs alike to use statutes more effectively without the risk that the state-specific definition of "vulnerable adult" will be held inapplicable to their cases.

Of course an age-only definition of elderly persons is not without risk. In her article, "Financial Abuse of the Elderly: Is the Solution the Problem?" Professor Carolyn Dessin argues that statutory protection of the elderly should be based on vulnerability and not at all on age.[72]

She reasons that laws that afford age-only protection to seniors are based on inappropriate ageist stereotypes.[73] She notes that these stereotypes stem from a societal obsession with youth and a belief that persons of a certain age are somehow weaker than younger persons.[74] Dessin takes issue with the minority of states that afford automatic protection to the elderly without assessing their vulnerability.[75] Without minimizing the importance of Dessin's concerns, the value of a bright line rule as a deterrent should outweigh these considerations. Nevertheless, age based protections should not be based on the concept that the elderly are somehow weaker than younger persons, but rather in the recognition that senior citizens have already been classified by abusers as the best targets. Dessin directly responds to this argument stating that society should not protect a victim because of their potential attractiveness to a perpetrator but rather because the person needs protection.[76] This argument fails to acknowledge that vulnerability does not have to be inherent to warrant protection. Elderly persons can be vulnerable for no other reason than that they are exponentially more likely to be targeted than a younger person. However, this unique vulnerability still merits protection.

Another potential argument against age based protections and penalty enhancements is that they do more harm than good because while they put potential abusers on notice of increased penalties, they also may confirm negative stereotypes. It is highly unlikely that age-based definitions will cause more abuse. Legislators can outline the purpose of the definition of elderly person so as not to encourage stereotypes or offend sensitivities while still sending the message that states will no longer tolerate elder financial abuse.

Another argument against an age-only definition is that it would give unnecessary protection to seniors who are not physically or mentally vulnerable.[77] Expanding the definition of elderly persons to include those who are not mentally or physically vulnerable will actually increase the effectiveness of the laws. Persons incapacitated by mental or physical disability are less likely to possess the capacity to report abuse let alone bring civil actions. By including seniors with full mental and physical capacity in a statutory definition of "elderly person" the number of reports of abuse as well as the number of suits filed will likely increase. This will serve to deter future abuse against all seniors-- including those who lack capacity.[78]

Legal uniformity across jurisdictions is crucial to stemming elder financial abuse. Creating a uniform definition of "elderly person" based solely on age is the crucial first step in effective deterrence as it will provide for more effective reporting, prosecution and restitution.

III. PLANNING FOR INCAPCITY

1. Individual Plans for Incapacity

Individual financial plans for incapacity are much preferred to state remedies in combating abuse. However, not all preventative measures are equally effective. States should take steps to encourage individual plans for incapacity through increased education and reformation of the durable power of attorney.

Individuals can do much to prevent abuse. These plans are most effective if they minimize the potential for social isolation. Preventative actions can be as simple as creating a joint tenancy, or more complex as in the execution of durable power of attorney or the creation of a revocable trust. Whatever method is elected, a plan for incapacity will only be effective if it limits isolation. This is one of the supposed advantages of a guardianship. A guardian's oversight of the ward protects against abuse by third parties, and the court's supposed oversight prevents abuse by the guardian. Individual plans for incapacity operate under a similar theory but unlike a guardianship can be very flexible, and provide far more independence to the elderly person.

a. Joint Tenancy

Joint ownership is the most frequently utilized method of dealing with incapacity.[79] Usually a person can complete a joint tenancy in financial accounts in just a single visit to a bank. While this tool can be useful it can also lead to unintended consequences. In a recent Florida case, a wealthy plaintiff, Bernachea created a joint tenancy with right of survivorship in a bank account for his mistress.[80] An unexpected heart attack left Bernachea unconscious in the hospital.[81] His mistress waited faithfully by his bedside. Then his adult children arrived. These circumstances proved less than ideal for a first family meeting and ended with the mistress leaving insulted. The mistress promptly transferred $280,000 from the joint bank account to her private account.[82] Upon recovery Bernachea sued his now former mistress, arguing that he lacked donative intent when he granted her access to his account.[83] The court rejected this argument, holding that the establishment of a joint tenancy in the account created the presumption of a gift. Bernachea was unable to produce the clear and convincing evidence required to rebut this presumption.[84] This case would likely have different outcomes in other jurisdictions. For example, in Oregon and in many other states a joint account belongs to the parties only in proportion to the parties' net contribution to the account.[85]

