
OVERSEEING DURABLE POWER OF ATTORNEY IN IOWA: DISCOURAGING ABUSE, HONORING PRINCIPALS

ABSTRACT

Guardianships and conservatorships are an important and useful tool necessary for caring for disabled and incompetent adults. These tools allow others to handle the ward's (the person being cared for) finances and health care decisions. However, they result in a significant loss of liberty and decisionmaking ability on the part of the ward and due to the procedural and judicial requirements of the process of establishing guardianship and conservatorship, are not easily accessible when needed.

A useful alternative for adults who need assistance or want to engage in advance planning is the durable general power of attorney. These statutes exist in every state, including Iowa. However, their ease of use also results in ease of abuse. Additional protections for vulnerable principals who cannot advocate for themselves are necessary.

Iowa has already established the legislative infrastructure for these additional protections to be effective. The state simply has to implement its already-passed legislation. The state recently took a significant step in the interest of protecting vulnerable adults when it passed the Iowa Uniform Power of Attorney Act in 2014. This Note looks to the future of advance directives in Iowa and provides additional suggestions for continued and improved protection of vulnerable adults in the state.

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I. INTRODUCTION

It was once said that the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those that are in the shadows of life, the sick, the needy and the handicapped.¹

When it becomes impossible or unsafe for a formerly independent adult to make financial decisions, due to either cognitive impairment or physical illness, one option for older Iowans is establishment of a conservatorship.² Conservatorship in Iowa is the equivalent of guardianship of the estate in other jurisdictions.³ It is the process by which the court appoints a conservator—a substitute decisionmaker.⁴ The proposed ward (the formerly independent older adult) must possess a “capacity [that] is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the person’s financial affairs.”⁵ This process disallows the ward’s decisionmaking with respect to his or her finances.⁶ The process of establishing a conservatorship can be long and emotionally taxing for the ward.⁷ Because establishment of conservatorship is a function of the court, it requires time and money to provide notice, file motions and

1. 123 CONG. REC. 37,287 (1977) (statement of President Hubert H. Humphrey).

2. See IOWA CODE § 633.566(2)(a) (2015).

3. Compare *id.* and § 633.576 with, e.g., WIS. STAT. ANN. § 54.19 (West 2015).

4. IOWA CODE § 633.3(7).

5. *Id.* § 633.566(2)(a).

6. *Id.* § 633.576.

7. See Marshall B. Kapp, *Alternatives to Guardianship: Enhanced Autonomy for Diminished Capacity*, in OLDER ADULTS’ DECISION-MAKING AND THE LAW 182, 183 (Michael Smyer et al. eds., 1996).

paperwork, seek evidence, and obtain legal assistance and representation.⁸ Additionally, it is a process which denies wards of their ability to make decisions that fall within the powers of the conservator.⁹ In some instances—instances where the elder’s cognitive capacity is already significantly limited—this is a less traumatic change. However, in others, wards are still aware of at least some of the deprivation of their rights and can feel deprived of what ability they have left. There are provisions in Iowa’s Probate Code that provide for limited conservatorship.¹⁰ But just as under plenary conservatorship, in the areas in which the conservator is granted power to make decisions, the ward is denied decision-making ability.¹¹

When an adult anticipates a substitute decisionmaker is necessary, there is an alternative process in Iowa: the adult planning for the future may name an agent to assist in making financial decisions via a document called a general power of attorney.¹² This Note is an exploration of the advantages of the use of the durable general power of attorney as well as potential improvements that could be made in Iowa to provide protection for principals.

A. History and Purpose of Power of Attorney Documents

Durable general power of attorney allows persons needing or wanting assistance with financial matters (principals)¹³ to name an agent they trust to assist them in financial matters.¹⁴ In a durable power of attorney, the authority of the agent survives the incapacity of the principal.¹⁵ In Iowa, the legislature established the durable general power of attorney in 1975 during

8. See IOWA CODE § 633.566.

9. See *id.* §§ 633.576, 633.637; see also *Guardianship and Conservatorship in Iowa Issues in Substitute Decision Making*, IOWA LEGAL AID, <http://web.archive.org/web/20150915131325/http://www.iowalegalaid.org/files/A3ED30CF-AFFE-7431-9310-0D521E4312AF/attachments/A46282A2-F8F7-409E-8F46-6AACAEC3A418/06-how-to-set-up-9-2013.pdf> (last updated Sept. 2013).

10. IOWA CODE §§ 633.572(2), 633.637.

11. See *id.*

12. See *id.* § 633B.301; see also Melissa O’Rourke, *Evaluating Your Estate Plan: Powers of Attorney and Other Forms of Substitute Decision Making*, IOWA STATE UNIVERSITY EXTENSION AND OUTREACH 1–2 (Jan. 2012), <http://www.extension.iastate.edu/agdm/wholefarm/pdf/c4-54.pdf>.

13. IOWA CODE § 633B.102(11).

14. *Id.* § 633B.201.

15. *Id.* § 633B.102(3).

the 66th General Assembly.¹⁶ In 2014, Iowa adopted a presumption of durability for the general power of attorney.¹⁷ A durable general power of attorney is useful as an inexpensive advance planning tool that is an alternative or even a supplement to conservatorship.¹⁸ Durable general power of attorney is an incredibly popular and widely used tool. Every state has a durable general power of attorney provision within its statutes.¹⁹

Under Iowa law, durable power of attorney does not need to take

16. 1975 Iowa Acts ch. 208 sec. 15, p. 492.

17. IOWA CODE § 633B.104 (2015).

18. See STEVE WEISMAN, A GUIDE TO ELDER PLANNING: EVERYTHING YOU NEED TO KNOW TO PROTECT YOUR LOVED ONES AND YOURSELF 27 (2013); Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 575 (1996).

19. ALA. CODE § 26-1A-104 (West 2015); ALASKA STAT. ANN. § 13.26.356 (West 2015); ARIZ. REV. STAT. ANN. § 14-5501 (West 2015); ARK. CODE ANN. § 28-68-104 (West 2015); CAL. PROB. CODE § 4124 (West 2015); COLO. REV. STAT. ANN. § 15-14-501 (West 2015); DEL. CODE ANN. tit. 12, § 49A-104 (West 2015); D.C. CODE § 21-2082 (West 2015); FLA. STAT. ANN. § 709.2104 (West 2015); GA. CODE ANN. § 10-6-141 (West 2015); HAW. REV. STAT. § 551E-3 (West 2015); IDAHO CODE ANN. § 15-12-104 (West 2015); 755 ILL. COMP. STAT. ANN. 45 / 2-4 (West 2015); IND. CODE ANN. § 30-5-10-3 (West 2015); IOWA CODE § 633B.104 (2015); KAN. STAT. ANN. § 58-652 (West 2015); KY. REV. STAT. ANN. § 386.093 (West 2015); LA. CIV. CODE ANN. art. 2989 (West 2015 with Acts effective December 31, 2015); ME. REV. STAT. ANN. tit. 18-A, § 5-904 (West 2015); MD. CODE ANN. EST. & TRUSTS § 17-105 (West 2015); MASS. GEN. LAWS ANN. ch. 190B, § 5-502 (West 2015); MICH. COMP. LAWS ANN. § 700.5501 (West 2015); MINN. STAT. ANN. § 523.07 (West 2015); MISS. CODE ANN. § 87-3-111 (West 2015); MO. ANN. STAT. § 404.705 (West 2015); MONT. CODE ANN. § 72-5-501 (West 2015); NEB. REV. STAT. ANN. § 30-4004 (West 2015); NEV. REV. STAT. ANN. § 162A.210 (West 2015); N.H. REV. STAT. ANN. § 506:6 (West 2015); N.J. STAT. ANN. § 46:2B-8.2 (West 2015); N.M. STAT. ANN. § 45-5B-104 (West 2015); N.Y. GEN. OBLIG. LAW § 5-1501A (McKinney 2015); N.C. GEN. STAT. ANN. § 32A-9 (West 2015); N.D. CENT. CODE ANN. § 30.1-30-02 (West 2015); OHIO REV. CODE ANN. § 1337.24 (West 2015); OKLA. STAT. ANN. tit. 58, § 1072.1 (West 2015); OR. REV. STAT. ANN. § 127.005 (West 2015); 20 PA. CONS. STAT. ANN. § 5601.1 (West 2015); R.I. GEN. LAWS ANN. § 18-16-2 (West 2015); S.C. CODE ANN. § 62-5-501 (West 2015); S.D. CODIFIED LAWS § 43-5-19 (West 2015); TENN. CODE ANN. § 34-6-105 (West 2015); TEX. ESTATES CODE ANN. § 752.001 (West 2015); UTAH CODE ANN. § 75-5-501 (West 2015); VT. STAT. ANN. tit. 14, § 3508 (West 2015); VA. CODE ANN. § 64.2-1602 (West 2015); WASH. REV. CODE ANN. § 11.94.046 (West 2015); W. VA. CODE ANN. § 39B-1-104 (West 2015); WIS. STAT. ANN. § 244.04 (West 2015); WYO. STAT. ANN. § 3-5-101 (West 2015); CONN. GEN. STAT. ANN. § 802e-45a-562 *repealed by* Uniform Laws—Power of Attorney—Adoption, 2015 Conn. Legis. Serv. 15-240 (H.B. 6774) (West) (providing for the adoption of a durable general power of attorney under the Connecticut Uniform Power of Attorney Act effective July 1, 2016). **The state code citations in this footnote and subsequent ones reflect statutory updates in WestlawNext as of Oct. 2, 2015.

