

# REFORMING POWER OF ATTORNEY LAW TO PROTECT ALASKAN ELDERS FROM FINANCIAL EXPLOITATION

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## ABSTRACT

*In this Article, the Author discusses the issues arising under the current power of attorney law in Alaska and the impact the law has on Alaskan elders. The Author surveys and summarizes preventative measures set out in the 2006 Uniform Power of Attorney Act (UPOAA), in addition to non-UPOAA reforms adopted in other jurisdictions or suggested by scholars. The Author analyzes the relevance and practicality of the various provisions as applied to Alaska and highlights the major themes that should be considered when reforming the current statute.*

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## INTRODUCTION

“I know it when I see it.”<sup>1</sup> This famous legal saying applies aptly to the offense of elder exploitation. Because of the vulnerabilities associated with aging, elders are prone to many levels of financial exploitation unique to their demographic. And because this exploitation does not fit squarely into conventional legal categories, many of these crimes go unreported and unprosecuted.<sup>2</sup> This is particularly evident when there is abuse of a power of attorney (POA).

Consider the following hypotheticals, *A* and *B*. In *A*, the elderly Jane is physically frail and requires assistance going to the bathroom at all hours of the daytime. Jennifer and her daughter, Jane, decide that Jennifer will move in to provide care when Jennifer is home and hire a personal care assistant to be there while Jennifer is at work. The two also agree that Jennifer will pay Jane’s mortgage, utilities, health expenses, and sundries with money from Jane’s life savings. To grant Jennifer access to Jane’s funds, Jane appoints Jennifer her attorney-in-fact using a

1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

2. Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 13 (2007).

durable POA document,<sup>3</sup> but the two never sign a written contractual agreement that the funds will be used exclusively for paying Jane's living and health expenses. At the time Jane signs the POA form, she is mentally competent but increasingly forgetful, and she eventually loses competence as a result of Alzheimer's Disease. Shortly after Jennifer moves in with Jane, she uses Jane's funds to pay for the mortgage, utilities, and other necessary health supplies, as agreed. However, after Jane loses competence, Jennifer changes the beneficiaries on all of Jane's insurance and benefit policies, naming Jennifer's children as beneficiaries, replacing Jane's elderly sisters. Nothing in the statutory durable POA prohibits Jennifer from taking this action.<sup>4</sup>

In hypothetical *B*, the same facts apply as in hypothetical *A*, except that after a year, Jennifer stops using Jane's funds to pay Jane's mortgage and health expenses. Instead, Jennifer uses the funds for her own exclusive benefit, causing Jane to go six months in arrears on her mortgage. Jane finds out about this and revokes the POA with Jennifer's knowledge. On the same day Jane does this, Jennifer goes to Jane's bank and uses the now-revoked POA to transfer the remainder of Jane's funds to Jennifer's personal bank account. The bank teller is suspicious and considers reporting the transaction to the authorities but is hesitant for fear of violating privacy laws. He decides to review the notarized POA document presented to him by Jennifer, which he recognizes as a statutory form. The teller comes across the following text:

A third party who fails to honor a properly executed statutory form power of attorney may be liable to the principal, the attorney-in-fact, the principal's heirs, assigns, or estate for a civil penalty, plus damages, costs, and fees associated with the failure to comply with the statutory form power of attorney.<sup>5</sup>

After reading these words, the bank teller completes the transaction.

These two hypotheticals highlight problems inherent in the current law, or lack of law, governing power of attorney in Alaska. In hypothetical *A*, Jennifer acted entirely within the law. Although Jane did not contemplate Jennifer's actions when she signed the durable POA document, nothing in the document itself prohibited Jennifer from reassigning Jane's assets.<sup>6</sup> Case law in Alaska on the issue is scarce; at most, a court might find that Jennifer's duty as an agent is to act in

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3. "Durable" denotes survival of the POA after the principal loses mental capacity. 3 AM. JUR. 2D *Agency* § 26 (2009). Thus, Jennifer's POA will continue even if Jane becomes incapacitated.

4. See ALASKA STAT. § 13.26.332 (2008).

5. *Id.*

6. See *id.*

Jane's "best interests" once Jane has become incompetent.<sup>7</sup> Although Jane made a clear decision to make her sisters the beneficiaries on her life insurance policy, Jennifer could claim that it actually was in Jane's best interests for Jennifer's children to become beneficiaries of the life insurance policies. Jennifer could argue that she would have left Jane entirely in the care of paid strangers without the incentive of funds for her children, that Jane was aware of this fact, and therefore that it was in Jane's best interests to have the beneficiaries changed.

In hypothetical *B*, Jennifer has clearly acted contrary to law by using an invalid POA. However, since Alaska does not require that the POA be recorded,<sup>8</sup> the bank teller had no way of determining that the validly issued POA was subsequently revoked. Additionally, despite his suspicions, the current state of the law creates a disincentive for the teller to prevent the transaction because of the foreboding statutory warning that penalties could be assessed against him and his workplace.

These two situations highlight the problems with the current power of attorney law in Alaska. Elder exploitation has recently gained attention in the media<sup>9</sup> and is increasingly recognized as a real and widespread problem.<sup>10</sup> As the prevalence of POAs in estate planning increases, so too will accompanying fraudulent behavior. This in turn will require increased formality in the procedures required when creating a POA.<sup>11</sup> Further, elder exploitation will only increase as the "baby boomer" generation ages.<sup>12</sup>

The problem with attempting to create legal recourse for elder fraud and exploitation is that both involve subtle types of theft.<sup>13</sup> The victimized elder often transfers property to an account shared with the

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7. Courts in Alaska have yet to discuss precisely the fiduciary duty of a POA. However, courts would likely analogize a POA's duty to that of an attorney at law and incorporate the analysis laid out in *Miller v. Sears*, 636 P.2d 1183 (Alaska 1981).

8. See ALASKA STAT. § 13.26.332 (2008).

9. Recent scandals involving the Astor dynasty of New York City have brought elder abuse to the forefront of the media's attention. See John Eligon, *Brooke Astor's Son Guilty in Scheme to Defraud Her*, N.Y. TIMES, Oct. 8, 2009, at A1, available at <http://www.nytimes.com/2009/10/09/nyregion/09astor.html>.

10. See Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 268 (2003). In Philadelphia, the district attorney conducted a "crackdown" on durable POA abuse. Jonathan Federman & Meg Reed, *Abuse and the Durable Power of Attorney: Options for Reform*, GOV'T LAW ONLINE, Mar. 1994, at 1, 26-27, available at [http://www.governmentlaw.org/files/1993\\_Sandman.pdf](http://www.governmentlaw.org/files/1993_Sandman.pdf).

11. See Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 14 (2001).

12. See Federman & Reed, *supra* note 10, at 43.

13. See Dessin, *supra* note 10, at 269.

perpetrator, who may use the account for her own purposes.<sup>14</sup> The POA is one of the tools used by those who prey on the elderly,<sup>15</sup> as the document enables a perpetrator to commit crimes under what appears to be the elder's consent. Alaska's small population often exacerbates the problems of unchecked and abused POAs.