Even in jurisdictions that do not automatically presume donative intent the potential for abuse is still great as initially well-intended individuals face personal financial strain and succumb to the temptation to exploit. Often trusting or incapacitated victims are not aware of the withdrawals or are afraid of accusing for fear of negative consequences to an otherwise beneficial relationship with the abusers. Schemes for abuse can just as easily be premeditated and elaborate. For example, a couple in California was recently convicted of felony elder theft when they swindled $1.1 million from a 97 year old victim. The couple first befriended the elderly man, and then convinced him to add them to his bank account under the guise they would provide financial management services. The victim was entirely unaware of any withdrawals. By the time his abusers were apprehended his accounts were almost completely drained.[86]

b. Durable Powers of Attorney

Joint tenancy is a weak preventative tool because it requires an elderly person to give unfettered access and, in some jurisdictions, actual rights in and to assets. Durable power of attorney can be a much more secure alternative to simple joint tenancy and guardianship. Power of attorney is a creature of common law; creating a fiduciary relationship in which an agent is empowered to act on behalf of a principal.[87] Under common law, this agency relationship terminated at the incapacity of the principal.[88] In the mid 1950's states began to enact statutes which allowed for powers of attorney to continue after incapacity.[89] The rationale behind these enactments was to create a way for low income persons to enjoy financial planning benefits comparable to those enjoyed by wealthier persons through revocable trusts.[90]

All states have since enacted statutes allowing for durable power of attorney (DPOA). A principal can grant either financial or healthcare DPOA.[91] DPOAs are extremely flexible in both enactment and scope of powers granted. A DPOA can be take effect immediately or can be springing; taking effect upon determination of incapacity.[92] States vary somewhat on how to enact durable powers of attorney. The general requirement is that the DPOA be signed while the principle is capable.[93] Some states such as Arizona require a separate statement indicating that the power of attorney is intended to be durable.[94] In terms of scope a DPOA can bestow very limited powers, such as a directive that the fiduciary transfer all assets into a specified trust, or can be as broad as granting complete control over a principal's finances.

A DPOA is a much more effective tool than a simple joint tenancy because it imposes substantial fiduciary duties. An agent owes a duty of loyalty to the principal and agrees not to act contrary to the benefit of the principal during the agency relationship.[95] This specifically includes, among other duties, a duty not to use the principal's property for personal gain.[96] Fiduciary duties prohibit an agent from engaging in activities that are personally beneficial at the expense of the principal.[97] Unfortunately, DPOA has become a notorious enabler for abuse. This is because, absent any specific stipulation, DPOA does not provide for any monitor other than the principal.[98]

Once the principal becomes incapacitated, fiduciary protections may do little absent any third party oversight to impede abuse. In a Vermont case, Kurrelmeyer executed a very broad DPOA naming his wife as his agent.[99] When Kurrelmeyer became very ill his wife transferred substantial real estate into a newly created trust. She was the primary beneficiary in that trust even though the property was already designated to go his children in her husband's will.[100] After Kurrelmeyer's death these transfers were challenged by his adult children. They argued that the property was inappropriately excluded from probate because the DPOA did not authorize the creation of a new trust.[101] The Vermont Supreme Court held that the transfers were valid because the DPOA demonstrated the decedent's intention for broad grant of power.[102] The case is illustrative of the extent to which manipulation by a fiduciary can be enabled under DPOA.

The main issue in DPOA is one of oversight. Although fiduciary responsibilities are imposed, absent a monitor they do not effectively stop abuse. Legal scholars are quick to counter that too much oversight mitigates the attractiveness of the DPOA over a guardianship.[103]

