
NOTE

**NURSING HOME ABUSE OF AGENTS: CREDITOR MISUSE OF
NEW YORK'S REVISED DURABLE POWER OF ATTORNEY**

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Mary is eighty-two years old and lives at Spring View, a skilled nursing home facility near Syracuse, New York. Mary's husband, Walter, died three years ago after a prolonged battle with Parkinson's disease. After Walter's death, Mary's health slowly deteriorated and her doctor determined that she needed skilled nursing care.

Mary's son, Richard, moved into Mary's home shortly after Walter's death to care for his mother. Walter works as a part time bus driver. Following Walter's death, Mary executed a Health Care Proxy, Statutory Short Form Power of Attorney, and Statutory Major Gifts Rider appointing Richard as her agent. Richard has been handling Mary's day-to-day medical and financial affairs for the past year.

Six months ago, based upon Mary's doctor's recommendation, Richard moved Mary to Spring View. As Mary's agent, he signed all the various applications, financial disclosures and documents requested by the nursing home to allow Mary to be a full time resident. At the same time, Richard applied for nursing home assistance through the Chronic Care Unit of Medicaid in Onondaga County. Richard advised Spring View of the application for Medicaid.

A month after Mary moved to Spring View, Richard received a bill for services in the amount of \$10,500 (\$350 per day). Richard contacted the Medicaid worker assigned to Mary's case and was told

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not to pay the Spring View bill because Mary's application was pending and Medicaid would pay the bill once Mary's application had been approved. Richard called the Spring View business office and explained what he had been told by the Medicaid worker.

Four months later, with an outstanding bill of \$42,000 for Mary's care, Spring View filed a Petition for a Special Proceeding naming Richard individually and as the agent under a power of attorney for Mary. The Petition alleged that Richard had violated his fiduciary duty as Mary's agent by not acting in her best interests by failing to pay the outstanding bill from Spring View, causing her possible eviction. In the Petition, Spring View demanded that Richard give a full accounting of all of Mary's assets as well as an explanation of his actions. The Petition also demanded the removal of Richard as the agent for Mary, required that he pay the attorney's fees of Spring View, and asked the judge to hold Richard personally responsible for Mary's \$42,000 nursing home bill.

Richard did not have the means to hire an attorney to defend him. On the return date of the Petition, Richard appeared *pro se* before the Supreme Court. The attorney for Spring View offered to settle the case if Richard immediately paid the outstanding bill. Fearing that he would be held personally liable and lose his ability to care for his mother, Richard agreed to pay the outstanding bill of \$42,000. As Richard didn't have the funds available, he was forced to take out a home equity loan on the house to pay the nursing home, even though Medicaid would have eventually paid the entire bill.¹

I. INTRODUCTION

According to the Third Restatement of Agency, "[a] written instrument may make an agent's actual authority effective upon a principal's loss of capacity, or confer it irrevocably regardless of such loss."² A commonly used device that confers agency, and does not terminate upon incapacity, is known as a Durable Power of Attorney ("DPOA").³ While such a device can be useful to avoid government and court involvement in the event of incapacity, it can also be dangerous. Without proper safeguards, the agent under a

¹ This hypothetical is based on cases handled by our office. The details have been changed.

² RESTATEMENT (THIRD) OF AGENCY § 3.08 (AM. LAW INST. 2006).

³ Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 2 (2006).

DPOA can use the device to exploit an elderly principal.⁴ Due to the danger of abuse of the principal at the hands of the agent, state legislatures have enacted various measures to protect principals.⁵ However, as this paper sets out, some reforms that combat DPOA abuse may be contrary to the purpose of the device. One of these reforms is the Special Proceeding available to third parties pursuant to the New York General Obligations Law section 5-1510(3), which in its current form allows creditors to bypass the protections offered by New York Debtor Creditor law.⁶

In order to understand how the special proceeding came to be in its current form, this paper will discuss the history of the DPOA on a national scale, its application in New York, and the various measures taken by New York and other states to ensure agents do not abuse the power granted to them by principals who are no longer competent to manage their affairs.

II. HISTORY

A DPOA statute was first codified in 1954 by the state of Virginia, which enacted a statute that allowed an agent to maintain power over a principal's assets after the onset of the principal's incapacity.⁷ Codification of the DPOA was necessary because common law did not allow an agent to maintain power over a principal's assets after the principal became incapacitated.⁸ The Virginia statute did not bring national attention to the problem of incapacity, but it was the first state to attempt to deal with the problem, and subsequently, spurred by national studies into the problems the elderly and incapacitated face, the Uniform Law Commissioners ("ULC")⁹ created a committee to work on a proposal for "a power of attorney that could be used for assisting the mentally disabled."¹⁰ All fifty states have adopted some form of the device envisioned by the ULC, which we now know as a DPOA,

⁴ See *id.* at 3.