Since the Alaska POA statute is similar to those in other jurisdictions, this Article will track the recommendations made nationwide in order to analyze the law governing powers of attorney and determine what can be done to protect elders from POA abuse in Alaska. Part I of this Article summarizes the history of the development of the durable POA and how it has evolved into its present-day form. Part II analyzes the key attributes of Alaska POA law and the problems that result from gaps in the law. Part III summarizes the remedies proposed nationwide to curb POA abuse, and Part IV analyzes and recommends potential remedies relevant to Alaska.

## I. LEGAL ORIGINS OF THE POWER OF ATTORNEY DOCUMENT AS AN ESTATE PLANNING TOOL

### A. Background

#### 1. Definition

Through a POA, a person uses a legal document to permit someone else to act on his behalf "temporarily for purposes of convenience or, as often recommended by elder law and estate planning attorneys, for purposes of planning for incapacity."<sup>16</sup> A POA is considered "durable" if the "authority remains even if the principal becomes incompetent."<sup>17</sup> In a few states, a POA is presumed to be durable unless otherwise noted.<sup>18</sup> In most states, however, a POA is not durable unless the document specifically states that it is.<sup>19</sup> This Article will use the term

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14. *See id.* Other examples include "unauthorized use of victim's credit cards and bank cards, creation of joint account interests, execution of deeds under duress, [and] diversion of Social Security and pension payments . . ." Whitton, *supra* note 2, at 14.

15. *See* Whitton, *supra* note 2, at 12.

16. LORI A. STIEGEL & ELLEN M. KLEM, AARP PUB. POLICY INST., POWER OF ATTORNEY ABUSE: WHAT STATES CAN DO ABOUT IT 9 (2008), available at [http://assets.aarp.org/rgcenter/consume/2008\\_17\\_poa.pdf](http://assets.aarp.org/rgcenter/consume/2008_17_poa.pdf); *see also* Boxx, *supra* note 11, at 7.

17. 3 AM. JUR. 2D *Agency* § 26 (2009).

18. Federman & Reed, *supra* note 10, at 9.

19. 3 AM. JUR. 2D *Agency* § 26 (2009). In general, most jurisdictions require that specific language be present. *See, e.g.*, MONT. CODE ANN. § 72.5.501(1) (2009) ("A durable power of attorney . . . contains the words, 'This power of attorney is not affected by subsequent disability or incapacity of the principal or lapse of time' or 'This power of attorney becomes effective upon the disability or

“power of attorney” to refer to a “durable power of attorney” unless otherwise stated.

Subject to less court scrutiny than required in a guardianship, and less costly and less complicated than the formation of a trust, a durable POA is often used to serve as a flexible and convenient mechanism for estate management.<sup>20</sup> In Alaska, recordation is permitted but not required,<sup>21</sup> and there is no central registry where POAs must be filed. The only verification requirement is that the signatures on the POA document be notarized—but the notary public has no duty apart from determining the identities of the persons signing the document.<sup>22</sup> A statutory form is provided, and any non-statutory forms must comply substantially with, and not contradict, the provisions in the statutory form.<sup>23</sup>

When used properly, a POA can be an effective estate management tool because of its ease of use and formation. Its greatest benefit, however, is also its greatest flaw: an agent’s unchecked authority makes a POA an effective means of defrauding elders.<sup>24</sup>

## 2. History

The POA derived from the common law principle of agency, and in its early form it ceased to be effective upon the incompetency of the principal.<sup>25</sup> The Model Special Power of Attorney for Small Property Interests Act of 1964 defined the POA as a means of providing a less expensive alternative to guardianship for small estates.<sup>26</sup> The principal’s signature before a judge was required, as were an inventory of the property in the estate and a statement of the principal’s annual income.<sup>27</sup> The POA document had to be filed and recorded, accounting was required, and estates exceeding a certain amount could not use the POA document.<sup>28</sup> This formulation presumed that the risks inherent in a POA

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incapacity of the principal’ or similar words showing the intent of the principal that the authority conferred must be exercisable notwithstanding the principal’s subsequent disability or incapacity.”).

20. See Whitton, *supra* note 2, at 16. (“[D]urable powers [of attorney] were meant to be a low-cost, flexible, and private alternative to guardianship.”).

21. See ALASKA STAT. §§ 13.26.332, 34.25.010 (2008).

22. See ALASKA STAT. § 13.26.332 (2008). The sample General Power of Attorney form provided in Section 13.26.332 of the Alaska Statutes requires the signature of an officer or notary. *Id.*

23. ALASKA STAT. § 13.26.347 (2008).

24. See Boxx, *supra* note 11, at 12.

25. See *id.* at 4–5; see also Federman & Reed, *supra* note 10, at 4.

26. See STIEGEL & KLEM, *supra* note 16, at 9; see also Boxx, *supra* note 11, at 7.

27. Boxx, *supra* note 11, at 8.

28. *Id.*

were minimized if the assets at stake were small.<sup>29</sup> It also presumed that family members were more trustworthy agents than those with no acquaintance to a principal.<sup>30</sup> The 1964 Act upheld the long-held agency rule that an agency relationship no longer exists if a principal who appointed an agent becomes incompetent or dies; thus, a POA ceased to be effective upon the incompetency or death of its principal.<sup>31</sup>

It was not until 1969 that the principle of durability replaced the common law rule.<sup>32</sup> The Uniform Probate Code in 1969 created a provision allowing for a durable POA.<sup>33</sup> Virginia was the first state to permit this instrument, and the durable POA became a popular estate planning tool.<sup>34</sup> The 1969 Act also removed the provision limiting the POA to small estates.<sup>35</sup> The 1984 and 1987 versions of the Uniform Durable Power of Attorney Act removed provisions relating to agent liability,<sup>36</sup> and by 1984, all states had durable POA statutes.<sup>37</sup> From the 1960s through the 1990s, statutory revisions were less concerned with guarding against abuse and more focused on developing the POA into a streamlined estate planning mechanism.<sup>38</sup>

These early forms of the POA did not provide explicit options for third parties who wished to prevent or call attention to POA abuse by agents, and states only began to implement reforms in this area in the early 1990s.<sup>39</sup> The early forms also failed to contemplate the predicament of third party financial institutions presented with fraudulent POAs, resulting in litigation against both those institutions that honored a fraudulent POA and those that refused a valid POA.<sup>40</sup>

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29. *Id.* at 7-9. Smaller estates, however, generally have fewer financial resources available for use in recovering defrauded assets. Furthermore, the loss of a small sum has a far more significant effect on a small estate than on a large one.