c. Revocable Trusts

The revocable trust provides a balance of oversight and flexibility. The revocable trust essentially entails the transfer of title of assets by the settlor (creator) to the trust.[104] The settlor becomes the beneficiary, and if not the sole beneficiary, the settlor may also serve as trustee.[105] The settlor has the power to withdraw a revocable trust at any time.[106] The trust does not affect the settlor's enjoyment or freedom to dispose of assets during the life of the settlor. In the event of incapacity a successor trustee can be predetermined in the terms of the trust or by unanimous decision of the beneficiaries.[107] If no trustee is selected, the courts will select a replacement trustee.[108] Perhaps most important to limiting abuse are the reporting requirements placed on the trustee. The trustee is required to provide a reporting to all beneficiaries at least annually; but also upon request.[109] This oversight is balanced with very flexible discretion and authority given to the trustee.[110] Additionally, the reporting and accounting requirements required in a revocable trust result in wider recognition and acceptance in the business and legal community.[111] Finally, due to their complexity, a grantor of a revocable trust is more likely to be better educated about financial options than a principal of a simple DPOA; resulting in better fiduciary relationships with lower risk for abuse.[112]

One of the drawbacks to the revocable trust is the cost of both its creation and maintenance. The cost of the trust is proportional to the size of its assets. A small trust with few assets can be managed by a family member or close friend. Yet the default reporting requirements will still be an effective guard against financial abuse. In the case of a larger trust, a commercial trustee may be necessary. Furthermore, the cost of maintaining a trust will be minimized by the money saved through the avoidance of probate. Using the revocable trust to make testamentary dispositions also has the secondary benefit of adding more potential beneficiaries to whom the trustee will eventually have to answer should there be any abusive conduct. Ultimately the value in the security that a revocable trust provides should outweigh the cost concern to most seniors.

2. State Influence on Incapacity Planning

For some elderly persons a revocable trust will not be a viable option. Unfortunately, modest assets will not minimize the risk of isolation and exploitation. In these cases a DPOA will be the best option for planning for incapacity. Accordingly, it is imperative that states take steps to decrease the potential for the abuse of the DPOA. Potential principals and agents alike should be educated as to the serious consequences entailed in a DPOA. Better education will allow principals to make more tailored use of the DPOA. With understanding an elderly person can easily add reporting requirements or other safeguards into their DPOA.[113] Additionally, fiduciaries who understand their obligations as well as the liabilities attached to their service will be more effective agents. Education will lead to more refined DPOAs which will result in wider acceptance by the business and professional communities. This may require states to scale back access to the durable power of attorney. For example one online legal service advertises a power of attorney for $35.00 with an emphasis on rapid completion.[114] While online creation of power of attorney may aid in the instruments' proliferation, unless these tools accompany educational requirements such as the completion of an online certification course by both the principal and agent, ease of creation could easily translate into greater propensity for abuse.

States should also take more direct steps to prevent abuse under the DPOA. A uniform approach to handling DPOAs would further foster education. Thirteen states have adopted the Uniform Powers of Attorney Act (UPOAA); first introduced in 2006.[115] Whether the UPOAA provides enough reform is still debated; nevertheless, its adoption would be an important first step towards a uniform approach across jurisdictions in encouraging incapacity planning.[116]

Its drafters admit that the primary purpose of the reforms promulgated in the UPOAA is to preserve the flexibility and utility of the power of attorney rather than to prevent abuse.[117] For example, section 119 of the UPOAA grants immunity for a good faith acceptance of a DPOA.[118] Section 120 goes even farther by imposing liability for the refusal to accept a valid DPOA in certain situations.[119] These sections demonstrate understanding on the part of the drafters that if DPOA is not widely accepted, it will not be effective as an alternative to guardianship.[120] This is further indicated in section 104 stating that under the UPOAA, the power of attorney is assumed to be durable unless otherwise indicated.[121] This contrasts with the current practice is states that require a separate grant of durability.[122]

While increasing the flexibility and acceptance of DPOA, the UPOAA also adds some provisions to prevent abuse. The UPOAA requires that a power of attorney be signed and notarized to be effective.[123] Additionally, the UPOAA lists specific fiduciary responsibilities including the maintenance of a complete record of the agent's activities.[124] Furthermore, the UPOAA imposes a duty on an agent to preserve the estate plan of the principal.[125] Although there is no default requirement for automatic reporting, section 114 provides that an agent must provide a report if it is requested by the principal, a government agency, or another fiduciary.[126] The best defense the UPOAA provides against abuse is found in section 116. It enumerates a generous list of persons who have standing to pursue a claim against an abusing fiduciary.[127] This list includes, among others, a principal's spouse, descendent, beneficiary, caregiver, or any person that demonstrates a sufficient interest in the welfare of the principal.[128]