⁵ *Id.* at 33.

⁶ See N.Y. GEN. OBLIG. LAW § 5-1510(3) (Consol. 2015); see *infra* Part VI.

⁷ Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 6 (2001). See VA. CODE ANN. § 11-9.2 (1954) (repealed 2010).

⁸ Andrew H. Hook & Lisa V. Johnson, *The Virginia Uniform Power of Attorney Act*, 44 U. RICH. L. REV. 107, 109 (2009).

⁹ This organization is also known as the National Conference of Commissioners on Uniform State Laws. *About the ULC*, UNIF. LAW COMM'N, <http://www.uniformlawcommission.com/Narrative.aspx?title=About%20the%20ULC> (last visited Jan. 5, 2016).

¹⁰ Boxx, *supra* note 7, at 6, 7. This committee will be referred to as "the Model Act committee."

through the Uniform Probate Code (“UPC”), the Uniform Durable Power of Attorney Act (“UDPAA”), or a modified version of one of the uniform codes.¹¹

Although states recognized the DPOA device, they did not simultaneously enact many of the protections that the Model Act committee recommended, because the ULC adopted the Virginia enactment, rather than its own Model Act committee’s proposal.¹² The ULC did not follow the Model Act committee’s proposal because the DPOA the committee recommended would only be used for very small amounts of property and would have strict oversight by the court, including that the agent give the issuing court information about annual income and property subject to the agent’s authority.¹³ In contrast, the UPC final version did not include these restrictions, because “the drafters were ready to make the device available for a broad constituency as an economic alternative to guardianship,” and felt that restrictions recommended by the Model Act committee would discourage adoption of the device.¹⁴

As the ULC did not restrict the DPOA to small estates, legislatures have enacted individual statutes to curb abuse of incapacitated principals who could be taken advantage of by their agents.¹⁵ Today, legislatures continue to search for reforms that allow for “low cost and flexibility,” but that also decrease abuse of the DPOA relationship by unscrupulous agents.¹⁶

In 2002, the ULC began to study various DPOA legislation, and “found that a majority of states had begun to enact non-uniform provisions to deal with specific matters upon which the UDPAA was silent.”¹⁷ As a result of this study, the ULC adopted the Uniform Power of Attorney Act (“UPOAA”), which aimed to unify Power of Attorney laws among the states.¹⁸ Adopted in 2006 by the ULC, fifteen jurisdictions adopted the UPOAA by 2014.¹⁹ Other states,

¹¹ Michael N. Schmitt & Steven A. Hatfield, *The Durable Power of Attorney: Applications and Limitations*, 132 MIL. L. REV. 203, 205 (1991).

¹² Boxx, *supra* note 7, at 10.

¹³ *See id.* at 7–8.

¹⁴ *See id.* at 10, 11. The drafters did not want to tie up the document in red tape, which would stop the group of people meant to use the document, those with small estates who need a low cost alternative to guardianship, from using the new document in the manner envisioned by the drafters. *See* Schmitt & Hatfield, *supra* note 11, at 204–05 & 205 n.8.

¹⁵ *See* Boxx, *supra* note 7, at 12–14.

¹⁶ Jennifer L. Rhein, Note, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 ELDER L.J. 165, 174 (2009).

¹⁷ Hook & Johnson, *supra* note 8, at 109–10.

¹⁸ *Id.* at 110.

¹⁹ *See* UNIF. PROBATE CODE §§ 5B-101–5B-302 (amended 2010). The states that adopted

including New York and California, have extensively revised their DPOA statutes separately from the UPOAA.²⁰

III. DPOA REFORM

The DPOA is “most frequently used as an economical and efficient way for family members to handle the financial affairs of an elder parent.”²¹ A problem with DPOA reform is that too much oversight risks negating the flexibility and low cost of the device.²² If reform creates too many protections and safeguards, general practitioners may advise clients to stay away from a DPOA in favor of trusts, devices that can be used in a similar manner to a DPOA, but in a stricter and less flexible setting.²³

An often suggested reform, increased court supervision, would “dilute the usefulness of the arrangement and would be inefficient overall” because it would create a relationship similar to guardianship.²⁴ Accordingly, increased supervision should be a last resort, because it forces a principal and agent to spend money on legal representation and requires that they appear in court, a situation the principal tried to avoid by creating a DPOA and naming an agent. Before instituting legislation that includes increased supervision, reforms that allow an agent to act without forcing them to spend time and money defending their actions in court should be exhausted. In line with this point of view, there are many options state legislatures can choose that have the potential to make an agent think twice before violating his or her fiduciary duty.²⁵

the UPOAA by 2014 are New Mexico, Idaho, Nevada, Virginia, Maine, Wisconsin, Colorado, Maryland, Montana, Alabama, Arkansas, West Virginia, Ohio, and Nebraska. Angela M. Vallario, *The Uniform Power of Attorney Act: Not a One-Size-Fits-All Solution*, 43 U. BALT. L. REV. 85, 90–91 (2014).