effect at the time the document is executed.²⁰ The durable general power of attorney may become effective at the occurrence of a later triggering event, generally the incapacity of the principal.²¹ Given that guardianship or conservatorship is often the alternative, a durable general power of attorney, whether it is immediately effective or effective only later, becomes much more attractive for older adults who do not wish to give up decisionmaking ability until they are legally incompetent.²²

Iowa uses a conservatorship framework for court-appointed substitute decisionmakers with respect to finances and property.²³ The conservatorship statute requires proposed wards be deemed legally incompetent by clear and convincing evidence to handle their own financial matters.²⁴ After this finding, a conservator will be appointed for either limited or plenary financial decisionmaking, ending the ward's decisionmaking ability in the areas controlled by the conservator.²⁵ A conservatorship arises only when it is both a time of necessity and the ward has lost faculties to the extent of legal incompetence.²⁶ It is important to note that the statutory duties of conservators also include a requirement that they must act in the best interest of the ward.²⁷ If they do not, they may be subject to civil or criminal liability.²⁸ Courts take the character for honesty of the proposed conservator into account when considering whether to appoint that conservator.²⁹

The proposed ward is represented in the court proceedings by a guardian ad litem.³⁰ The ward can agree to the conservatorship proceeding—a voluntary conservatorship—or the ward can contest the conservatorship.³¹ In the case of involuntary conservatorship, the ward has not planned for

20. See IOWA CODE § 633B.109(1) (2015).

21. See *id.* § 633B.109(1)–(3); WEISMAN, *supra* note 18, at 29.

22. See WEISMAN, *supra* note 18, at 27–29.

23. See IOWA CODE § 633.551.

24. *Id.*

25. *Id.*; see *id.* § 633.576 (describing the powers of conservators).

26. See Kapp, *supra* note 7.

27. See IOWA CODE § 633.576; see also *In re Conservatorship of Deremiah*, 477 N.W.2d 691, 694 (Iowa Ct. App. 1991) (noting a fiduciary has a duty to act in the best interests of the ward).

28. See IOWA CODE § 633.160.

29. See, e.g., *In re Conservatorship of Deremiah*, 477 N.W.2d at 693.

30. IOWA CODE § 633.575.

31. *Id.* §§ 633.570, .572.

legal incompetence.³² Finally, “[g]uardianships [or conservatorships] frequently are expensive, time consuming, and emotionally tumultuous; they may result in unnecessary deprivation of basic civil liberties.”³³

In contrast, the durable general power of attorney is administered and managed extra-judicially, and no judicial review occurs before (or after, absent a reason) the agent is named.³⁴ One of the values of the durable general power of attorney is that the principal can participate in planning prior to the need arising (i.e., prior to incapacitation or some other event that “triggers” the need for a power of attorney).³⁵ It provides a workable tool in society’s efforts to balance the values of personal autonomy and taking care of vulnerable people.³⁶ To appoint an agent under a durable general power of attorney, the principal must simply obtain the form provided by the statute or consult an attorney to draw up a personalized instrument.³⁷ The document lays out potential duties of the named agent from which the principal can choose.³⁸ The principal can give the named agent essentially plenary power over financial decisionmaking or can limit the agent’s powers to certain matters.³⁹ The document must be completed and signed by the principal and notarized.⁴⁰ With the recent changes to the law, the agent must also sign an acknowledgement of his duties as agent.⁴¹

The principal’s incapacitation traditionally terminated the power of attorney.⁴² However, the time of incapacitation is when the principal most needs assistance.⁴³ Under the durable power of attorney, the agent’s ability to act on behalf of the principal is unaffected by the principal’s incapacity.⁴⁴

32. See *id.* § 633.566 (providing the requirements of an application to a court petitioning for the appointment of a conservator for a proposed ward).

33. Kapp, *supra* note 7, at 183.

34. See IOWA CODE § 633B.201; see also Lori A. Stiegel, *Commentary: Barriers to the Development and Use of Alternatives to Guardianship*, in *OLDER ADULTS’ DECISION-MAKING AND THE LAW* 202, 209 (Michael Smyer, et al. eds., 1996).

35. See IOWA CODE § 633B.109.

36. Kapp, *supra* note 7, at 183.

37. See IOWA DEP’T OF ELDER AFFAIRS, *POWER OF ATTORNEY HANDBOOK* 7–9 (2006), available at http://publications.iowa.gov/9370/1/POA_BookletUpdate.pdf.

38. IOWA CODE § 633B.301.

39. *Id.*

40. *Id.*

41. *Id.*

42. Dessin, *supra* note 18, at 576.

43. *Id.* at 576–77.

44. IOWA CODE § 633B.102(3).

The power becomes invalid only upon the death of the principal or the revocation of the document by the principal while the principal remains competent.⁴⁵ Implementation of the presumption of durability of the power of attorney is the realization that a power of attorney was useless when it ceased to function at the moment it was most necessary.⁴⁶

B. The ULC's Answer to the Problems Posed Above

The Uniform Power of Attorney Act (UPOAA) was drafted and distributed in 2006 by the then-named National Conference of Commissioners on Uniform State Laws⁴⁷—now the Uniform Law Commission (ULC)⁴⁸—in response to the wide variation in state laws related to durable power of attorney.⁴⁹ The UPOAA presumes durability of the instrument and provides some additional provisions to safeguard vulnerable principals.⁵⁰ Safeguards include definition of minimum duties owed by agents to principals and the “impos[ition of] liability for agent misconduct.”⁵¹ Additionally, the UPOAA’s stated primary purpose is to “preserve a principal’s freedom to choose both the extent of an agent’s authority and the principles to govern the agent’s conduct.”⁵² Seventeen states have adopted the UPOAA in whole or in part: Alabama, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Iowa, Maine, Montana, Nebraska, Nevada, New Mexico, Ohio, Pennsylvania, Virginia, West Virginia, and Wisconsin.⁵³ Legislation regarding proposed enactment of the UPOAA in some form is pending in Washington.⁵⁴ The Iowa Uniform Power of Attorney Act (Iowa UPOAA) was enacted during the 2014 legislative session and went into

45. *Id.* § 633B.110; *see also* DANA SHILLING, LEGAL ISSUES OF DEPENDENT AND INCAPACITATED PEOPLE ¶ 11.3 p.11-8 (2007).

46. *See* WEISMAN, *supra* note 18, at 28; Dessin, *supra* note 18, at 576–77.

47. UNIF. POWER OF ATTORNEY ACT 2006).

48. *About The ULC*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About+the+ULC> (last visited Sept. 7, 2015).

49. Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 ELDER L.J. 165, 175 (2009) (recognizing “the need for a new uniform act that would help reconcile the divergent state laws”).

50. *Id.* at 176; *see also* UNIF. POWER OF ATTORNEY ACT § 104.

51. Rhein, *supra* note 49, at 176 (citing UNIF. POWER OF ATTORNEY ACT §§ 116–117).

52. UNIF. POWER OF ATTORNEY ACT at Prefatory Note.

53. *Legislative Fact Sheet—Power of Attorney*, UNIFORM LAW COMM’N [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Power of Attorney](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Power+of+Attorney) (last visited Sept. 10, 2015).