Some scholars note that the UPOAA does not do enough to prevent abuse through a DPOA.[129] In her article "No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals" Jenifer Rhein argues that most of the protections included in the UPOAA are not new additions but rather reiterations of the current standards already present under common law.[130] Rhein further notes that even in the instances where the UPOAA adds fiduciary responsibilities, the chances for their enforcement are small absent any supervision or reporting requirement of the agent.[131] Rhein's recommendation for solving this problem is based on a comparison with recent amendments to the DPOA in Britain.[132] She recommends that, in addition to adopting the UPOAA, states should take extra measures by requiring that DPOA be witnessed and standardized through registration and fees.[133] Rhein further suggests that notification of others in addition to the principal should be adopted; with these persons being granted standing to challenge fiduciaries in court.[134]

While Rhein highlights important deficiencies in the UPOAA, her recommended remedies would likely chill not only the flexibility of DPOA, but also their creation by low income individuals; the very class of principals the DPOA was designed to benefit. This is not to say that Rhein's suggested remedies would not be effective. In fact they could prove to be very beneficial additions to an individual's DPOA. A more feasible remedy would be to include a default annual report requirement similar to those mandated in a revocable trust. As the UPOAA already requires that an agent maintain a complete record it would not be an unreasonable burden on the agent to produce an annual report. In the same vein as Rhein's notification suggestion, this report should be made available to beneficiaries, fiduciaries, family members or other specified individuals.

In spite of its shortcomings, The UPOAA should be adopted by all of the states because it establishes a uniform system. This would allow for better clarity and education of principals and agents while fostering future reforms.

IV. CONCLUSION

Elder financial abuse is a serious problem that demands immediate attention. Although a framework for reporting, prosecuting and remedying abuse is theoretically in place, it is not yet effective. Uniform laws across jurisdictions will increase the efficacy of the system and prevent more abuse. An important first step is for all state legislatures to adopt a uniform definition of "elderly person" based strictly on age rather than on varying definitions of capacity and vulnerability. This definitional shift will create a legal bright line that will deter abuse while also clarifying reporting requirements, opening pathways to prosecutions, and encouraging civil litigation.

Individual planning for incapacity is the best way to prevent elder financial abuse. These plans must strike the appropriate balance enough oversight to prevent isolation, independence for the principal and flexibility for the fiduciary. A revocable trust has been a long time favorite for incapacity planning and whenever possible should be utilized in conjunction with a limited DPOA. On its own the DPOA can be an important guard against abuse for those who do not have the assets needed to use the revocable trust. However, a DPOA can also be a dangerous catalyst for fiduciary abuse. States legislatures must encourage education for fiduciaries and principals alike about the true power entailed in a DPOA. Finally, all states should pass at least some elements of the UPOAA to create jurisdictional uniformity in regards to the DPOA. This uniformity will allow for better education and further necessary reforms. Though an important first step, the UPOAA does not include any default provisions for reporting. Under the UPOAA, a power of attorney is automatically presumed to be durable. Therefore States should include default reporting requirements for a power of attorney; in addition to adopting the UPOAA to match this increase in agency authority.

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[10] I*d*. at 465; James L. Buchwalter, *Causes of Action for Financial Elder Abuse Under State Statute*, Cause of Action Series 55 Causes of Action 2d 157. § 23 (2012).
[11] *See*, Lawrence A Frolik, *Elder Law in a Nutshell*. 405 (5th ed. 2010).
[12] *See generally*, Shelby A.D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 San Diego L. Rev. 505 (2004); Terrie Lewis, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 Wm. Mitchell L. Rev. 911 (2001).
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] MetLife, *supra*, at 2.
[17] Buchwalter, *supra*, § 12, (citing *Zimmer v. Nawabi*, 566 F. Supp. 2d 1025 (E.D. Cal. 2008)). (Mortgage lender targets elderly couple based on their age).
[18] Metlife, *supra*, at 3.
[19] *Id*.
[20] Linda S. Whitton, *Durable Powers as an Alternative to Guardianship*: *Lessons We Have Learned* 37 Stetson L. Rev. 7, 14 (2007-2008).
[21]Buchwalter, *supra*, § 23, (citing *Mabel R. v. Rayshawn D.*, 33 Misc 3d 1023, 933 N.Y.S.2d 529 (Fam. Ct. 2011)).
[22] Metlife, *supra*, at 3; Richard J. Bonnie, Robert B. Wallace, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America. Panel to Review Risk and Prevalence of Elder Abuse and Neglect*. The National Acad. Pr. 96 (2003).