30. *Id.* at 8. Research data has, however, proven the opposite to be true. THE NAT'L CTR. ON ELDER ABUSE, ABUSE OF ADULTS AGE 60+: THE 2004 SURVEY OF ADULT PROTECTIVE SERVICES 19 (2006), available at <http://www.apsnetwork.org/Resources/docs/AbuseAdults60.pdf>.

31. See, e.g., Boxx, *supra* note 11, at 7-8.

32. Federman & Reed, *supra* note 10, at 13.

33. Boxx, *supra* note 11, at 10.

34. *Id.* at 6.

35. *Id.* at 10; see also STIEGEL & KLEM, *supra* note 16, at 9.

36. STIEGEL & KLEM, *supra* note 16, at 9.

37. Federman & Reed, *supra* note 10, at 4.

38. See *id.* at 1.

39. *Id.* at 66 (referencing changes made in California, Missouri, New Hampshire, and Illinois).

40. See generally Daniel A. Wentworth, *Durable Powers of Attorney: Considering the Financial Institution's Perspective*, 17 PROB. & PROP. 37 (2003).

## B. 2006 Uniform Power of Attorney Act and Other Reforms

By 2006, it was clear that the POA had become a tool for financial exploitation. The 2006 Uniform Power of Attorney Act (UPOAA or the “Act”) was the first uniform act to propose provisions designed to prevent abuse.<sup>41</sup> By March 2008, New Mexico and Idaho had enacted the UPOAA, with more states expected to follow suit in 2009.<sup>42</sup> The Act includes a clearer explanation of what constitutes “good faith” for an agent<sup>43</sup> and reserves special treatment for “hot powers” – those powers which have the capacity to diminish the value of the principal’s estate and assets.<sup>44</sup> The Act also contains provisions that specifically address both the liability of and possible sanctions against third parties and agents.<sup>45</sup> The intention of the Act was to address the shortcomings of its predecessors in these areas.

## II. KEY PROVISIONS OF AND PROBLEMS WITH POWER OF ATTORNEY LAW IN ALASKA

### A. Provisions of the Alaska Power of Attorney Statute

The POA statute in Alaska reflects the longstanding national trend of developing the POA as an efficient estate planning tool. In Alaska, POAs may be recorded, though, as previously noted, recordation is not required.<sup>46</sup> Alaska provides a recommended form and requires all lawful POAs to be consistent with the form.<sup>47</sup> Unless a principal dictates otherwise (by crossing out and initialing), the statutory form enables an agent to enter real estate, banking, and estate transactions, and to disseminate the principal’s funds in any manner.<sup>48</sup> It allows for durability where there is clear and unambiguous language indicating such.<sup>49</sup> The statutory form also allows a principal to limit an agent’s power so that it arises only when the principal becomes incompetent.<sup>50</sup>

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41. STIEGEL & KLEM, *supra* note 16, at vii.

42. *Id.* at 8.

43. *Id.* at vii.

44. *See id.*; *see also* Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 347 (2008).

45. *See* STIEGEL & KLEM, *supra* note 16, at viii. The specific provisions of the Act, along with recommended reforms, will be discussed *infra* Part III.

46. ALASKA STAT. § 34.25.010 (2008).

47. ALASKA STAT. § 13.26.332 (2008).

48. *Id.*

49. *Id.*

50. *Id.*

Alternate POAs are permitted.<sup>51</sup> The statutory form lays out the procedure and requirements for revocation and protects third parties who reasonably rely on a statutory POA.<sup>52</sup> No legal counsel is required when elders use the statutory or any other POA form.<sup>53</sup>

The statute also lays out requirements for establishing the incompetence or disability of a principal,<sup>54</sup> but at no point is this procedure required by statute in order to effectively utilize a POA after a principal has become incompetent.<sup>55</sup> Nor is an assessment of a principal's competence required at the signing of a POA.<sup>56</sup> The statutory form specifically protects third parties who accept the POA based on "reasonable representations" and imposes a \$1000 fine on a third party who refuses to do so.<sup>57</sup> This provision, however, has been interpreted to mean that a POA must be valid in order to require the third party to accept it.<sup>58</sup>

There is no statutory provision requiring that a copy of a POA be retained by a third party to whom it is presented.<sup>59</sup> Nor is there a statutory provision prohibiting the use of photocopies.<sup>60</sup> As stated earlier, recording is permitted but not required, and there is no central registry for recording who is acting as an attorney-in-fact.<sup>61</sup> Further, there is no requirement for a POA to include details regarding court procedure, inventory, or accounting relating to a principal's assets.<sup>62</sup>

## B. Modern Problems with the Alaska Statute

There is no dispositive survey on the prevalence of POA abuse nationwide or in Alaska.<sup>63</sup> While there have been some surveys of estate attorneys, these studies are by no means exhaustive.<sup>64</sup> Recent studies,

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51. ALASKA STAT. § 13.26.335 (2008).

52. *Id.*

53. *See* ALASKA STAT. § 13.26.332 (2008). The lack of legal counseling when using a statutory form has been roundly criticized. *See* Federman & Reed, *supra* note 10, at 20; *see also infra* Part III.

54. ALASKA STAT. § 13.26.353(a)(1)-(2) (2008).

55. *See* ALASKA STAT. §§ 13.26.332, 13.26.350(a) (2008).

56. *See* ALASKA STAT. § 13.26.332 (2008). It seems this requirement becomes relevant only if the POA has not been designated as "durable" and someone has challenged the use of a non-durable POA on behalf of an incompetent principal. *See* ALASKA STAT. § 13.26.350 (2008).

57. ALASKA STAT. § 13.26.353(b)-(c) (2008).

58. *See* Whitton, *supra* note 2, at 42.

59. *See* ALASKA STAT. §§ 13.26.332-.358 (2008).

60. *See id.*

61. *See id.*

62. *See id.*

63. *See* Whitton, *supra* note 2, at 12.

64. *Id.*

however, indicate that financial exploitation of elders is widespread and increasing, and that even if the incidence of exploitation is low, the consequences in each particular case can be devastating.<sup>65</sup>

The insufficiency of the Alaska statute is illustrated by the hypothetical situations presented above.<sup>66</sup> In hypothetical *A*, the agent's transactions may have exceeded the scope of the authority delegated by the once-competent principal and may overtly contravene the principal's prior intentions. Further, even if the agent in hypothetical *A* acted in good faith, there is no specific guidance in the POA document as to the scope of the agent's authority, making it difficult to discern when agents are acting in good faith.<sup>67</sup> The transaction also suggests self-dealing.<sup>68</sup> However, the durability component of the document enables the perpetrator to act in a self-dealing manner, and a court could find that the perpetrator acted entirely within her authority under the POA.<sup>69</sup> By using a pre-printed statutory form that gives little information to the principal and the agent as to the extent of the authority and how that authority should be used, the agent is anointed with broad decision-making authority.<sup>70</sup> Additionally, the fact that the principal had become incompetent by the time the fraud was perpetrated demonstrates that the principal lost her ability to monitor the agent, a power important to any agency relationship.<sup>71</sup>

Hypothetical *B* highlights the problems resulting when a third party senses that something is amiss regarding a POA. While the statute allows a third party to refuse to accept a POA that he believes is invalid, this attempt at protecting a third party acting in good faith is obscured by the statutory threat of a fine should that person be incorrect in deeming a POA invalid. Compounded by the fact that there is no way in which the third party can determine whether the POA is current, or even valid,<sup>72</sup> there is little incentive and substantial discouragement in the statute for a third party to prevent a fraudulent transaction from occurring.<sup>73</sup> Additionally, since there is no requirement that the third

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65. See *id.* at 12-13.