54. *Id.*

effect in July 2014.⁵⁵

Iowa's adoption of the UPOAA⁵⁶ is a substantial step—though far from the last—in Iowa's protection of its vulnerable adult population. This Note proposes certain changes that are particular to already-existing resources in addition to the already-enacted Iowa UPOAA to improve protections for vulnerable principals without “gut[ting] the usefulness of the power of attorney.”⁵⁷ Specifically, this Note proposes that Iowa's Dependent Adult Abuse statute should be modified and strengthened to encompass more vulnerable adults and potential abusers. Additionally, a wider range of persons and professionals should be mandatory reporters of elder abuse. Further, Iowa has already passed a Substitute Decision Maker Act that has not yet been implemented.⁵⁸ That Act should be implemented, and the agencies and services formed under it should be used as a resource to prevent elder abuse and registration of power of attorney documents to enhance accountability of named agents for the treatment of vulnerable principals. These proposed changes are relatively modest, especially considering the fact that much of the legislation involved has already been passed.⁵⁹

II. THE RISK OF ABUSE UNDER THE CURRENT CONFIGURATION

A. *The Problem of Elder Abuse Nationally*

The National Center on Elder Abuse defines abuse as “any knowing, intentional, or negligent act committed . . . that causes harm to a vulnerable adult, or places one at serious risk of harm.”⁶⁰ Abuse may be perpetrated physically or emotionally, via exploitation, neglect, or abandonment.⁶¹

The population of older adults is growing significantly. “By 2050, people aged 65 and older are expected to comprise 20 percent of the total

55. See 2014 Iowa Acts ch. 1078, at 1 (codified at IOWA CODE § 633B.101–403 (2015)).

56. *Id.*

57. Rhein, *supra* note 49, at 178 (quoting Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 46 (2001)).

58. See IOWA CODE § 231E.13 (“Implementation of [the Substitute Decision Maker Act] is subject to availability of funding as determined by the department.”).

59. See, e.g., IOWA CODE § 231E.1.

60. SHILLING, *supra* note 45, at ¶ 7.1[1] p.7-2; see also *FAQs*, NAT'L CTR. ON ELDER ABUSE, <http://www.ncea.aoa.gov/faq/index.aspx> (last visited Sept. 10, 2015).

61. SHILLING, *supra* note 45, at ¶ 7.1[1] p.7-2.

U.S. population.”⁶² The fastest-growing segment of the population is persons aged 85 and over.⁶³ Elder abuse is under-reported as illustrated in the 2011 New York Elder Abuse Prevalence Study. It found that only about one in every 24 cases of elder abuse is reported.⁶⁴ Financial abuse is self-reported at a higher rate than other forms of elder abuse.⁶⁵ In 2009, 5.2 percent of people over the age of 60 responding to a phone survey reported financial exploitation by a family member.⁶⁶ Older adults who require assistance with activities of daily living or are otherwise disabled in some manner, either cognitively or physically, are consistently found to be at greater risk of abuse, particularly with respect to financial exploitation, than those elders who are not disabled.⁶⁷ To put that statistic in perspective, more than half of people over the age of 85 have some level of cognitive impairment.⁶⁸ However, more than half of principals victimized by their named agent were in fact competent, indicating that even intact faculties cannot guarantee that one will not be victimized.⁶⁹ Unfortunately, there are currently no reliable measures of the incidence of financial exploitation via durable general power of attorney.⁷⁰

Yet another confounding factor that contributes to the incidence of elder abuse is the fact that “[o]f elder abuse cases reported in a 2003 study by the National Center on Elder Abuse, two-thirds were perpetrated by a family member.”⁷¹ The trust a principal places in the named agent is

62. *Statistics/Data*, NAT’L CTR. ON ELDER ABUSE, <http://www.ncea.aoa.gov/library/data> (last visited Sept. 10, 2015).

63. *Id.*

64. N.Y.C. ELDER ABUSE CTR., UNDER THE RADAR: N. Y. STATE ELDER ABUSE PREVALENCE STUDY 50 (2011), *available at* <http://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf>.

65. *Statistics/Data*, *supra* note 62 (citing N.Y.C. ELDER ABUSE CTR., UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY 35–36 (2011)).

66. OJP FACT SHEET: ELDER ABUSE AND MISTREATMENT, OFFICE OF JUSTICE PROGRAMS (Nov. 2011), http://ojp.gov/newsroom/factsheets/ojpfs_elderabuse.html.

67. IOWA ELDER ABUSE INITIATIVE DEMONSTRATION PROJECTS FISCAL YEAR 2001–2011 5 (2012), *available at* http://www.iowaaging.gov/sites/files/aging/documents/2012_EAI_Results_Report.pdf.

68. *Statistics/Data*, *supra* note 62.

69. Michele M. Hughes, *Remedying Financial Abuse by Agents Under a Power of Attorney for Finances*, 2 MARQ. ELDER’S ADVISOR 39, 39 (2001), *available at* <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1264&context=elders>.

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

71. Sean Gardiner, *Tears, Trials, and Other Troubles for Famous Family*, AARP

compounded with the trust a principal typically has for a family member. If the named agent takes advantage of that trust, the principal may not know, may not believe, or may be loath to report financial exploitation. “[U]p to one million older Americans are targeted by financial abuse yearly, and family members and caregivers are most often the culprits.”⁷²

Family dysfunction may also contribute to the incidence of intra-family abuse via durable general power of attorney.⁷³ Long-standing interpersonal troubles may result in later retaliation when caregiving roles are reversed.⁷⁴ Finally, when the principal’s estate is large and the agent stands to inherit or, at minimum, benefit from the principal’s estate at the principal’s death, the agent may have a conflict of interest causing the agent to act in a way that is not in the principal’s best interest.⁷⁵ In the words of the great Notorious B.I.G., “Mo Money Mo Problems.”⁷⁶

B. Elder Abuse in Iowa

The Elder Abuse Initiative in Iowa produced a report in 2012 that did not provide Iowa-specific statistics on prevalence of elder abuse in the state.⁷⁷ The report does not specify why, though it is likely because the data is too incomplete to publish accurate numbers.⁷⁸ The report does note that, like the national statistics, elder abuse in Iowa tends to be under-reported.⁷⁹ Further, in Iowa, the Dependent Adult Abuse statute does not require mandatory reporting outside of certain classifications of caregivers and abuse; it is a unique statute—one that should be amended to encompass a broader range of caregivers and abuses not currently included in the law.⁸⁰

(July 20, 2009), http://www.aarp.org/relationships/family/info-07-2009/astor_family_tears_trials_and_other_troubles.html.

72. *Conviction of Astor’s Son Helps Other Financial Elder Abuse Cases*, ELDER LAW ANSWERS, <http://www.elderlawanswers.com/conviction-of-astor39s-son-helps-other-financial-elder-abuse-cases-7889> (last updated Oct. 12, 2009).

73. See Gardiner, *supra* note 71.

74. See *id.*

75. See *id.*

76. NOTORIOUS B.I.G. FT. MASE, PUFF DADDY, MO MONEY MO PROBLEMS, on LIFE AFTER DEATH (Bad Boy Records 1997).

77. See IOWA ELDER ABUSE INITIATIVE, *supra* note 67, at 5–7.

78. See *id.*

79. *Id.* at 6.

80. See IOWA CODE § 235B (2015); IOWA ELDER ABUSE INITIATIVE, *supra* note 67, at 6–7.

C. Elder Abuse and Durable Powers of Attorney

Relatively few studies have been conducted to explore the prevalence of abuse of the durable general power of attorney.⁸¹ However, two law students at Albany Law School conducted one such study, published in 1994.⁸² The study questioned legal professionals and aging-services personnel about their experiences encountering durable general power of attorney abuse.⁸³ “[Sixty-six percent] of the 410 [respondents from 46 states] . . . had encountered some degree of durable power of attorney abuse.”⁸⁴ Of those, a majority had encountered more than one instance of abuse.⁸⁵ One author indicated that “an undetectable but probably high percentage of financial elder abuse is committed by . . . [durable power of attorney] agents . . . in what are supposed to be protective measures for the elderly.”⁸⁶

The UPOAA, and the Iowa UPOAA, establish that “the principal’s reasonable expectations [are] the paramount guideline for agent actions.”⁸⁷ Absent any expressed reasonable expectations on the principal’s part, the agent is bound to act in the principal’s best interests.⁸⁸ “[C]ourts strictly construe power-of-attorney language and refuse to extend authority ‘beyond that which is directly given or necessary and proper to carry the authority to full effect.’”⁸⁹

The case of *State v. Flax* illustrates abuse of an older woman via a

81. See, e.g., Stiegel, *supra* note 34, at 209 (noting there are a limited number of studies available which analyze the prevalence of abuse of durable power of attorney authority).