²⁰ See CAL. PROB. CODE § 4540(k) (Deering 2015); N.Y. GEN. OBLIG. LAW §§ 5-1500–5-1514 (Consol. 2015).

²¹ Andrew R. Fischer, Note, *Elder Abuse: A Private Problem That Requires Private Solutions*, 8 J. HEALTH & BIOMEDICAL L. 81, 96 (2012).

²² See *supra* note 13 and accompanying text.

²³ See UNIF. POWER OF ATT’Y ACT § 114 cmt. (UNIF. LAW COMM’N 2006) (discussing the advantages of a power of attorney over a trust); Fischer, *supra* note 21, at 111 (discussing the challenges of using a trust, along with the benefits of the trust over a Durable Power of Attorney).

²⁴ Boxx, *supra* note 7, at 40; see also Schmitt & Hatfield, *supra* note 11, at 208 (explaining the relationship between a court-appointed guardian and an attorney-in-fact).

²⁵ Appointing a monitor or requiring that the agent communicate with the principal about his or her actions both ensure that an agent does not feel they can act without oversight. See Kohn, *supra* note 3, at 47; see also *infra* Section VI.C.

Reforms designed to curb agent abuse of a principal take many forms. Some broad categories include:

- Reforms that change the requirements for execution of a DPOA;²⁶
- Reforms that clarify the limitations of an agent's authority or reforms that impose new limitations on the agent's authority to act;²⁷ and
- Reforms that increase third parties' ability to police DPOA relationships.²⁸

A study published by the New York State Coalition on Elder Abuse shows that increased education is linked to a decrease in financial abuse of the elderly.²⁹ Further, punishment is not an effective deterrent, partially because offenders may not be aware there are penalties for their actions.³⁰ In fact, one of the driving factors behind DPOA abuse is a principal's ignorance of the power given to an agent through the DPOA device.³¹ Accordingly, it can be inferred that reform is best served through education of principals and agents, because it decreases the chance of abuse before such abuse occurs. In contrast, third party policing of the principal and agent relationship will only discover past abuse or ongoing abuse, rather than address the problem at its source.

There are many proposals that use third parties to police DPOA relationships. Financial institutions could be made "mandatory reporters," or businesses that work with agents could be assigned an affirmative duty to notify the principal of transactions that are higher than a certain amount.³² Another approach would require

²⁶ Such as requiring a notary or more witnesses, or informing the principal of the power they give the agent through the Power of Attorney. Kohn, *supra* note 3, at 34.

²⁷ Among other things, this category of reform limits the ability of an agent to self-deal or give gifts, both activities which are suspicious and prone to abuse. *Id.*

²⁸ This category allows an expanded group of people to petition a court for review of the activities of an attorney in fact, because there may not be anyone who fits the traditional standing requirements to challenge an unscrupulous or dishonest agent whose practices are questioned. *See id.* at 35.

²⁹ Jessica Coombs, Note, *Scamming the Elderly: An Increased Susceptibility to Financial Exploitation Within and Outside of the Family*, 7 ALB. GOV'T L. REV. 243, 263 (2014).

³⁰ Rebecca C. Bell, *Florida's Adoption of the Uniform Power of Attorney Act: Is It Sufficient to Protect Vulnerable Adults?*, 24 ST. THOMAS L. REV. 32, 52 (2011) ("Reform should also be directed at preventing abuse by better educating the agent and providing deterrents for the agents to commit fraud. Certainly, criminal and civil penalties can provide helpful remedies to victims of abuse and exploitation but may not be very effective deterrents for committing abuse, especially if the agent is unaware of such penalties.").

³¹ Kim Vu-Dinh, *Reforming Power of Attorney Law to Protect Alaskan Elders from Financial Exploitation*, 27 ALASKA L. REV. 1, 12 (2010).

³² *Id.* at 18–19.

principals to undergo a competency examination before signing a DPOA.³³ However, these reforms would be of limited use, because they would not help stop abuse of a principal who became incapacitated after creation of the DPOA.