66. See *supra* Introduction.

67. See ALASKA STAT. § 13.26.332 (2008). The importance of setting a standard for agent conduct is discussed further in STIEGEL & KLEM, *supra* note 16, at 5-6.

68. See STIEGEL & KLEM, *supra* note 16, at 4.

69. For further treatment of this concept, see Whitton, *supra* note 2, at 37.

70. The dangers of using pre-printed forms have resulted in some jurisdictions prohibiting the use of such forms altogether. See Dessin, *supra* note 10, at 315.

71. For further discussion of the lack of monitoring by an incompetent principal, see *id.* at 10-11.

72. For further discussion of this concept, see Federman & Reed, *supra* note 10, at 59-62.

73. See STIEGEL & KLEM, *supra* note 16, at 5-6.

party retain a copy of the POA,<sup>74</sup> the principal will encounter proof problems if she seeks to recover from the fraudulent agent.

In both hypotheticals, the principal grants the agent broad decision-making authority<sup>75</sup> without the assistance of legal counsel and without monitoring by the courts.<sup>76</sup> The principal has not considered that the selected agent could defraud her.<sup>77</sup> Because the principal in both scenarios is in the exclusive care of the agent, detection of a fraud will likely come long after the principal's estate has been exhausted. This underscores the importance of increasing opportunities for monitoring.<sup>78</sup>

There is relief available through litigation in both hypotheticals, even if only testimonial evidence is available. Jane, faced with the situation in hypothetical A, may argue under the line of reasoning set out in *Ware v. Ware* that Jennifer used undue influence to obtain the POA.<sup>79</sup> Under the hypothetical B situation, Jane might pursue a fraud claim against the agent by using testimonial evidence provided by the bank teller. In both scenarios, there are possible claims of breach of fiduciary duty and fraud.<sup>80</sup>

However, the opportunity for relief through litigation does little to prevent the occurrence of fraud. For example, elders are often precluded from obtaining legal assistance because of a lack of resources or an unwillingness to sue the loved ones who defrauded them.<sup>81</sup> Additionally, criminal prosecution is rarely sought in elder fraud cases.<sup>82</sup> Therefore, the risk of litigation and other sanctions does not appear to be an effective deterrent in the hypothetical situations discussed above.<sup>83</sup>

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74. See ALASKA STAT. §§ 13.26.332–358 (2008).

75. There are dangers inherent in appointing an agent with broad decision-making authority. See Federman & Reed, *supra* note 10, at 10.

76. See STIEGEL & KLEM, *supra* note 16, at 5–6.

77. For further discussion of the “disbelieving elder,” see *id.*

78. See Whitton, *supra* note 2, at 10–11; see also STIEGEL & KLEM, *supra* note 16, at 5–6.

79. “When examining the relationship between parent and child for proof of undue influence, we will consider ‘the effect of the influence which was, in fact, exerted upon the mind of the [donor], considering his physical and mental condition, the person by whom it was exerted, the time and place and all the surrounding circumstances’ . . . .” *Ware v. Ware*, 161 P.3d 1188, 1193 (Alaska 2007) (citations omitted).

80. See Boxx, *supra* note 11, at 22–23.

81. See Federman & Reed, *supra* note 10, at 6.

82. *Id.* at 42. For example, an Albany Law School Government Law Center national survey found that only 31 out of 270 reported instances of durable POA abuse resulted in criminal prosecution. *Id.*

83. See *id.* at 6.

### III. NATIONWIDE REFORM

Alaska is not alone in its flawed POA law; statutory reforms and remedies have been recommended and implemented across the country. The 2006 UPOAA was one of the first attempts by lawmakers and elder law experts to respond to the potential for POA abuse.<sup>84</sup> The UPOAA has twenty-one provisions designed to address three innate problems in the power of attorney: “(1) the breadth of control that an agent generally has over the principal’s property, (2) the lack of third-party oversight . . . and (3) the lack of legal standards and clarity about the duty owed by the agent to the principal.”<sup>85</sup>

The following survey of reforms is comprised of provisions found in the UPOAA, statutory provisions from other jurisdictions, and recommendations by experts in elder law. The survey is divided into four sections: (a) reforms that better educate principals, (b) reforms that better educate and deter agents from fraud, (c) reforms that protect third parties and require them to prevent fraud from occurring when fraud is evident, and (d) reforms that create additional remedies for defrauded victims. Each section will review the reforms suggested by the UPOAA and list non-UPOAA recommendations. This survey focuses on the provisions addressing intentional POA abuse and is not intended to be an exhaustive survey of all possible reform provisions.

#### A. Reforms That Educate the Principal

Principals often sign POA forms without fully understanding the nature of the power bestowed by the POA.<sup>86</sup> This fact has been identified as one of the primary factors leading to POA abuse.<sup>87</sup>

For instance, principals in Alaska who use the statutory form delegate power to their agents to act on their behalf in: real estate transactions; transactions involving tangible personal property, chattels, goods, bonds, and shares; commodities transactions; banking transactions; business operating transactions; insurance transactions; estate transactions; and gift transactions.<sup>88</sup> To prohibit agents from having a particular power, principals must cross out that power and initial the adjacent line on the form.<sup>89</sup> The Alaska statute does not

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84. STIEGEL & KLEM, *supra* note 16, at vii.

85. *Id.* at 11.

86. *Id.* at 5–6.

87. *Id.*; *cf.* Whitton, *supra* note 2, at 18–19.

88. ALASKA STAT. § 13.26.332 (2008).

89. *Id.*

require affirmative language for a principal to delegate the listed powers.<sup>90</sup>

When misused, these “hot powers” enable agents to dissipate their principals’ assets.<sup>91</sup> Because of this potential, the UPOAA has two provisions which treat hot powers with special importance.<sup>92</sup>

Under the UPOAA, agents are prohibited from exercising hot powers unless the principal has expressly granted the agent such powers in the POA document.<sup>93</sup> This in turn requires a principal to evaluate each of the powers he or she chooses to delegate to the agent and by default educates the principal as to the extent of power created by the POA document.

Because statutory short forms and pre-printed forms enable a POA to be created without legal counseling, some experts have recommended rejecting the statutory short form altogether.<sup>94</sup> Others suggest that states should require that the statutory short forms warn principals of the authority being created,<sup>95</sup> or that the POA be read aloud to principals with poor eyesight.<sup>96</sup> Experts have also suggested that principals create a POA only as a “springing power” that arises upon the principal’s incompetence.<sup>97</sup> This suggestion, however, fails to account for fraud which may occur after the principal is deemed incompetent.