82. JONATHAN FEDERMAN & MEG REED, ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM, GOV’T L. CTR. OF ALBANY L. SCH. 1 (1994), available at <http://www.albanylaw.edu/glc/publications/glo/Documents/Abuse%20and%20the%20Durable%20Power%20of%20Attorney%20-%20Options%20for%20Reform.pdf>.

83. *Id.* at 28–32.

84. *Id.* at 37; see also Stiegel, *supra* note 34, at 209.

85. FEDERMAN & REED, *supra* note 82, at 37; see also Stiegel, *supra* note 34, 209.

86. SHILLING, *supra* note 45, at ¶ 7.7 p. 7-21.

87. Whitton, *supra* note 70, at 27 (citing UNIF. POWER OF ATTORNEY ACT § 114(a)(1)); see also IOWA CODE § 633B.114 (2015).

88. IOWA CODE § 633B.114; UNIF. POWER OF ATTORNEY ACT § 114 cmt.; see also Whitton, *supra* note 70, at 27.

89. Whitton, *supra* note 70, at 35 (quoting *Estate of Swanson v. United States*, 46 Fed. Cl. 388, 392 (2000)).

granted power of attorney.⁹⁰ The abused elderly woman named her financial consultant's wife as her agent,⁹¹ and the wife, once named agent, proceeded to use the elderly woman's money for herself rather than to reimburse creditors or third parties—as she had told the elderly woman.⁹² Ultimately, more than \$198,000 of the principal's money was used inappropriately.⁹³ The agent was convicted of first-degree theft.⁹⁴

Agents acting in bad faith or outside the terms of the power of attorney may be found liable for breach of fiduciary duty. This was the case in *Miller v. Eisentrager*, in which the principal's daughter was named his agent.⁹⁵ The principal's grandson, who was named in the will, filed a petition to reopen the principal's administered and closed estate.⁹⁶ The grandson received no notice of the administration of the estate upon the principal's death and received none of the principal's estate during administration.⁹⁷ It was discovered during trial that the agent used more than \$112,000 of the principal's estate.⁹⁸ The agent depleted the estate to such a degree that there was no net estate upon administration.⁹⁹ The court found that the agent did not prove that she acted as per the wishes of her father, the principal, and that she injured the grandson by denying him of his share of the estate.¹⁰⁰ The agent was found liable of the amount that was spent inappropriately—more than \$112,000.¹⁰¹

Agents who abuse their abilities under a durable general power of attorney may also be subject to liability in tort; specifically, agents may be liable for conversion. The defendant in *Alexopoulos v. Dakouras* was found liable for conversion after the court found he had misappropriated more

90. State v. Flax, No. 0-774/99-1519, 2002 Iowa App. LEXIS 76, at *4 (Iowa Ct. App. Jan. 28, 2002).

91. *Id.* at *3.

92. *Id.* at *12–13.

93. *Id.* at *11.

94. *Id.* at *4, 33.

95. Miller v. Eisentrager, No. 9-819/09-0596, 2009 Iowa App. LEXIS 1704, at *3 (Iowa Ct. App. Dec. 30, 2009).

96. *Id.* at *4.

97. *Id.*

98. *Id.* at *6.

99. *Id.* at *6–7.

100. *Id.* at *10–11.

101. *Id.* at *16.

than \$10,000 of the principal's funds.¹⁰² The court established that the power of attorney document itself is to be construed strictly and, because no language of ability to gift or self-gift was found in the document in question, the agent did not have the power to use the principal's funds for his own purposes.¹⁰³

The misuse of the durable general power of attorney can also affect bankruptcy proceedings. When a durable general power of attorney is misused in the context of the defendant's bankruptcy proceeding, the court tends to look with disfavor on the defendant's petition for discharge.¹⁰⁴ Specifically, in the case of *Stentz v. Stentz*, a Chapter 7 defendant was seeking to discharge debt owed to the estate of the principal.¹⁰⁵ The defendant's father named the defendant his agent and the defendant proceeded to drain his father's assets.¹⁰⁶ The defendant made unauthorized gifts to both himself and others.¹⁰⁷ There was no oversight of the durable general power of attorney functions provided as the principal's health deteriorated.¹⁰⁸ The plaintiff in *Stentz* alleged that the defendant had used these funds with malice and fraudulent intent and therefore violated Bankruptcy Code 11 U.S.C. § 523—which prohibits discharge of debts in bankruptcy accumulated in the course of “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.”¹⁰⁹ The court in *Stentz* found that the principal's funds were, indeed, misused and therefore the defendant's petition for discharge of debt was denied.¹¹⁰

A very similar outcome resulted in the bankruptcy case of *Guzick v. Nyberg*.¹¹¹ The defendant in this case was found to owe more than \$220,000 to the estate of the principal after the principal's death, due to the defendant's improper use of the durable general power of attorney and self-

102. *Alexopoulos v. Dakouras*, 179 N.W.2d 836, 841 (Wis. 1970).

103. *Id.* at 840.

104. *See, e.g., Stentz v. Stentz*, 197 B.R. 966, 986 (Bankr. D. Neb. 1996).

105. *Id.* at 971.

106. *Id.* at 970–71.

107. *See id.* (noting the durable power of attorney contained no authority to make gifts on the principal's behalf, but found the defendant had made money gifts to himself and to others).

108. *See id.*

109. *Id.* at 971 (citing 11 U.S.C. § 523(a)(4) (2012)).

110. *Stentz*, 197 B.R. at 986. The amount of misused funds is exempted from discharge in such bankruptcy proceedings. 11 U.S.C. § 523(a)(4).

111. *See Guzick v. Nyberg*, 459 B.R. 15, 26 (Bankr. D. Minn. 2011).

dealing during the life of the principal.¹¹² Again, the court denied discharge of the debt to the estate, as in *Stentz*, because of violation of the Bankruptcy Code.¹¹³ The defendant in *Nyberg* was the principal's named agent and was, again, a family member.¹¹⁴ No oversight was provided as to the agent's use of his power.¹¹⁵ The court in *Nyberg* had no difficulty, however, discerning that the agent's actions were counter to the principal's wishes and best interests due to the agent's timing (he drained the principal's account once the principal became incapacitated)¹¹⁶ and the principal's other documents (his will and pour-over trust).¹¹⁷ Improperly obtained or used funds were again refused discharge by the bankruptcy court based on misuse of the power of attorney.¹¹⁸

D. "An Appalling Set of Circumstances": An Extreme
and Well-Publicized Case

Perhaps the most extreme—and certainly the most widely publicized—case of elder abuse via durable general power of attorney was the case of the 105-year-old philanthropist and socialite, Brooke Astor.¹¹⁹ Known around the country for her generosity within the New York art, literary, and educational communities,¹²⁰ at the time of her descent into Alzheimer's disease,¹²¹ Ms. Astor's estate was valued at approximately \$180 million.¹²² Having plundered more than \$14 million,¹²³ Astor's son, Anthony Marshall (now deceased),¹²⁴ was convicted in 2009 of 14 counts—including first- and

112. *Id.* at 23–24.

113. *See id.* at 26; *see also* 11 U.S.C. § 523(a)(4), (a)(6).

114. *Nyberg*, 459 B.R. at 21.

115. *Id.*

116. *Id.* at 22–23, 25.

117. *Id.* at 25.

118. *Id.* at 26.

119. *The Brooke Astor Case: "An Appalling Set of Circumstances": Interview Conducted by Lori A. Stiegel, Senior Attorney, ABA Commission on Law and Aging, with Expert Witness Alex Forger*, ABA COMM'N ON L. & AGING 1–2 (2011), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/2011_aging_mar18_ea_brkastr_mono.authcheckdam.pdf.

120. *See* John Richardson, *The Battle for Mrs. Astor*, VANITY FAIR (Oct. 2008), <http://www.vanityfair.com/news/2008/10/astor200810>.

121. *Id.*

122. *See The Brooke Astor Case*, *supra* note 119, at 3.