Third party supervision of agent's actions under a DPOA may be the only way to catch a crafty abuser, but such supervision allows these third parties to interfere with the principal-agent relationship.³⁴ Accordingly, giving third parties standing to seek judicial relief has proven problematic, but nevertheless has been adopted by New York and UPOAA jurisdictions.³⁵ If standing provisions are too broad, they could subject honest agents to interference from unscrupulous third parties, including family members and creditors, and could allow third parties to interfere with the agent's ability to manage the principal's finances.³⁶ Due to the heightened possibility of abuse from third parties, legislators should tread carefully if any interested person or group with standing to seek judicial relief under the California Probate Code, is allowed to contest the acts or omissions of an agent.³⁷ While a statutory right for third parties to petition for judicial relief may be necessary to combat elder abuse, under current judicial relief schemes, an individual with his or her own interests at heart can easily create legal problems for an agent, even when there are no signs of abuse.

Other reforms, including mandatory judicial filings and court oversight have been suggested,³⁸ but require courts to maintain records for every DPOA.³⁹ Requiring such a high level of scrutiny would likely hinder the use of the device due to judicial resource

³³ *Id.* at 19.

³⁴ See Linda S. Whitton, *Durable Powers of Attorney as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 32, 34 (2007) ("The statutory categories of persons to whom an agent must account if requested are typically defined narrowly to protect the principal's privacy and discourage contentious meddling.").

³⁵ Kohn, *supra* note 3, at 25 ("[R]eforms that expand standing for third parties to inquire into agents' actions . . . create an additional avenue for family members to challenge an agent's actions. While successfully challenging an agent's actions under the current scheme is difficult, defending a well-intentioned agent's actions against legal challenge can be both time-consuming and expensive."); see N.Y. GEN. OBLIG. LAW § 5-1510(3) (Consol. 2015); UNIF. PROBATE CODE § 5B-116 (amended 2010).

³⁶ See Kohn, *supra* note 3, at 25.

³⁷ See CAL. PROB. CODE § 4541(c) (Deering 2015).

³⁸ See Whitton, *supra* note 34, at 15 ("[One commentator] suggests court registration of agents, periodic accounting to the court once a principal becomes incapacitated, and the filing of a final accounting after the principal's death.").

³⁹ See *id.*

limitations.⁴⁰ Just as the original restrictions that the Uniform Law Commissioners envisioned were not enacted, DPOA reform has not required court registration or other proposals that could significantly decrease the chance of abuse through direct judicial oversight.⁴¹

A reform choice that has not been implemented revolves around a “fundamental transaction.”⁴² A fundamental transaction is not explicitly defined, but could include transfers of more than a set percentage of the principal’s estate, the sale of real property, or could be articulated by state law, and further defined by each DPOA device.⁴³ If an agent did not inform the principal of a fundamental transaction, “and the principal later objected to the transaction, then the agent would have the burden of showing that the action was consistent with his or her fiduciary duties.”⁴⁴ This proposal provides an agent with incentive to disclose his or her actions to the principal in order to avoid problems later on, and minimizes the need for a third party to monitor the DPOA relationship.⁴⁵ However, it may not have been implemented because it would not help an incapacitated principal.

IV. THE UNIFORM POWER OF ATTORNEY ACT

The ULC adopted the Uniform Power of Attorney Act in 2006 to create a model for the states to follow when amending DPOA legislation, because “a majority of states had enacted non-uniform provisions to deal with specific matters upon which the [UDPAA] is silent.”⁴⁶ The UPOAA proposed to combat elder abuse by:

- “Requir[ing] gift making authority to be expressly stated in the grant of authority;”
- “Includ[ing] safeguards against agent abuse;” and
- “Includ[ing] remedies and sanctions for abuse by the agent.”⁴⁷

The UPOAA addresses these goals in sections 114, 116, and 201.⁴⁸

⁴⁰ *See id.*

⁴¹ *See infra* Parts IV, VI.

⁴² Kohn, *supra* note 3, at 49.

⁴³ *See id.*

⁴⁴ *Id.* at 50.

⁴⁵ *Id.* at 51 (“In the DPOA context, empowering principals to monitor the relationship may largely alleviate the need for more intrusive and burdensome third party monitoring.”).

⁴⁶ UNIF. POWER OF ATT’Y ACT Prefatory Note (UNIF. LAW COMM’N 2006).

⁴⁷ *Id.*

⁴⁸ Although all citations will refer to the UPOAA, the UPC enacted the UPOAA, and

Article 3, a statutory short form DPOA, educates the principal about the authority he or she grants an agent through the device.⁴⁹

A. *Section 114*⁵⁰

“Section 114 clarifies agent duties by articulating minimum mandatory duties (subsection (a)) as well as default duties that can be modified or omitted by the principal (subsection (b)).”⁵¹ Those duties that cannot be modified include: (1) acting in good faith; (2) acting within the scope of authority the principal allowed; and (3) either acting with the reasonable expectations of the principal, if the principal’s expectations are known, or in the best interests of the principal if he or she is unavailable or incapacitated.⁵² Clarifying an agent’s duties may help steer him or her away from violating the fiduciary relationship created by the DPOA.