The effectiveness of these warnings and educational provisions is difficult to ascertain since the elderly principal usually does not contemplate that her trusted agent would defraud her. For that reason,

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90. *Id.*

91. See STIEGEL & KLEM, *supra* note 16, at 4-6. “Hot powers” include the ability to:

[C]reate, amend, revoke, or terminate an inter vivos trust; make a gift; create or change rights of survivorship; create or change a beneficiary designation; authorize another person to exercise authority granted to the agent; waive the principal’s right to be a beneficiary of a joint and survivor annuity; exercise fiduciary powers that the principal has authority to delegate; and disclaim or refuse an interest in property.

Whitton, *supra* note 44, at 347-48.

92. See Whitton, *supra* note 44, at 348; see also UNIF. POWER OF ATT’Y ACT §§ 201, 301 (2006).

93. During the drafting of the UPOAA, there was a minority view that hot powers should be made non-delegable. Whitton, *supra* note 44, at 348-49. However, this arrangement may have the undesired effect of eviscerating the utility of the POA altogether and is therefore not an optimal solution.

94. Federman & Reed, *supra* note 10, at 48 (citing Jeffrey Kolb, *Indiana Power of Attorney Act*, 25 IND. L. REV. 1345, 1360-70 (1992)). At least one state, Indiana, “decided against providing a statutory short form of the durable power of attorney because of the potential abuse [of] individuals executing powers without legal advice.” *Id.* at 21 (internal quotation marks omitted).

95. *Id.* at 51-55.

96. *Id.*

97. *Id.* at 23; Whitton, *supra* note 2, at 19.

the provisions that complement those reforms educating the principal are crucial to protect elders.

### **B. Reforms That Educate and Deter the Agent from Committing Fraud**

The UPOAA created provisions that squarely address the defrauding agent and impose liability on agents who violate POA law.<sup>98</sup> Those provisions were clearly intended to impose liability as a warning to would-be perpetrators of POA fraud and abuse.<sup>99</sup>

The UPOAA provides a back-up protective mechanism if the principal fails to take explicit measures to delineate powers. The UPOAA sets out three mandatory standards of care for all POAs, regardless of whether the POA was created using statutory documents: (1) agents must act according to the principal's reasonable expectations, if known, and must act otherwise in the principal's best interest; (2) agents must act in good faith; and (3) agents must act within the scope of the authority granted.<sup>100</sup> While these standards protect agents who act contrary to the principals' best interests when directed to do so by competent principals,<sup>101</sup> it also expressly mandates that an agent act in the best interests of an incompetent principal.

The UPOAA also sets out the following default duties of agents if there is no specification in the POA document:

1. Act loyally for the principal's benefit;
2. Avoid creating a conflict of interest that impairs the ability to act impartially in the principal's best interest;
3. Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
4. Keep records;
5. Cooperate with a person that has authority to make healthcare decisions for the principal;
6. Attempt to preserve the principal's estate plan to the extent the plan is known to the agent and preservation is consistent with the principal's best interest;
7. Give an accounting if requested by the principal, a fiduciary appointed for the principal, a governmental agency having authority to protect the principal's welfare,

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98. UNIF. POWER OF ATT'Y ACT § 117 (2006).

99. See STIEGEL & KLEM, *supra* note 16, at 12.

100. UNIF. POWER OF ATT'Y ACT § 114(a)(1)-(3) (2006).

101. Whitton, *supra* note 44, at 349.

the personal representative or successor in interest of the principal's estate, or if ordered by a court.<sup>102</sup>

The provisions creating these default duties were designed to prevent self-dealing by agents who acted without specific authorization by a principal.<sup>103</sup> Even before the creation of the 2006 UPOAA, some states sought to send a clear message to perpetrators of elder fraud.<sup>104</sup> In Arizona, the state legislature imposed criminal and civil penalties against agents who acted "with intimidation or deception in procuring the power of attorney or any authority provided in the POA."<sup>105</sup>

Some experts have recommended that POAs should be registered with the courts and require periodic accounting once a principal is deemed incompetent.<sup>106</sup> While the effectiveness of the monitoring capability of an overburdened court is questionable, it has been suggested that the mere impression of oversight would be a sufficient deterrent to a potentially fraudulent agent.<sup>107</sup> Also suggested is a requirement that an agent sign an affidavit stating that he will not commit fraud using a POA.<sup>108</sup>

Experts have recommended requiring more formal procedures relating to the execution of a POA. Examples of these are the requirement of the inclusion of two witnesses and the requirement that the document be recorded.<sup>109</sup> These experts have argued that this would put agents on notice that they are being monitored and would enable third parties to determine whether a purported principal is on constructive notice that a POA exists.<sup>110</sup>

Others have suggested a requirement that an agent post a surety bond.<sup>111</sup> Such a requirement, however, would preclude the appointment of agents who may be competent and trustworthy but financially incapable of posting such a bond.

However, as more than one scholar has noted, "[e]ven a clear prohibition in the power of attorney against making gifts cannot prevent

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102. UNIF. POWER OF ATT'Y ACT § 114(b)(1)-(6), (h) (2006).

103. See Whitton, *supra* note 44, at 350-51.

104. See STIEGEL & KLEM, *supra* note 16, at 13.

105. ARIZ. REV. STAT. ANN. § 14-5506(a) (2005).

106. Dessin, *supra* note 10, at 317.

107. *Id.*

108. Wentworth, *supra* note 40, at 41-42. However, it is questionable whether a perpetrator of fraud, who uses dishonesty as a major tool in obtaining funds, would be deterred by such a requirement.

109. Federman & Reed, *supra* note 10, at 2, 48.

110. *Id.* at 59.

111. *Id.* at 80.

an abusive agent from converting the principal's property. . . ."<sup>112</sup> Without reforms mandating the involvement of third parties, the restrictions on agents are much less powerful.

### C. Reforms That Protect Third Parties and Mandate that They Prevent Fraud

The most important factor that allows an agent to defraud a principal is the principal's undeserved trust in a selected agent. Principals often give trusted family members or friends POAs without considering that their chosen agents may be tempted to use the authority granted under a POA for personal gain. This risk can be mitigated to some degree by the involvement of third parties.