123. Richardson, *supra* note 120.

124. Shayna Jacobs & Corky Siemaszko, *Anthony Marshall, Convicted of Looting Mother Brooke Astor's Fortune, Dead at 90: Lawyer*, NY DAILY NEWS,

second-degree grand larceny, fraud, and conspiracy.¹²⁵ Among the most serious counts were those that stemmed from his abuse of the durable general power of attorney granted to him by his mother prior to her cognitive decline.¹²⁶

Once Marshall's mother began to exhibit significant symptoms of dementia, Marshall, at first gradually, and later brazenly, depleted his mother's art collection without paying the required taxes, and isolated his increasingly confused mother.¹²⁷ Using other methods of deception, Marshall had his mother's will and its codicils altered in ways that were unquestionably not within her original estate plan, which cut out her beloved charities that were originally supposed to receive the residue of her significant estate.¹²⁸ Employing his durable general power of attorney, Marshall "took tangibles—mostly art—from Mrs. Astor's apartment and charged her with many of his personal expenses."¹²⁹ He also used his power of attorney to give himself a \$1 million raise.¹³⁰ He then proceeded to neglect his mother's health:

They found her sitting on a grubby old couch in the back of her New York Apartment, a dachshund on either side of her. The nurses had dressed her up. She was wearing a wig, heavy makeup to hide skin cancer, a hat, and gloves.¹³¹

It is alleged that Marshall failed to provide for basic medical care.¹³² It is certain that in an effort to retain as much of his mother's fortune as possible for himself, Marshall closed as many of his mother's houses as he could and fired all of the staff therein.¹³³

Marshall's attorney, Francis X. Morrissey, Jr., was also convicted of a number of crimes in connection to Astor's case, including conspiracy, fraud,

<http://www.nydailynews.com/new-york/anthony-marshall-son-brooke-astor-dead-90-article-1.2029294> (last updated Dec. 2, 2014).

125. *The Brooke Astor Case*, *supra* note 119, at 3.

126. *Id.* at 10, 13.

127. Richardson, *supra* note 120.

128. *The Brooke Astor Case*, *supra* note 119, at 4.

129. *Id.* at 14.

130. *Conviction of Astor's Son*, *supra* note 72.

131. Richardson, *supra* note 120.

132. *Id.*

133. *Id.*

and forgery.¹³⁴ He was immediately disbarred.¹³⁵ The lesson: not only can the perpetrator of the direct abuse be punished, so too can any attorney involved.

*E. The Current Durable General Power of Attorney
and Its Lack of Oversight*

Under the current law in most jurisdictions, the durable general power of attorney's strengths are also its weaknesses.¹³⁶ It is cost-effective, low-maintenance, and allows the agent a wide breadth of power to handle the principal's finances.¹³⁷ To execute a valid durable general power of attorney, the principal must be competent when it is executed.¹³⁸ A durable general power of attorney cannot be revoked once the principal becomes incompetent.¹³⁹ It can be revoked at any time while the principal remains competent.¹⁴⁰ This is also true under Iowa law.¹⁴¹

Once the principal is no longer competent and is in the greatest need of assistance, little to no oversight is provided as to the agent's use of authority.¹⁴² An agent's actions are interpreted as those of the principal.¹⁴³ Further, once the principal is no longer competent, the power of attorney can no longer be effectively revoked without judicial intervention.¹⁴⁴ As a general rule, powers and duties of the agent are dictated by state law.¹⁴⁵ State

134. See *The Brooke Astor Case*, *supra* note 119, at 1.

135. *Id.*

136. See Stiegel, *supra* note 34, at 209 ("The durable power of attorney is the alternative that seems most subject to abuse, probably because it can grant broad authority with little oversight. Of course, that is precisely what makes it so useful in the first place as an alternative to guardianship."); Dessin, *supra* note 18, at 581–84.

137. IOWA DEP'T OF ELDER AFFAIRS, *supra* note 37, at 6–7, 10.

138. Dessin, *supra* note 18, at 581.

139. *Id.*

140. O'Rourke, *supra* note 12, at 1.

141. See *Jackson v. Schrader*, 676 N.W.2d 599, 606 (Iowa 2003) (noting the principle must be competent in order to execute inter vivos transactions); IOWA CODE § 633B.201 (2015); *id.* § 633B.110(1)(c) (indicating the principal may revoke the power of attorney).

142. Dessin, *supra* note 18, at 583. But see IOWA CODE § 633B.116 (providing for judicial review of agent actions under a durable power of attorney upon the petition of an approved person).

143. See IOWA CODE § 633B.201(7) ("An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.").

144. See *supra* notes 136–40 and accompanying text.

145. Dessin, *supra* note 18, at 585 (quoting RESTATEMENT (SECOND) OF CONFLICTS

“common law imposes a fiduciary duty on the agent”; fiduciary duty imposes a requirement of loyalty and to act in the best interests of the principal.¹⁴⁶ Self-dealing and making gratuitous transfers that are not within the demonstrated and established pattern of the principal constitute misuse of the position as agent.¹⁴⁷ In fact, because a fiduciary duty is imposed on the agent, a presumption of fraud automatically arises when the agent obtains an advantage over the principal.¹⁴⁸ Under normal circumstances, the burden would fall on the party alleging fraud to support this allegation.¹⁴⁹ However, in the instance when an automatic presumption of fraud arises because of the presence of an agency relationship, the burden then falls on the agent accused of fraud or undue influence to rebut.¹⁵⁰ Further, in the absence of a convincing or sufficient rebuttal from the agent, it is likely that a finding of undue influence or fraud will be reached because of the nature of the relationship and the burden of proof.¹⁵¹ In Iowa, such a breach of fiduciary duty on the agent’s part has resulted in the nullification of mortgages signed by the agent that were to the clear detriment of the principal—such as when the mortgages resulted in foreclosure against the principal.¹⁵²

*F. Iowa’s Recent Forays Into Changes in the Law of General
Durable Power of Attorney*

Iowa legislators have considered amending the law pertaining to durable general power of attorney in the recent past. In early 2013, two separate bills were introduced in the Iowa House proposing amendments to the durable general power of attorney law.¹⁵³ Both proposed adoption, with some variation, of one of the propositions set forth in the UPOAA: clear

§ 291 (1971)).

146. Jane A. Black, Note, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws are Failing a Vulnerable Population*, 82 ST. JOHN’S L. REV. 289, 308 (2008) (quoting Ellen J. Henningsen, *Preventing Financial Abuse by Agents Under Powers of Attorney*, WIS. LAWYER, (Sept. 2000), <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=73&Issue=9&ArticleID=22318>).

147. See, e.g., *Schock v. Nash*, 732 A.2d 217, 228 (Del. 1999).

148. See, e.g., *Kanawha Valley Bank v. Friend*, 253 S.E.2d 528, 530 (W. Va. 1979).

149. See, e.g., *Fletcher v. Mathew*, 448 N.W.2d 576, 581 (Neb. 1989).

150. See *Kanawha Valley Bank*, 253 S.E.2d at 530.

151. See *Fletcher*, 448 N.W.2d at 581, 583.

152. See *Citizens State Bank v. Ruebel*, No. 1-090/10-1028, 2011 Iowa App. LEXIS 732, at *20, *23 (Iowa Ct. App. July 27, 2011).

153. H.F. 86, 85th Gen. Assemb. (Iowa 2013); H.F. 416, 85th Gen. Assemb. (Iowa 2013).

definition, statement, and required acknowledgement by the agent of his or her responsibility as a fiduciary of the principal.¹⁵⁴ One bill, H.F. 86, made the validity of the instrument dependent upon the notarization that the agent understands his or her fiduciary duties to the principal.¹⁵⁵ The other, H.F. 416, employed both the required acknowledgement of fiduciary duty by the agent—a measure also suggested by the UPOAA¹⁵⁶—as well as registration of the instrument with the secretary of state.¹⁵⁷ Both bills went to committee where they died in 2013.¹⁵⁸

In 2014, during the 85th General Assembly of the Iowa Legislature, Iowa formally adopted the Iowa UPOAA.¹⁵⁹ The Iowa UPOAA mirrors the ULC's with some minor differences.¹⁶⁰ The Iowa UPOAA provides one additional safeguard for vulnerable adults—it requires the signors of the durable power of attorney document to be adults who are not prospective agents.¹⁶¹ Additionally, the document must be notarized.¹⁶² Iowa's UPOAA also differs from the UPOAA in that suspension of the power of attorney is presumed upon appointment of a conservator in Iowa; the power of attorney only continues post-conservatorship if a court orders its continuance.¹⁶³ Conversely, the ULC's UPOAA presumes the power of attorney's continued validity despite appointment of guardian or conservator.¹⁶⁴ Co-agents must act by majority where applicable in Iowa, while under the

154. See H.F. 86, 85th Gen. Assemb.; H.F. 416, 85th Gen. Assemb.; UNIF. POWER OF ATTORNEY ACT § 105 (2006); see also Rhein, *supra* note 49, at 176.