Subsection (b) specifies the powers a principal can modify.⁵³ These provisions include the duty to “act loyally for the principal’s benefit,” the agency common law standard, and the duty to avoid conflicts of interest that could preclude the agents’ ability to put the principal’s best interests ahead of his or her own interests.⁵⁴ Additionally, subsection (b) specifies that an agent must “keep a record of all receipts, disbursements, and transactions made on behalf of the principal,” and must produce these records if ordered to by the court, or if asked to produce the records by the principal, the principal’s fiduciary, or a governmental agency responsible for protecting the principal’s welfare.⁵⁵ According to the section 114 commentary, “[t]he inclusion of a governmental agency . . . is a response to growing national concern about financial abuse of vulnerable persons.”⁵⁶ Although allowing government agencies to demand records qualifies as third party policing, it is not as suspect as other third party standing reforms, because agencies like Adult Protective Services are not individuals who may have an interest in

therefore all cited language can also be found in the UPC. Compare UNIF. PROBATE CODE §§ 5B-114, 5B-116, 5B-201 (amended 2010), with UNIF. POWER OF ATT’Y ACT §§ 114, 116, 201 (UNIF. LAW COMM’N 2006).

⁴⁹ See *id.* § 301.

⁵⁰ See *id.* § 114 (UNIF. LAW COMM’N 2006); see *infra* Appendix.

⁵¹ UNIF. POWER OF ATT’Y ACT § 114 cmt.

⁵² *Id.* § 114; Hook & Johnson, *supra* note 8, at 122.

⁵³ See *id.* § 114(b).

⁵⁴ See *id.* § 114 (b)(1), (2), (h), cmt.

⁵⁵ *Id.* § 114 (b)(4), (h).

⁵⁶ *Id.* § 114 cmt.

interfering with the principal and agent relationship.⁵⁷

*B. Section 116*⁵⁸

“The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse.”⁵⁹ Section 116 gives standing to third parties to request judicial relief to review the actions of an agent and “grant appropriate relief.”⁶⁰ Anyone who fits within the nine categories may initiate an action; the broadest categories are people “that demonstrate[] sufficient interest in the principal’s welfare,” and “a person asked to accept the power of attorney.”⁶¹ Broad standing is required because the typical financial abuse victim is isolated from the outside world.⁶² Therefore, in order to discover abuse, the UPOAA must give standing to as broad a group of people as possible so that any party suspicious of the DPOA relationship has standing to expose an abusive agent.⁶³ The UPOAA followed the lead of “the majority of states that have standing provisions” when it gave standing to individuals with a “sufficient interest in the principal’s welfare.”⁶⁴

Judicial review sought by a third party can be dismissed by a competent principal under subsection (b), which allows the principal to quash a petition if he or she still has full capacity.⁶⁵ However, if the principal is incapacitated, or has diminished capacity, a court has discretion to allow the petitioner to proceed, whether or not the principal may object to the action.

*C. Section 201*⁶⁶

This section stops a principal from giving an agent authority over certain powers that are particularly susceptible to financial abuse, such as powers that allow an agent to alter the principal’s current estate planning, or empty the principal’s bank accounts.⁶⁷ Statutory

⁵⁷ See *id.* § 114 cmt; see Kohn, *supra* note 3, at 25.

⁵⁸ UNIF. POWER OF ATT’Y ACT § 116 (UNIF. LAW COMM’N 2006); see *infra* Appendix.

⁵⁹ UNIF. POWER OF ATT’Y ACT § 116 cmt.

⁶⁰ See *id.* § 116(a).

⁶¹ *Id.* § 116(a)(8), (9).

⁶² *Id.* § 116 cmt; see Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance between Autonomy and Protection*, 1 PHX. L. REV. 343, 356–57 (2008).

⁶³ See *id.* at 357.

⁶⁴ UNIF. POWER OF ATT’Y ACT § 116(a)(8), cmt.

⁶⁵ See *id.* § 116(b).

⁶⁶ See *id.* § 201; see *infra* Appendix.

⁶⁷ See *id.* § 201 cmt; Whitton, *supra* note 62, at 348.

limitations on an agent's authority decrease the ease with which an agent can deplete the principal's assets, whether intentionally for fraudulent purposes, or for purposes in line with the principal's intent. Powers that require an express grant include: (1) authority over the creation, amendment, revocation, and termination of a trust; (2) the ability to change rights of survivorship, or beneficiary designations; and (3) the power to delegate authority given to an agent through the DPOA device.⁶⁸ This reform does not require the same caution as broad standing provisions, because it focuses on prevention of abuse.⁶⁹