[23] A. Paul Blunt, *Financial Exploitations of the Incapacitated*, 5 Journal of Elder Abuse & Neglect, 19, 21 (1993).
[24] Metlife, *supra*, at 3. (Stating that most victims were between the age 80-89).
[25] Blunt, supra, 21.
[26] *Id.*
[27] Cal Welf. & Inst. Code Ann § 15600 (2014) (West).
[28] Frolik, *supra*, at 418 §16.8.
[29] 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, 4 (2005).
[30] Folik, *supra*, at 418.
[31] Lemke and Moskowitz*, supra,* at 4.
[32] *Id*.
[33] National Adult Protective Services Association, *Elder Justice Act*, *available at* http://www.napsa-now.org/policy-advocacy/eja-implementation/ (accessed April 22, 2014).
[34] Lemke and Moskowitz*, supra*, at 4.
[35] Frolik, *supra*, at 419.
[36] Del. Code Ann. tit. 31, § 3910.(West 2014); *See also,* Carolyn L. Dessin, *Should Attorneys Have a Duty to Report Financial Abuse of the Elderly* 38 Akron L. Rev. 707, 709-710 (2005). (Discussing mandatory reporting requirements across jurisdictions with correlating citations to state statutes).
[37] Del. Code Ann. tit. 31, § 3910. (West 2014).
[38] Ariz. Rev. Stat. Ann § 46-454. (2013) (West).
[39] Carolyn L. Dessin, *Should Attorneys Have a Duty to Report Financial Abuse of the Elderly*, *supra*, at 710.
[40] Id. at 708, footnote 8.
[41] Mark D Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions* 5 Elder L.J. 75, 79 (1997).
[42] *Id*. at 75.
[43] *Id*. at 78-79.
[44] *Id*. at 109.
[45] Frolik, *supra*, at 252-254.
[46] *Id*.
[47] Cynthia Barrett, *Elder Law Incapacity Planning*, 2 Marq. Elder's Advisor 38, 40 (2000).
[48] *See generally*, Moore and Schaefer, *supra*, note 12. (Authors provide a well-organized and comprehensive summary of the criminal and civil statutes addressing elder financial abuse in all 50 states.
[49] *Id*. at 708
[50] Dessin, *Should Attorneys Have a Duty to Report Financial Abuse of the Elderly,* supra, at 708
[51] Tex. Hum. Res. Code Ann. § 48.002 (West 2013).
[52] Moore and Schaefer, *supra*, at 527, 566, (citing Fla. Stat. Ann. § 825.101 (West, 2014)).
[53]Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution A Problem?,* 34 McGeorge L. Rev. 267, 289 (2003).
[54] *Watson v. State*, 95 So.3d 977, 978 (Fla.App. 2 Dist.,2012).
[55] *Id*.
[56] *Id*. at 982.