155. H.F. 86, 85th Gen. Assemb., § 1.

156. UNIF. POWER OF ATTORNEY ACT at § 201; see also Rhein, *supra* note 49, at 176.

157. H.F. 416, 85th Gen. Assemb., at § 1.

158. E-mail from Brenda Curran, Legislative Clerk for State Rep. Mary Gaskill, to author (Feb. 26, 2014, 13:11 CST) (on file with author); e-mail from Lisa Heddens, State Rep., to author (Feb. 25, 2014, 12:31 CST) (on file with author).

159. IOWA CODE § 633B (2015); 2014 Iowa Acts ch. 1078, at 1.

160. Compare IOWA CODE §§ 633B.105, .108, .111, .116, with UNIF. POWER OF ATTORNEY ACT §§ 105, 108, 111, 116.

161. Compare IOWA CODE § 633B.105, with UNIF. POWER OF ATTORNEY ACT § 105.

162. Compare IOWA CODE § 633B.105 (requiring acknowledgment of a durable power of attorney by notary public or other individual authorized by law to take acknowledgments), with UNIF. POWER OF ATTORNEY ACT § 105 (“A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.”).

163. IOWA CODE § 633B.108 (also allowing a power of attorney to continue despite the appointment of a conservator if the power of attorney so provides).

164. UNIF. POWER OF ATTORNEY ACT § 108.

UPOAA, they may each act independently.¹⁶⁵ Importantly, Iowa's UPOAA outlines who may seek review of an agent's performance.¹⁶⁶ This section mirrors the UPOAA.¹⁶⁷ The list includes "[t]he principal's caregiver, including but not limited to a caretaker as defined in section 235B.2 or 235E.1, or another person that demonstrates sufficient interest in the principal's welfare."¹⁶⁸ The Iowa UPOAA does not broaden the ability to seek judicial review to anyone, but it does vastly increase the swath of people who may seek judicial review of the agent's performance if the individual seeking review can demonstrate a sufficient interest in the welfare of the principal.¹⁶⁹ This Note praises the above-noted changes in the law, and additionally this Author would support the expansion of the definition of "caretaker" in Iowa.¹⁷⁰

III. USING AND ADAPTING RESOURCES ALREADY IN PLACE IN IOWA TO IMPROVE PROTECTIONS FOR VULNERABLE PRINCIPALS

A. Expand Mandatory Reporting of Suspected Elder Abuse in Iowa

Certain classifications of caregivers are designated mandatory reporters under Iowa's current Dependent Adult Abuse statute.¹⁷¹ These classifications include staff members of community mental health centers, peace officers, home health aides, health professionals, social workers, and counselors.¹⁷² Civil or criminal liability may be imposed for failure to report.¹⁷³ With expansions in the definition of elder abuse in Iowa, so too should the mandate of reporting such abuse be expanded. Additionally, the mandated reporter definition should include named agents under general durable power of attorney documents so that failure to report would result in another cause of action against abusive agents.

Iowa's mandated reporting requirements are not unique. In fact, nearly every state requires reporting of elder abuse.¹⁷⁴ Some states only require

165. Compare IOWA CODE § 633B.111, with UNIF. POWER OF ATTORNEY ACT § 111.

166. IOWA CODE § 633B.116.

167. See UNIF. POWER OF ATTORNEY ACT § 116.

168. IOWA CODE § 633B.116 (emphasis added).

169. See *id.*

170. See *infra* Part III.B.

171. IOWA CODE § 235B.3(2)(a)–(h) (2015).

172. *Id.*

173. *Id.* § 235B.3(12); see also SHILLING, *supra* note 45, at ¶ 7.4[1] p.7-13.

174. ALA. CODE § 38-9-8 (West 2015); ALASKA STAT. ANN. § 47.24.010(a) (West

reporting of elder abuse that occurs institutionally¹⁷⁵ or, like Iowa, only require certain classifications of professionals or caregivers to report suspected elder abuse.¹⁷⁶ However, in some states there is a blanket mandate to report suspected incidents of elder abuse.¹⁷⁷ Regardless of their scope, mandated reporting requirements are not unique. In fact, states that do not have such mandated reporting of elder abuse are in the extreme minority; their numbers are shrinking. As of July 2014, Colorado implemented a mandated reporter requirement, bringing the number of states with no mandated reporter requirement to one.¹⁷⁸

2015); ARIZ. REV. STAT. ANN. § 46-454(A)–(B) (West 2015); ARK. CODE ANN. § 12-12-1708(a)(1) (West 2015); CAL. WELF. & INST. CODE § 15630 (West 2015); COLO. REV. STAT. ANN. § 18-6.5-108 (West 2015); CONN. GEN. STAT. ANN. § 17b-451 *amended by* 2015 Conn. Acts 15-236 (Reg. Sess.) (effective Oct. 1, 2015); DEL. CODE ANN. tit. 31, § 3910 (West 2015); D.C. CODE ANN. § 7-1903 (West 2015); FLA. STAT. ANN. § 415.1034 (West 2015); GA. CODE ANN. § 30-5-4 (West 2015); HAW. REV. STAT. § 346-224 (West 2015); IDAHO CODE ANN. § 39-5303 (West 2015); 320 ILL. COMP. STAT. ANN. 20/4 (West 2015); IND. CODE ANN. § 12-10-3-9 (West 2015); KAN. STAT. ANN. § 39-1402 (West 2015); KY. REV. STAT. ANN. § 209.030 (West 2015); LA. REV. STAT. ANN. § 15:1504 (West through 2015 with 2015 Reg. Sess. Acts effective on or before December 31, 2015); ME. REV. STAT. tit. 22, § 3477 (West 2015); MD. CODE ANN. FAM. LAW § 14-302 (West 2015); MASS. GEN. LAWS ANN. ch. 19A, § 15 (West 2015); MICH. COMP. LAWS ANN. § 400.11a (West 2015); MINN. STAT. ANN. § 626.557 (West 2015); MISS. CODE ANN. § 43-47-7 (West 2015); MO. ANN. STAT. § 565.188 (West 2015); MONT. CODE ANN. § 52-3-811 (West 2015); NEB. REV. STAT. ANN. § 28-372 (West 2015); NEV. REV. STAT. ANN. § 200.5093 *amended by* 2015 Nev. Legis. Serv. ch. 174 (A.B. 223) (West 2015) (amending the reporting provision to include reporting of abandonment); N.H. REV. STAT. ANN. § 161-F:46 (West 2015); N.J. STAT. ANN. § 52:27D-409 (West 2015); N.M. STAT. ANN. § 27-7-30 (West 2015); N.C. GEN. STAT. ANN. § 108A-102 (West 2015); N.D. CENT. CODE ANN. § 50-25.2-03 (West 2015); OHIO REV. CODE ANN. § 5101.61 *as amended by* 2015 Ohio Laws File 11 (Am. Sub. H.B. 64) (West); OKLA. STAT. ANN. tit. 43A § 10-104 (West 2015); OR. REV. STAT. ANN. § 124.060 (West 2015); 35 PA. CONS. STAT. ANN. § 10225.701 (West 2015); R.I. GEN. LAWS ANN. § 42-66-8 (West 2015); S.C. CODE ANN. § 43-35-25 (West 2015); S.D. CODIFIED LAWS § 22-46-9 (West 2015); TENN. CODE ANN. § 71-6-103 (West 2015); TEX. HUM. RES. CODE ANN. § 48.051 (West 2015); UTAH CODE ANN. § 62A-3-305 (West 2015); VT. STAT. ANN. tit. 33, § 6903 (West 2015); VA. CODE ANN. § 63.2-1606 (West 2015); WASH. REV. CODE. § 74.34.035 (West 2015); W. VA. CODE ANN. § 9-6-9 (West 2015); WIS. STAT. ANN. § 46.90 (West 2015); WYO. STAT. ANN. § 35-20-103 (West 2015).

175. See, e.g., CONN. GEN. STAT. ANN. § 17b-451 *amended by* 2015 Conn. Acts 15-236 (Reg. Sess.) (effective Oct. 1, 2015).

176. See, e.g., IOWA CODE § 235B.3(2)(a)–(h); NEB. REV. STAT. ANN. § 28-372 (West 2015).

177. See, e.g., UTAH CODE ANN. § 62A-3-305(1) (West 2015).

178. COLO. REV. STAT. ANN. § 18-6.5-108 (West 2015); *see also* statutes cited *supra* note 174.

Interestingly, though New York's law has been cited as ideal throughout this Note, it does not have a mandated reporter requirement for elder abuse.¹⁷⁹ The applicable statute creates an agency—Adult Protective Services—to address reports of elder abuse, and provides services for abused elders such as case management and in-home services.¹⁸⁰ But no one is required to report a suspected incident of elder abuse to the agency.¹⁸¹ This Note advocates for mandated reporting and thus, in this respect, New York's law is not ideal.