D. The UPOAA Statutory Short Form

The statutory short form set forth in Article 3 of the UPOAA and section 5B-301 of the UPC fulfills the execution requirements for a DPOA, and educates the principal about the authority granted to an agent under the DPOA through warnings and advice about the use of the document.⁷⁰ Requiring a statutory short form is one of a small number of reforms that ensures the principal is informed of the authority given to an agent, because it requires that the information be printed directly on the DPOA device.⁷¹ However, this viewpoint is not universally accepted. Florida eliminated the statutory short form DPOA, because the State believed that eliminating the boilerplate form increases the chance that the principal will seek legal advice and learn about the DPOA before giving an agent authority over his or her assets.⁷² However, Florida's rationale ignores the DPOA's greatest benefits: low cost and flexibility.⁷³ Further, it is possible that abolishing the statutory short form will dissuade people who do not have the money to hire a lawyer from planning for incapacity at all, when they may otherwise have executed a DPOA.

V. LEGISLATIVE HISTORY OF THE NEW YORK POWER OF ATTORNEY

New York Power of Attorney Law has changed dramatically since the state enacted the first statutory short form in 1948.⁷⁴ A 1946

⁶⁸ *Id.* § 201(a)(1), (3), (4), (5).

⁶⁹ *See id.* § 201.

⁷⁰ *See id.* § 301 cmt.

⁷¹ *See Bell, supra* note 29, at 50.

⁷² *Id.*

⁷³ *See supra* Part III.

⁷⁴ 2 IRA MARK BLOOM & WILLIAM P. LAPIANA, DRAFTING NEW YORK WILLS AND RELATED

study recommended a statutory short form, because many institutions required that a DPOA include “language specifically authorizing a particular transaction” before they accepted an agent’s authority.⁷⁵ As each institution required unique language, a general DPOA had limited utility, because a new document needed to be signed for each institution.

Prior to the enactment of DPOA legislation, the only options for handling an incompetent person’s affairs were through a housekeeping trust, a judicially appointed committee, or appointing a conservator pursuant to Article 77 of the New York Mental Hygiene Law.⁷⁶ It was not until 1986 that it became unlawful to refuse to accept a statutory short form DPOA.⁷⁷ After the enactment, a principal and agent relationship became a viable option to manage an incompetent person’s affairs, because companies could not legally refuse to recognize a statutory DPOA.⁷⁸ However, although it became unlawful to refuse to accept a DPOA, the amended statute did not include penalties for those who continued to refuse to accept properly executed DPOAs.⁷⁹

In 1988, New York enacted legislation that allowed springing Powers of Attorney, and in 1994, the state codified a statutory short form for the device and revised the existing statutory short form DPOA.⁸⁰ The springing power allowed designation of a third party to certify incapacity, or in the alternative, allowed for the specification of a triggering event.⁸¹ Once a principal became incapacitated or the triggering event occurred, the DPOA granted an agent authority over the principal’s affairs.⁸² Additionally, the revised DPOA warned the principal of the powers granted by the document, and the section that specifically granted powers changed so that the principal was required to initial each power granted, rather than initial each power eliminated.⁸³ In 1996, the legislature amended the 1994 legislation to simplify and clarify the new laws due to practitioner dissatisfaction with prior revisions.⁸⁴

DOCUMENTS § 19.02[3] (4th ed. 2013).

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ *See* N.Y. GEN. OBLIG. LAW § 5-1504 (McKinney 2010); BLOOM & LAPIANA, *supra* note 74, at § 19.02[3].

⁷⁹ *See* N.Y. GEN. OBLIG. LAW § 5-1504.

⁸⁰ *See* BLOOM & LAPIANA, *supra* note 74, at § 19.02[4].

⁸¹ *See* N.Y. GEN. OBLIG. LAW § 5-1501B(3)(b).

⁸² *See id.* § 5-1501B(3)(b).

⁸³ *See* BLOOM & LAPIANA, *supra* note 74, at § 19.02[4].

⁸⁴ *See id.* at § 19.02[5].

Additionally, modifications were made to the Power of Attorney law in 2010, subsequent to the 2008 amendments discussed in detail in this paper.⁸⁵ The 2010 amendments exempted DPOAs put in place “primarily for a business or commercial purpose” from restrictions meant to protect against abuse of DPOAs used for financial and estate planning purposes.⁸⁶

VI. NEW YORK’S MODERN POWER OF ATTORNEY

In 2008, New York adopted revisions to the Power of Attorney law based on a comprehensive study of the existing law carried out by the New York Law Revision Commission (“the Commission”).⁸⁷ The Commission was created in 1934, and is “the oldest continuous agency in the common-law world devoted to law reform through legislation.”⁸⁸ The Commission’s purpose is to examine the common law and New York statute, consider proposed changes to the law, consider suggestions regarding defects in the law, and recommend necessary changes to bring New York law “into harmony with modern conditions.”⁸⁹ Some of the Commission’s 2008 recommendations were designed to combat abuse and fraud by agents acting under DPOAs.⁹⁰ According to the study, situations where fraud or abuse could occur include when there is no supervision of agents acting for incapacitated principals, when agents make major gifts and other property transfers, and any situation where there is the potential for financial exploitation.⁹¹ Based on these areas of concern, the Commission recommended changes to address each problem.