#### 1. Lay Persons

The UPOAA recommends that co-agents or successor agents be responsible for protecting principals if another agent breaches or is about to breach a fiduciary duty.<sup>113</sup> The Act also enumerates a number of third parties who may petition the court to review an agent's conduct or a POA itself.<sup>114</sup> Such persons include guardians, conservators, fiduciaries, healthcare proxies, spouses, parents, descendants, presumptive heirs, beneficiaries, governmental agencies with regulatory authority, caregivers, or any persons asked to accept the power of attorney.<sup>115</sup>

#### 2. Financial Institutions

Perhaps the third parties most capable of preventing fraudulent transactions are the financial institutions that hold a principal's assets. Often, bank tellers and other staff are at the front lines, conducting transactions at an agent's request. As in hypothetical *B* above, a bank teller who suspects that a POA document is fraudulent currently has no resources available to him to check whether his suspicions are true. Additionally, even if a POA were recorded, a teller may worry about violating confidentiality covenants between the principal and the bank if he reports a perpetrator to authorities.<sup>116</sup>

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112. Whitton, *supra* note 44, at 355 n.68 (citing Richard B. Vincent, *Financial Exploitation Involving Agents Under Powers of Attorney*, VICTIMIZATION OF THE ELDERLY & DISABLED, May-June 2000, at 3-4).

113. UNIF. POWER OF ATT'Y ACT § 111(d) (2006); *see also* STIEGEL & KLEM, *supra* note 16, at 12.

114. UNIF. POWER OF ATT'Y ACT § 116(a)-(b) (2006).

115. *Id.*; *see also* Whitton, *supra* note 2, at 33-34.

116. *See* Dessin, *supra* note 10, at 305.

Banks were formerly unprotected when they accepted fraudulent POAs that appeared to have been properly executed.<sup>117</sup> Some banks used to deem a POA “revoked” if it had been executed a certain number of years prior.<sup>118</sup> Under the *Restatement (Second) of Agency*, banks cannot interpret vague provisions in favor of an agent.<sup>119</sup> Some scholars believe that where a statute has a reasonableness standard, a financial institution is already entitled to reject a POA and damages for reasonable non-acceptance should be limited to the minor costs associated with obtaining an unquestionably valid POA.<sup>120</sup>

The 2006 UPOAA explicitly protects a third party who in good faith believes that a POA is suspect.<sup>121</sup> Under the UPOAA, a third party may request certification of any factual matter concerning a principal, agent, or power of attorney, as well as the opinion of legal counsel regarding a POA.<sup>122</sup> Based on the available evidence, a third party would be empowered to reasonably refuse to accept a POA. If a refusal is unreasonable, the penalty is limited to the attorneys’ fees necessary to rectify the situation.<sup>123</sup>

While Alaska’s current POA statute arguably allows a third party financial institution to refuse to accept a POA if there is a valid basis to do so,<sup>124</sup> the notice on the statutory form regarding liability for refusal likely outweighs a third party’s good faith desire to prevent a fraudulent transaction from occurring.<sup>125</sup> Incorporating an explicit statement protecting a third party who reasonably refuses to accept a POA would send a more direct message. This protection should be balanced by

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117. Wentworth, *supra* note 40, at 39 (citing *In re Estate of Davis*, 632 N.E.2d 64 (Ill. App. Ct. 1994)).

118. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 38 (1958)).

119. *Id.* (citing *Grabowski v. Bank of Boston*, 997 F. Supp. 111, 117 (D. Mass. 1997)).

120. *Id.*

[A] financial institution that rejects a document based on reasonable acceptance and review guidelines should be protected from liability. In addition, the damages that would result from liability for non-acceptance would generally be different from those stemming from exposure for permitting an unauthorized person to access the account. For example, damages for an unreasonable failure to accept a power of attorney might equal the costs associated with the court appointment of a guardian in lieu of reliance on the power of attorney.

*Id.* at 42.

121. UNIF. POWER OF ATT’Y ACT § 119 (2006); *see also* STIEGEL & KLEM, *supra* note 16, at 12.

122. UNIF. POWER OF ATT’Y ACT § 119(d) (2006).

123. UNIF. POWER OF ATT’Y ACT § 120; *see also* Whitton, *supra* note 2, at 45.

124. Section 13.26.353(c) of the Alaska Statutes only imposes a civil penalty where the POA presented to the non-accepting third party is “valid.”

125. ALASKA STAT. § 13.26.332 (2008).

inclusion of a penalty for instances where the refusal is clearly unreasonable. Taking a cue from the 2006 UPOAA, the Alaska statute could explicitly lay out circumstances under which a third party is authorized to refuse to comply with an agent's request.<sup>126</sup> This ultimately would have the effect of both protecting third parties and encouraging them to act according to their reasonable suspicions that a purported agent is acting unlawfully.<sup>127</sup>

This provision could be criticized as being unduly burdensome to the principal, especially in cases where refusal is based on a reasonable but false assumption.<sup>128</sup> In some instances, banks have required principals to complete a POA form issued by the institution itself.<sup>129</sup> Existing surveys of estate lawyers indicate that this extra measure of protection is not unduly burdensome.<sup>130</sup> Others have suggested that guidelines be established under which third parties are required to review POA documents.<sup>131</sup>

The most important attribute of the UPOAA provision is that it creates a safe harbor for third parties, allowing them to prevent fraudulent transactions from occurring without requiring them to conduct full investigations.<sup>132</sup> If a refusal is unreasonable, a third party is required to rectify the situation but is not excessively punished for that error.<sup>133</sup> This creates an environment in which a third party may act without fear when he suspects the presence of financial exploitation.

Other jurisdictions have taken the duty of the third party to a higher level.<sup>134</sup> Some scholars have suggested that certain financial institutions be made mandatory reporters.<sup>135</sup> Some states have even

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126. UNIF. POWER OF ATT'Y ACT § 120(b)-(d).

127. See Whitton, *supra* note 44, at 352; see also STIEGEL & KLEM, *supra* note 16, at 12.

128. Cf. Whitton, *supra* note 44, at 352 (noting how practitioners complain of "arbitrary" refusal of POA documents by financial institutions).

129. Wentworth, *supra* note 40, at 42. This requirement, for obvious reasons, can only lawfully be complied with where the principal is not incompetent.

130. Whitton, *supra* note 2, at 39 ("Despite the significant percentages of attorneys who reported difficulty with acceptance of POAs by banks, brokerage houses, and insurance companies, case decisions on this issue are scant. Practitioners report that if the principal is still competent, it is faster and less costly to have the principal execute the form favored by the third party.").

131. Wentworth, *supra* note 40, at 42.

132. See Whitton, *supra* note 2, at 45.

133. See *id.* ("[A] safe harbor permitting refusals of a valid power of attorney when the third person suspects that something is amiss allows the third person to 'do the right thing' without imposing an unreasonable burden to 'watch dog' all agent-conducted transactions.").

134. See Whitton, *supra* note 2, at 46 (noting that it may be necessary to subject third parties to consequences in order to prevent harmful delays in the agent's ability to use a POA).

135. Federman & Reed, *supra* note 10, at 88.

required that third parties notify principals when a transaction exceeds a certain amount.<sup>136</sup> However, the effect of mandatory reporter statutes is unclear.<sup>137</sup>

There have also been suggestions that certain third parties be given the power to revoke a POA if a principal becomes incapacitated.<sup>138</sup> This would necessarily require an extremely high level of proactive involvement on the part of the third party, and would likely deter institutional third parties, such as banks, from getting involved in any capacity.