As an additional protection for vulnerable adults in Iowa, somewhat harsher penalties could also be imposed for failing to report suspected elder abuse. In some states, failure to report is considered a misdemeanor violation.¹⁸² Penalties range from none (in the states that do not require reporting) to criminal fines and jail time (as in California).¹⁸³ Iowa imposes civil liability and misdemeanor charges for failure to report.¹⁸⁴ Iowa could go as far as to impose criminal fines and jail time to ensure compliance with the mandatory reporting requirement. Such a penalty does not seem out of line with mandated reporting or the goal of the proposed statutory change.

B. Modify and Strengthen Iowa's Adult Abuse Statute

Under Iowa's current Dependent Adult Abuse statute, three criteria must be met for the Department of Human Services to initiate any sort of

179. *New York State Doesn't Have Mandatory Reporting: Good or Something to Change?*, NYC ELDER ABUSE CENTER (Jan. 8, 2015), <http://nyceac.com/elder-justice-dispatch-new-york-state-doesnt-have-mandatory-reporting-good-or-something-to-change/>; see also N.Y. Cnty. Dist. Attorney's Office, *2013 Nationwide Survey of Mandatory Reporting Requirements for Elderly and/or Vulnerable Persons* 27–30, National Adult Protective Services Association (Aug. 2013), <http://www.napsa-now.org/wp-content/uploads/2012/04/Mandatory-Reporting-Chart.pdf>.

180. N.Y. SOC. SERV. LAW § 473(1) (McKinney 2015).

181. See *supra* note 179 and accompanying text.

182. SHILLING, *supra* note 45, at ¶ 7.4[1] p.7-13.

183. See *id.*; PENALTIES FOR FAILING TO REPORT ELDER ABUSE: COMPARISON CHART WITH PROVISIONS FROM ADULT PROTECTIVE SERVICES LAWS, BY STATE, AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING (2009), available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/2011_agin_g_ea_failure.authcheckdam.pdf.

184. IOWA CODE § 235B.3(12) (2015).

action.¹⁸⁵ First, the individual must be a dependent.¹⁸⁶ A dependent is defined as “a person 18 years of age or older who is unable to protect his or her own interests or unable to adequately perform or obtain the services necessary to meet essential human needs” such that the person requires the care of another.¹⁸⁷ Second, the alleged abuser must be a caretaker.¹⁸⁸ A caretaker is defined as a “related or nonrelated person who has the responsibility for the protection, care, or custody of a dependent adult” because the caretaker has voluntarily, by contract, by employment, or via court order obtained that responsibility.¹⁸⁹ Third, the alleged abuse must be willful or negligent acts or omissions of the caretaker, and be classified as sexual or physical abuse, financial exploitation, or denial of critical care.¹⁹⁰

In *Mosher v. Department of Inspections and Appeals*, Mosher, a Certified Nursing Assistant, was accused of dependent adult abuse after soliciting and accepting loans in large amounts from a nursing home resident for whom she cared.¹⁹¹ The nursing home resident was cognitively intact, though medically frail.¹⁹² Though the Department of Inspections and Appeals found that Dependent Adult Abuse had occurred, the Iowa Supreme Court overturned the agency’s opinion.¹⁹³ The court indicated that a finding of dependent adult abuse was not supported because the nursing home resident did not qualify as a dependent adult since he had no mental condition that kept him from functioning adequately.¹⁹⁴ In some states, such as New York, a finding of elder abuse would have been supported by the nature of the relationship between the two and the inappropriate nature of the solicitation of loans or gifts within such a relationship.¹⁹⁵

185. See *id.* § 235B.2; *Elder Abuse, Neglect & Financial Exploitation*, IOWAAGING.GOV, <https://www.iowaaging.gov/sites/files/aging/documents/Elder%20Abuse%20Neglect%20%26%20Financial%20Exploitation.pdf> (last visited Sept. 10, 2015).

186. See IOWA CODE § 235B.2(5).

187. *Id.* § 235B.2(4).

188. See *id.* § 235B.2(5).

189. *Id.* § 235B.2(1).

190. See *id.* § 235B.2(5).

191. *Mosher v. Dep’t of Inspections & Appeals*, 671 N.W.2d 501, 504, 506 (Iowa 2003).

192. See *id.* at 504–06.

193. *Id.* at 507, 519.

194. *Id.* at 518.

195. See, e.g., *Gordon v. Bialystoker Ctr. & Bikur Cholim, Inc.*, 285 N.E.2d 285, 287–89 (N.Y. 1978).

The imbalance of power and potential for abuse was inherent in *Mosher* because of the type of patient and medical personnel relationship between the two parties. A similar unbalanced relationship existed in *Gordon v. Bialystoker Center & Bikur Cholim, Inc.*, in which the nursing home received significant funds from a patient-resident in the months leading up to her death.¹⁹⁶ Though there was no showing of improper undue influence, the nursing home bore the burden of proving that the gift from the patient was consciously, knowledgeably, and willingly given.¹⁹⁷ The nursing home failed to prove that the parties were acting from positions of equality and therefore failed to reach its burden of proof.¹⁹⁸ The New York Court of Appeals found for the plaintiff, indicating that due to the imbalanced relationship, the nursing home improperly accepted the gift.¹⁹⁹

Iowa's Dependent Adult Abuse Act leaves many adults who do not classify as dependent or whose abusers do not qualify as caretakers without protection or a remedy.²⁰⁰ In New York, no such requirement of dependency exists as a threshold by which Adult Protective Services will act.²⁰¹ In New York, report of abuse of any adult by another person, whether financial or physical in nature, will result, minimally, in an initial investigation within 72 hours by Adult Protective Services.²⁰² After the initial investigation, if abuse is discovered, services to reduce the risk to the adult will be offered.²⁰³ Under Iowa's Dependent Adult Abuse statute, no such response will occur unless the adult is dependent and being abused by the caretaker.²⁰⁴

An Iowa legislative advocacy group specializing in issues of older adults, the Older Iowans Legislature, is advocating for the consideration of an expanded elder abuse law.²⁰⁵ It recognizes the limitations of the current

196. *See id.* at 287–88.

197. *Id.* at 288–89.

198. *Id.* at 287–88.

199. *Id.* at 288, 290.

200. IOWA ELDER ABUSE INITIATIVE, *supra* note 67, at 6–7.

201. *See* N.Y. SOC. SERV. LAW § 473 (McKinney 2015); *see also The Victims*, N. Y. STATE OFFICE OF CHILDREN & FAMILY SERVICES, <http://ocfs.ny.gov/main/psa/victims.asp> (last visited Sept. 10, 2015).

202. *Protective Services for Adults Frequently Asked Questions*, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVICES, <http://ocfs.ny.gov/main/psa/faq.asp> (last visited Sept. 10, 2015).

203. *Id.*

204. *See* IOWA CODE § 235B.2(5) (2015); *Elder Abuse, Neglect*, *supra* note 185.

205. *See Priority Bills*, OLDER IOWANS LEGISLATURE, <http://www.olderiowans.org/legislation.htm> (last visited Sept. 10, 2015).

law to ensure that Iowa seniors are “protect[ed] against all recognized categories of elder abuse.”²⁰⁶ It further proposes that the Aging Disability Resources Centers should be utilized for elder abuse reporting.²⁰⁷ This Author believes that function should be served by the Office of the Substitute Decision Maker once it is funded and functional.²⁰⁸

A broader definition of persons that may be helped by Adult Protective Services in Iowa opens an avenue of assistance that is crucial for victims of abuse, even if the remedy is reactive rather than proactive.²⁰⁹ This alteration is especially important since the most common perpetrators of the financial exploitation form of elder abuse are family members—who may or may not be classified as caretakers—neighbors, and friends, in addition to caregivers and agents.²¹⁰

Though it would require additional resources, with the expansion of the definition of adult abuse in Iowa, so too should the available services for abused or neglected adults be expanded. New York’s Adult Protective Services provides services to vulnerable adults from within the agency—housekeeping, financial management services, and long-term legal interventions, such as guardianship.²¹¹ The informational website for Iowa’s Dependent Adult Abuse program indicates that it provides referrals only for safe housing.²¹² Iowa should expand its services along the lines of the New York approach.

C. Iowa Has Successfully Passed a Substitute Decision Maker Act—Implement It

In 2005, after 15 years of research, task forces, and starts-and-stops, the

206. *See id.*

207. *Id.*

208. *See infra* Part III.C.