⁸⁵ See *id.* at § 19.02[8]; see *infra* Part VI.

⁸⁶ See N.Y. GEN. OBLIG. LAW § 5-1501C (Consol. 2015); BLOOM & LAPIANA, *supra* note 74, at § 19.02[8].

⁸⁷ See N.Y. LAW REVISION COMM’N, 2008 RECOMMENDATION ON PROPOSED REVISIONS TO THE GENERAL OBLIGATIONS LAW POWERS OF ATTORNEY (2008) (detailing the group’s intricate study of power of attorney law and subsequent agreed-upon improvements).

⁸⁸ *About the Commission*, N.Y. ST. L. REV. COMM’N, <http://lawrevision.state.ny.us/> (last visited Jan. 31, 2016).

⁸⁹ *Id.*

⁹⁰ See MCKINNEY’S, NEW YORK ESTATE AND SURROGATE PRACTICE PAMPHLET 429 (2014) [hereinafter N.Y. PRACTICE PAMPHLET] (“The real danger of the simple form [of POA post 1996] was the ease with which it could be used for financial abuse of the vulnerable and elderly, as can quickly be seen after entering ‘power of attorney’ into the search box of any online newspaper archive.”).

⁹¹ See N.Y. LAW REVISION COMM’N, *supra* note 87, at 13–15.

A. *The Statutory Major Gifts Rider*

The Commission recommended a “separate section relating to major gifts and a new statutory Major Gifts Rider to the statutory power of attorney form in which the Principal may authorize the Agent to make major gifts and other transfers.”⁹² New York enacted the Statutory Major Gifts Rider (“SMGR”), which “is the only way to give an agent authority to make gifts of the principal’s property beyond those authorized by a grant of authority under [General Obligations Law] section 1502I.”⁹³ The SMGR fulfills a goal similar to UPOAA section 201, curtailing the accidental grant of excessive agent authority over a principal’s assets.⁹⁴ To execute a SMGR, the principal must have signed a DPOA, and the SMGR must be witnessed by two people who are not eligible to receive gifts under the SMGR.⁹⁵

B. *The Standard of Care and the Agent’s Fiduciary Duty*

Before the 2008 amendment took effect, “New York law . . . [was] silent about an Agent’s responsibilities and no other statute specifie[d] that the Agent has a fiduciary obligation to the Principal, or identifie[d] the responsibilities or standard of care of an Agent.”⁹⁶

Under G.O.L. 5-1505(1),⁹⁷ an agent must act as “a prudent person dealing with the property of another.”⁹⁸ As an agent may not have knowledge of all of a principal’s assets, they are not held to the standard of a “prudent investor,” someone in charge of a trust who is required to exercise an investment strategy that conforms to the terms of the trust, and has an affirmative duty to invest trust assets in certain ways.⁹⁹ Further, the prudent investor must incur no more costs than “are reasonable in amount and appropriate,” and must diversify the portfolio they control, a heavier burden than that imposed on agents under a DPOA.¹⁰⁰ In contrast, an agent under a DPOA is held to a fiduciary standard that “will probably depend on

⁹² *Id.* at 24.

⁹³ IRA MARK BLOOM & WILLIAM P. LAPIANA, NEW POWER OF ATTORNEY LEGISLATION FOR NEW YORK 63 (2009). Section 5-1502I allows the attorney in fact to make payments for personal and family maintenance. N.Y. GEN. OBLIG. LAW § 5-1502I (Consol. 2015).

⁹⁴ See BLOOM & LAPIANA, *supra* note 93, at 63, 67; see *supra* Section IV.C.

⁹⁵ See BLOOM & LAPIANA, *supra* note 93, at 67.

⁹⁶ N.Y. LAW REVISION COMM’N, *supra* note 87, at 26.

⁹⁷ N.Y. GEN. OBLIG. LAW § 5-1505; see *infra* Appendix.

⁹⁸ N.Y. LAW REVISION COMM’N, *supra* note 87, at 28.

⁹⁹ See RESTATEMENT (THIRD) OF TRUSTS § 90 (2007).