Additionally, scholars have suggested that only original versions of a POA should be accepted, thereby reducing the opportunity to fabricate a POA using validly obtained signatures from other documents.<sup>139</sup> In addition to requiring that a POA be recorded, it has also been suggested that states should create a public registry listing individuals who have been convicted of durable POA abuse.<sup>140</sup> While this may be a resource-intensive objective, the idea of creating knowledge references and databases for third parties is a sensible one.<sup>141</sup>

### 3. *Healthcare Professionals*

Another preventative measure requiring substantial third party involvement would be to require a mental health assessment by a licensed professional, in which the professional certifies that a principal is competent to appoint a power of attorney. Though not widely recommended by the UPOAA or by experts in the field, Alaska already has a statute laying out the procedure to establish a principal's disability.<sup>142</sup> The procedure established in this provision would be relevant if a POA in question is non-durable, and one party—either an agent or a third party—has argued that a POA has expired because of the principal's disability.

Alaska could require a mental assessment before a durable POA is signed, to assure that an elder is competent at the time an agent is appointed. The additional expense to the state is unknown at the current time. However, it is noteworthy that existing infrastructure enabling

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136. *Id.* at 72.

137. Dessin, *supra* note 10, at 304.

138. Felderman & Reed, *supra* note 10, at 45, 66–67.

139. Wentworth, *supra* note 40, at 41.

140. Federman & Reed, *supra* note 10, at 77.

141. *Id.*

142. ALASKA STAT. § 13.26.353(a)(1)–(2) (2008).

health assessments throughout the state is already funded through a composite of federal, state, and private sources.<sup>143</sup>

#### D. Reforms That Create Remedies for a Defrauded Victim

This section complements the reforms discussed above that place an agent on notice of the repercussions of POA abuse.<sup>144</sup> While it is arguable as to whether criminal or civil sanctions effectively deter an unlawful power of attorney, this section focuses on helping a principal obtain remedies through litigation.

The UPOAA makes it clear that the State retains the ability to impose civil and criminal sanctions against perpetrators of POA abuse.<sup>145</sup> While defrauded elders may be unable to seek redress through personal injury litigation because of the loss of assets, statutes imposing criminal and civil prosecution would enable district attorneys and civil prosecutors to pursue relief through explicit, easily applied laws.

Civil and criminal sanctions have been created by statute all over the country,<sup>146</sup> including in Oklahoma,<sup>147</sup> Florida,<sup>148</sup> New Hampshire,<sup>149</sup> Maine,<sup>150</sup> and Arizona.<sup>151</sup> In New Hampshire, for example, the legislature created a rebuttable presumption that a transfer made by an agent for inadequate consideration, without explicit authorization in a durable POA, indicates undue influence, fraud, or misrepresentation.<sup>152</sup> In Maine, a gift of over ten percent of total assets creates a presumption of undue influence.<sup>153</sup> Arizona enacted a “slayer statute,” precluding perpetrators of elder fraud from inheriting the estates of those they defrauded.<sup>154</sup>

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143. See Regan Foster, *Telemedicine Reaches Over 200 Alaska Locations*, ALASKA JOURNAL OF COMMERCE, Jan. 27, 2003, available at [http://www.alaskajournal.com/stories/012703/foc\\_20030127016.shtml](http://www.alaskajournal.com/stories/012703/foc_20030127016.shtml).

144. See *supra* Part III.B.

145. UNIF. POWER OF ATT’Y ACT § 123 (2006); see also STIEGEL & KLEM, *supra* note 16, at 12.

146. See Whitton, *supra* note 2, at 23.

147. Federman & Reed, *supra* note 10, at 74-75.

148. *Id.* at 75.

149. N.H. REV. STAT. ANN. § 506:6(VII)(a) (2005).

150. See Dessin, *supra* note 10, at 315.

151. Boxx, *supra* note 11, at 13-14. In the 1990s, elder abuse was gaining public attention, and Arizona, a state with a high population of retirees, was on the forefront of statutory reform and prevention. Because of the serious penalties associated with POA abuse in that state, revocable trusts have become a more frequently used planning tool for aging Arizonans. *Id.*

152. N.H. REV. STAT. ANN. § 506:6(V) (2005).

153. Dessin, *supra* note 10, at 315.

154. Boxx, *supra* note 11, at 14.

At least one observer has recommended that there be specific laws stating that an agent who commits fraud must indemnify a defrauded principal.<sup>155</sup> The remedy created by such a provision, however, is arguably duplicative of the common law and statutory remedies allowed for fraud, undue influence, and other tort claims.

One issue given little treatment in contemporary studies is the problem of proof. While causes of action may have been created to enable victims to obtain relief, the absence of proof may effectively prevent a civil or criminal case from beginning. A relevant statutory provision might require that third parties who accept a POA document keep a photocopy of the document presented to them. Also helpful would be a requirement that agents keep all receipts and records of expenses paid on a principal's behalf with the principal's assets.

#### IV. STRENGTHS AND WEAKNESSES OF THE AVAILABLE REFORM PROVISIONS

##### A. Virtues of the Power of Attorney

It is clear that a safe POA is not necessarily the most useful POA. Part of what makes a POA beneficial is the low cost and relatively small burden on all parties involved: legal counsel is not required, statutory forms are widely available, and monitoring by the State is minimal. These characteristics, however, are precisely what make a POA so easy to use for fraudulent purposes.

Alaska has a population of approximately 686,000 residents,<sup>156</sup> dispersed over 586,000 square miles.<sup>157</sup> There are approximately 4000 licensed attorneys in the state.<sup>158</sup> In Alaska, usable and flexible POAs are necessities, particularly in bush areas where there are no attorneys and very limited court resources available to serve as POA monitors.<sup>159</sup>

As with all legislation, cost will be a major factor in determining which provisions the Alaska legislature should adopt. By looking at some factors that play an important role in the issue of POA abuse and

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155. Wentworth, *supra* note 40, at 42.

156. U.S. Census Bureau, Census Bureau Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2008, <http://www.census.gov/popest/states/NST-ann-est2008.html> (last visited Apr. 10, 2010).

157. David B. Allen, *A Land of Superlatives*, ENDANGERED SPECIES BULL., Mar./Apr. 1999, at 5, available at <http://www.fws.gov/endangered/bulletin/99/03-04/4-5.pdf>.