209. *Compare The Victims*, *supra* note 201 (defining victims of abuse as, “the frail elderly, the developmentally disabled, the mentally ill, the physically disabled, and substance abusers”), with *Dependent Adult Abuse*, IOWA DEP’T OF HUMAN SERVS., http://dhs.iowa.gov/dependent_adult_abuse (last visited Sept. 10, 2015) (defining victims as, “a person eighteen years of age or older who is unable to protect the person’s own interests or unable to adequately perform or obtain services necessary to meet essential human needs, as a result of a physical or mental condition which requires assistance from another, or as defined by department role.”).

210. *See* IOWA LEGAL AID, PAYING MEDICAL AND NURSING HOME BILLS WHILE AVOIDING FINANCIAL EXPLOITATION 62 (Nov. 14, 2013) (on file with author).

211. *Protective Services*, *supra* note 202.

212. *See Dependent Adult Abuse*, *supra* note 209.

Iowa General Assembly passed the Substitute Decision Maker Act.²¹³ Its purpose was to implement a statewide public guardianship program as a resource of last resort for people without someone to serve the purpose.²¹⁴ It provided for establishment of an Office of the Substitute Decision Maker out of which the Act's established services would be based.²¹⁵

As of the date of publication of this Note, the provisions of the Act had been put into effect but then subsequently defunded and dissolved.²¹⁶ On January 15, 2014, a new bill was introduced in the Iowa House providing for an appropriation to fund the implementation of the Office of the Substitute Decision Maker.²¹⁷ It proposed an appropriation of \$2,210,646 to be distributed to the Department of Aging for the 2014-2015 fiscal year.²¹⁸ It recognized the importance of the Office, stating,

The office was established in 2005, was partially funded in 2007, and was discontinued due to budget reductions in 2009. The office of substitute decision maker provides a public substitute decision maker (guardian, conservator, attorney-in-fact under a power of attorney, or a representative payee) to assist those with limited or no decision-making capabilities to make personal care and financial decisions.²¹⁹

The bill was then sent to subcommittee on January 22, 2014.²²⁰ The result of the Iowa House bill was reinstatement of the Office of the Substitute Decision Maker with an official appropriation for fiscal year 2015 of \$288,000.²²¹ The Office's official mission is to "[p]reserve individual

213. See IOWA CODE § 231E (2015); IOWA DEPARTMENT ON AGING, REPORT PURSUANT TO SF 2336: AN ACT RELATING TO APPROPRIATIONS FOR HEALTH AND HUMAN SERVICES 4 (2012), available at <https://www.iowaaging.gov/sites/files/aging/documents/Substitute%20Decision%20Maker%20Report.pdf> [hereinafter REPORT PURSUANT TO SF 2336].

214. REPORT PURSUANT TO SF 2336, *supra* note 213.

215. *Id.*

216. NAT'L HEALTH L. & POL'Y RES. CTR., *Developments for Substitute Decision Making*, UNIV. OF IOWA, <http://nhlp.law.uiowa.edu/developments-substitute-decision-making> (last visited Sept. 10, 2015).

217. *Bill History for HF 2009*, IOWA LEGISLATURE (Apr. 13, 2015), <http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=HF&key=0723C&ga=85>.

218. H.F. 2009, 85th Gen. Assemb. (Iowa 2014).

219. *Id.*

220. See *Bill History for HF 2009*, *supra* note 217.

221. E-mail from Tyler Eason, Dir. of the Iowa Office of the Substitute Decision Maker, to Author (Apr. 17, 2015) (on file with Author).

independence through . . . person-centered process[es].”²²² The Office is currently located in the Department on Aging and is staffed with only three people: Director, Tyler Eason; a coordinator, Sherri McLerran; and a secretary.²²³ The Office, once implemented statewide, may serve as guardian, conservator, agent, representative payee, and personal representative.²²⁴ Per Director Tyler Eason, Iowa is the only state that provides all five services for vulnerable adults through a state-run office.²²⁵ The Office is currently researching similar programs across the country and hopes to present a proposed budget and statewide implementation plan for Fiscal Year 2017.²²⁶

Statewide implementation of the Office of the Substitute Decision Maker is an extremely valuable resource for implementation of other necessary programs for vulnerable adults. With expansion of the program, the Office of the Substitute Decision Maker could also serve to house a central registry of executed durable general powers of attorney, thereby increasing accountability for named agents. Low-cost registration of these documents is one measure of protection for vulnerable principals.²²⁷ It has not yet been adopted by Iowa.²²⁸ Registration of durable general power of attorney documents increases the accountability of agents because their names appear on state-maintained registries, automatically providing for more oversight of persons in agent positions.²²⁹ The Office of the Substitute Decision Maker could also serve as a centralized location for issues of dependent adult and elder abuse in general. Consolidation of state resources intuitively makes sense. Finally, the Office of the Substitute Decision Maker could also serve to dispense information on the duties of the agent imposed by the durable general power of attorney.²³⁰ Agents that are aware of their duties and responsibilities would be less likely to abuse their power.²³¹

222. Tyler Eason, Dir. of the Iowa Office of the Substitute Decision Maker, Presentation to the National Association of Social Workers, Heartland (Apr. 16, 2015).

223. *See id.*

224. *Id.*

225. *See id.*

226. E-mail from Tyler Eason, *supra* note 221.

227. *See* Rhein, *supra* note 49, at 195.

228. *See* IOWA CODE § 633B (2015). *But see* H.F. 416, 85th Gen. Assemb. (Iowa 2013) (providing for the adoption of the requirement all power of attorneys be registered with the secretary of state). This Bill, however, was not adopted by Iowa. *See* E-mail from Lisa Heddens, *supra* note 158.

229. *See* Rhein, *supra* note 49, at 195.

230. *Id.*

231. *See id.*

Additionally, because abusers of elders tend to be trusted family members or trusted others, the Office of the Substitute Decision Maker could provide an option for older Iowans who do not have a family member that they can name as agent or who have been abused by their named agent.²³² Iowans could elect to use the Substitute Decision Makers provided by the state if necessary, thereby providing one more option and potentially reducing the risk of abuse.²³³ The Office of the Substitute Decision Maker could provide agent services to adults in need of such services that are overseen and objective in nature.²³⁴ These are relatively modest proposed changes to existing laws that have the potential to provide significant safeguards to elders and dependent adults without “gut[ting] the usefulness of the power of attorney.”²³⁵

IV. CONCLUSION

With relatively minor changes to the existing structure underlying the protection of older adults in Iowa, significantly increased protection can be provided to ensure appropriate use of granted durable general powers of attorney. The foregoing suggests such changes.²³⁶ Implementation of the already-legislatively-enacted Office of the Substitute Decision Maker is the most obvious step toward additional protection.²³⁷ Additional legislative work would be required, but expansion of the definition of “dependent adult” in Iowa would allow more instances of abuse and neglect currently ignored under the law to be addressed appropriately, more fully encompassing abuse that occurs under a durable general power of attorney.²³⁸ It is a positive and significant legislative step in Iowa that the Iowa UPOAA is now enacted, used, and codified. To bolster the Iowa UPOAA’s effects on protection, Iowa should also expand mandatory reporting requirements, penalties for failure to report, and the implementation, funding, and staffing of the Office of the Substitute Decision Maker which could be used as a central repository for all of the requirements that come with the Iowa UPOAA, as well as those suggested

232. See REPORT PURSUANT TO SF 2336, *supra* note 213.

233. See *id.*

234. *Id.*

235. Rhein, *supra* note 49, at 178 (quoting Boxx, *supra* note 57, at 46).

236. See *supra* Part III.

237. See *supra* Part III.B–C.

238. *Id.*

by this Note.²³⁹ These are ultimately relatively minor steps, legislatively speaking, given that much of the infrastructure is in place already. The benefits to vulnerable principals and vulnerable adults of any type in the state could be extensive as more people would fall into protected classes and mandatory reporting would expand concomitantly. “To paraphrase Hubert H. Humphrey, one moral test of humanity is how we treat those in the twilight of life.”²⁴⁰ Iowa has taken positive steps in the direction of protection of vulnerable adults. Work remains, but Iowa should be praised for its progress thus far.

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239. *Id.*

240. Thomas A. French, Op-Ed., *Elder Abuse is not Limited Just to Rich like Brooke Astor*, PENN LIVE (Nov. 4, 2009), http://www.pennlive.com/editorials/index.ssf/2009/11/elder_abuse_is_not_limited_jus.html.

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