[57] *Id.*
[58] Ill. Comp. Stat. Ann. 720 § 5/17-56 (West 2014).
[59] Del. Code Ann. tit. 31 § 3913 (West 2014).
[60] *Id*.
[61] Buchwalter, *supra*, at § 2, (citing In re National Western Life Ins. Deferred Annuities Litigation, 268 F.R.D. 652 (S.D. Cal. 2010); Intrieri v. Superior Court, 117 Cal. App. 4th 72, 12 Cal. Rptr. 3d 97 (6th Dist. 2004)).
[62]Ariz. Rev. Stat. Ann § 46-456. (2013) (West); Moore and Schaefer, *supra*, at 23.
[63] Del. Code Ann. tit. 6 § 2583 (West 2014).
[64] Del. Code Ann. tit. 6 § 2581 (West 2014).
[65] Buchwalter, *supra*, at § 21 (citing Tenn. Code Ann § 71-6-120 (West 2014)); 3 Tenn. Prac. Rules of Civil Procedure Ann. § 17:8 AC17 (4th ed.).
[66] Buchwalter, *supra*, at § 21, (citing Ariz. Rev. Stat. Ann. § 46-456 (West 2013)); Ariz. Rev. Stat. Ann § 14-1201 (West 2013); Cal. Prob. Code § 48 (West 2014).
[67] Buchwalter, supra, at § 21, (citing *Lickter v. Lickter*, 189 Cal.App.4th 712, 118 Cal.Rptr.3d 123 (Cal.App. 3 Dist.,2010)).
[68] *Id*.
[69] *Id*.
[70] Moore and Schaefer, *supra*, at 8.
[71]Brannon, *supra*, note 6.
[72]Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem*, *supra*, at 307.
[73] *Id*. at 292.
[74] *Id*. at 294.
[75] *Id*. at 295.
[76] Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem*, *supra*, at 302.
[77] *Id*. at 299.
[78] Brannon, *supra*, at 371.
[79] Frolik, supra, at 262.
[80] Varela v. Bernachea, 917 So.2d 295, 296 (Fla.App. 3 Dist.,2005).
[81] *Id*. at 297.
[82] *Id.*
[83] *Id.*
[84] *Id*. at 298.
[85] Or. Rev. Stat. Ann ST § 708A.465 (West. 2014)
[86] Press release, Office of the District Attorney, Santa Clara California, *Bank Manager and Husband Plead Guilty to Stealing from Elderly Client*. (July, 19, 2012), *available at* http://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NRA2012/brays-plead-guilty.aspx
[87] Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 Elder L.J. 165, 172 (2009).
[88] Nina A. Kohn, *Elder Empowerment As A Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 Rutgers L. Rev. 1, 5 (2006).
[89] *Id*. at 6.
[90] *Id*.
[91] Rhein, *supra*, at 171.

[92] *Id*. at 171-172
[93] *Id.*
[94] Ariz. Rev. Stat Ann. § 14-5501 (West) (2013).
[95] *See* Rhein, *supra* 172; Restatement (Third) Of Agency § 8.01 (2006).
[96] *Id*. at § 8.05
[97] *Id*. at § 8.01-.08 (2006).
[98] Lemke and Moskowitz, *supra*, at 9, (citing *Praefke v. Am. Enter. Life Ins. Co.*, 655 N.W.2d 456, 461 (Wis. Ct. App. 2002).
[99] *In re Estate of Kurrelmeyer*, 179 Vt. 359, 361 895 A.2d 207 (Vt. 2006).
[100] *Id*.
[101]*Id*. at 362.
[102] *Id*. at 366-367.
[103] Whitton, *supra*, at 10.
[104] Unif.Trust Code § 401 (2010).
[105] *Id*. at § 402.
[106] *Id*. at § 603.
[107] *Id*. at § 704.
[108] *Id*. at
[109] *Id*. at § 813.
[110] *Id*.
[111] Frolik, *supra*, at 275.
[112] *Id*.
[113] Barrett, *supra*, at 38-39. (Barret provides an excellent example of accounting language in DPOA to prevent abuse, "Within thirty days after my agent begins to act under this agency document, my agent shall notify me and any successor agent named in this power. Also, my agent shall account for his or her agency by providing a statement of account showing all receipts, disbursements, and asset changes or investment transactions since the prior statement of account and an inventory of my then-current assets known to the agent. The accounting shall be made at least once a year, and copies shall be sent to me and to any named successor agent.").
[114] *Start a Power of Attorney*. LegalZoom. Web. (accessed 21 Apr. 2014). <http://www.legalzoom.com/power-of-attorney/power-of-attorney-overview.html>.
[115] Uniform Law Commission, *supra*, at note 9.
[116] Rhein, *supra*, at 180.
[117] Unif. Power of Attorney Act. Prefatory note (amended 2006).
[118] *Id*. at § 119.
[119] *Id*. at § 120
[120] *Id*. at Comment to § 119.
[121] *Id*. at § 104
[122] Ariz. Rev. Stat Ann. § 14-5501 (West) (2013).
[123] Unif. Power of Attorney Act. § 105 (amended 2006).
[124] *Id*. at § 114.
[125] *Id.*
[126] *Id*.
[127] *Id*. at § 116.
[128] *Id*.

[129] Rhein, *supra*, at 180.
[130] *Id*. at 180.
[131] *Id*. at 180-181.
[132] *Id*. at 198.
[133] *Id*. at 198-199.
[134] *Id*. at 196.