158. Alaska Bar Ass'n, <http://www.alaskabar.org> (last visited Apr. 10, 2010).

159. At the trial court level, there are forty superior court judgeships and twenty-one district court judgeships. See About the Alaska Court System, <http://www.courts.alaska.gov/ctinfo.htm> (last visited Apr. 10, 2010).

elder fraud in Alaska, the legislature can identify and tailor reforms to the needs of Alaskan elders. Legislators can consider the fact that the provisions will likely affect the agents who have been functioning properly without the reforms. This Part will evaluate broad themes that should be considered and is not intended to be a detailed analysis of each of the reform provisions enumerated above.<sup>160</sup>

## B. Burdens Accompanying the Available Reform Options

### 1. *Burden on the State to Monitor*

In Alaska, some level of outside monitoring exists in most types of fiduciary relationships. Consider a guardian, who holds the same power as a durable POA but must be reviewed by a court visitor and the court itself upon appointment.<sup>161</sup> Along with the initial court procedures required to establish the guardianship, a guardian must submit annual reports to a court.<sup>162</sup> Consider also a trustee, who must abide by a trust document drafted by an attorney<sup>163</sup> and who must file income reports to various entities, including federal and state tax agencies.<sup>164</sup> Lastly, consider the example of an executor, whose nearly every move regarding an estate must be reviewed and approved by a court.<sup>165</sup> Creating these types of fiduciaries costs substantially more than appointing a power of attorney.<sup>166</sup> The fact that there is less monitoring of a POA is what keeps it a low-cost alternative. However, where there is less state monitoring, there is a greater need for specificity of the terms present in a POA.<sup>167</sup> Additionally, monitoring by third parties, who are often in a position to prevent fraud from occurring, becomes more important to a comprehensive scheme of fraud protection.

### 2. *Burden on the Principal*

The burden on a principal, or lack thereof, was the prevailing priority in the development of power of attorney law up until 2006. Critics have claimed that requiring periodic registration and accounting of a principal's estate, regardless of a principal's incapacity, not only

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160. *See supra* Part III.

161. ALASKA STAT. §§ 13.26.106, 13.26.108, 13.26.145 (2008).

162. ALASKA STAT. § 13.26.118(a) (2008).

163. Whitton, *supra* note 2, at 10.

164. *See, e.g.*, I.R.C. § 6012(a)(4) (2006) (describing when trusts must file income tax returns).

165. Boxx, *supra* note 11, at 44.

166. It has been reported by some that a guardianship can cost upwards of \$10,000. *See, e.g., id.* at 5 n.24.

167. *See id.* at 44.

burdens an agent but also burdens a principal who needs to be able to benefit from a flexible transfer of assets for her care.<sup>168</sup>

However, the provisions providing a principal with more explicit information as to the impact of the powers bestowed upon an agent are low-cost remedies which might achieve the goal of better educating principals. Requiring legal counsel for a POA is often cost-prohibitive and would seriously undercut the ease with which a POA can be used.<sup>169</sup> But straightforward information regarding the POA itself combined with special treatment of hot powers could provide meaningful education to an elder in need of a POA.

### 3. *Burden on the Agent*

Adding any provisions requiring additional accounting work on the part of an agent clearly burdens an agent and disincentivizes an individual from becoming an agent. An alternative requirement—mandating only that receipts be kept and costs documented and limiting accounting to occasions when it is demanded by a principal or any government agency acting in an elder's best interests—could be implemented at a relatively small cost to an agent and could have significant benefits for the protection of principals.

The truly prohibitive reform provisions are those that force an agent to absorb costs even when fraud is not present, such as requiring a surety bond to be posted. Furthermore, such a requirement might be counterproductive, as a principal may opt to pay for the surety bond so that a particular individual may serve as an agent.

Restoring liability for agents in the manner of the 2006 UPOAA, or even the Uniform Probate Code of 1969, should also be considered. The burden created by such reforms would primarily impact only a fraudulent agent.

### 4. *Burden on Third Parties*

Ultimately, as some observers have noted, neither a power of attorney nor any other type of agency relationship will completely prevent an elder's assets from being fraudulently squandered.<sup>170</sup> Accordingly, the importance of having third party financial institutions involved in screening out fraudulent transactions is critical in preventing elder fraud.

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168. Whitton, *supra* note 2, at 16.

169. An example would be the agents that are appointed for the purpose of using an elder's social security funds to pay for various expenses. Often, such elders have a very small fixed income, cannot afford to obtain legal counsel, and have very few options available for free legal advice.

170. Whitton, *supra* note 2, at 49.

Given that Alaska already has a number of resources that would enable monitoring without significant additional expense, it is useful to consider some of the recommendations that would increase the ability for monitoring, whether by a state agency or by another third party. Of the various recommendations requiring State involvement (having documents recorded, requiring signing in front of a court, creating a registry of POA offenders, etc.), it is important to note that Alaska already has a website of recorded documents available statewide.<sup>171</sup> Requiring that POAs be recorded would add very little expense to the state operating budget, given that the infrastructure necessary to comply with a recording provision already exists. In short, Alaska will need to look at infrastructure already in place to see if any reform provisions could take advantage of those resources at a relatively low cost.<sup>172</sup>

Similarly, requiring medical professionals to assess an elder's competence before that elder signs a POA would be effective in reducing the use of undue influence on an incompetent elder. Using health resources that already exist would create extra protection, especially for vulnerable Alaskan elders in remote bush areas.<sup>173</sup>

Reform provisions must allow third parties to evaluate a POA document and refuse to complete an individual transaction. Such provisions could also create a standardized minimum required evaluation procedure providing the third party with a litmus of how to measure an agent's transactions. It is optimal that third party financial institutions holding a principal's assets be required to verify the authenticity of a POA, whether through recorded documents, consultation with appropriate parties or attorneys, or other related provisions.<sup>174</sup>

It is crucial for the legislature to create a safe haven for banking institutions that seek to prevent fraud. Another more powerful step in this direction would be to make those banks mandatory reporters, without requiring full investigations.

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171. Recorder's Office, Alaska Dep't of Natural Res., <http://dnr.alaska.gov/ssd/recoff/search.cfm> (last visited Apr. 10, 2010).

172. For instance, the Alaska Court System utilizes Courtview, a comprehensive online docketing system that covers nearly all jurisdictions across the state. Alaska Trial Court Cases, Courtview Search, <http://www.courtrecords.alaska.gov/pa/pa.urd/pamw6500.display> (last visited Apr. 10, 2010). This might be used instead of creating a separate central registry of POA offenders.

173. See *supra* note 143 and accompanying text.

174. See Wentworth, *supra* note 40, at 38 ("Verifying the authority of the attorney-in-fact to act for the account owner . . . is the first priority of every financial institution and an estate planning attorney must recognize (and, when working with attorneys-in-fact, should set the expectation) that this initial reaction is appropriate.").

## CONCLUSION

The Alaska power of attorney statute can benefit greatly from the reform recommendations made by the UPOAA, legislation passed or proposed in other jurisdictions, and proposals by contemporary elder law experts. Under the current statute, the amount of POA abuse is already significant and is sure to increase as the resident population continues to age. Available low-cost reforms exist that work well with some components of Alaska's existing infrastructure. Lawmakers should consider enacting such reforms to curb this growing problem, which has devastating effects on elders in Alaska.