¹⁰⁰ *Id.* § 90(b), (c); BLOOM & LAPIANA, *supra* note 93, at 56.

the context in which the agent is operating.”¹⁰¹ For example, agents may want to refrain from investing money for a principal to avoid violating their fiduciary duty.¹⁰²

To avoid breaching his or her fiduciary duties under General Obligations Law section 5-1505(2),¹⁰³ an agent must act in the best interests of the principal.¹⁰⁴ Under previous New York law, this standard was not clearly defined.¹⁰⁵ What was known was that an agent had to act with “the utmost good faith toward the principal” and if an agent failed to do this, “a court could exercise its inherent power to revoke the agency.”¹⁰⁶ Perhaps due to this vague standard, the New York Attorney General issued an opinion to clarify that a nursing home could not force patients “to name the nursing home as agent over social security and retirement benefits.”¹⁰⁷ The Attorney General stated that “the purpose of a power of attorney [is] to protect the interest of the [nursing home] resident [not the nursing home].”¹⁰⁸ According to the Attorney General opinion, the nursing home asserted that the “object of the power of attorney . . . is to protect the interests of the nursing home facility, as a creditor,” which is inconsistent with the purpose of a DPOA.¹⁰⁹

In contrast to the vague fiduciary duty that prompted the Attorney General’s opinion, the current law establishes how an agent should act to fulfill their fiduciary duty.

First, and most importantly, the agent must act in accordance with the principal’s instructions or where there are no instructions in the best interest of the principal and to “avoid” conflicts of interest. Second, the agent is to keep the principal’s property “separate and distinct” Third, the agent must keep a record of “all receipts, disbursements, and transactions” entered into by the agent on the principal’s

¹⁰¹ *Id.*

¹⁰² *See id.* (“Investing known assets for greater income may or may [not] be possible within the ‘prudent person’ standard.”).

¹⁰³ N.Y. GEN. OBLIG. LAW § 5-1505(2); *see infra* Appendix.

¹⁰⁴ N.Y. GEN. OBLIG. LAW § 5-1505(2)(a)(1). The revised best interest allows an agent to self-deal if such self-dealing is in the principal’s best interests. *See* VINCENT J. RUSSO & MARVIN RACHLIN, N.Y. ELDER LAW PRACTICE § 6:46 (2015).

¹⁰⁵ BLOOM & LAPIANA, *supra* note 74, at § 19.02[1][b].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 97-17 Informal Op. N.Y. Att’y Gen. *1 (1997), 1997 N.Y. AG LEXIS *1. According to the AG Opinion, the nursing home asserted that the “object of the power of attorney . . . is to protect the interests of the nursing home facility, as a creditor[.]” which is inconsistent with the purpose of a DPOA. *See id.*

¹⁰⁹ *Id.* at *13.

behalf.¹¹⁰

The record kept by an agent of all transactions the agent completes must be shown to a number of parties listed within General Obligations Law section 5-1505(2)(a)(3), all who have “an official interest in the principal’s personal well-being or property.”¹¹¹ This group includes: (1) a monitor, (explained in the following section)¹¹² (2) a co-agent or successor agent, (3) a government entity investigating the possibility that a principal may require protective services, (4) a court evaluator, (5) a guardian ad litem, (6) the guardian or conservator of the principal’s estate, or (7) the personal representative of a deceased principal’s estate, but the final two people may only receive records if such records were not previously given to a court evaluator or guardian ad litem.¹¹³

C. *The Monitor*

“The appointment of a monitor pursuant to section 5-1509,¹¹⁴ allows the principal to arrange for informal oversight of an agent, particularly when the agent’s authority to act on behalf of the principal continues after the principal has become incapacitated and is no longer capable of directing the agent.”¹¹⁵ While a monitor is another third party involved in the principal and agent relationship, he or she is less suspect than those relationships created by statute, because it is within the discretion of the principal to choose a monitor they trust.¹¹⁶ Allowing appointment of a monitor shows the inherent flaws of the DPOA relationship,¹¹⁷ but it also allows the principal to appoint two categories of people that cannot be included by statute: a trusted friend who does not have the time or inclination to serve as agent, or a private firm, such as a law firm or accounting firm. These groups cannot be designated by statute, and so are perfect candidates to serve as monitors. Additionally, a larger group of individuals is likely to consent to act

¹¹⁰ BLOOM & LAPIANA, *supra* note 93, at 56–57.

¹¹¹ *Id.* at 57–58.

¹¹² *See infra* Part VI.C.

¹¹³ N.Y. GEN. OBLIG. LAW § 5-1505(2)(a)(3) (Consol. 2015).

¹¹⁴ *Id.* § 5-1509; *see infra* Appendix.

¹¹⁵ N.Y. PRACTICE PAMPHLET, *supra* note 90, at 469.

¹¹⁶ *See id.* § 5-1509.

¹¹⁷ *See* BLOOM & LAPIANA, *supra* note 74, § 19.02[1][b] (“If finding a trustworthy agent is difficult, how realistic is it to assume that the principal will also be able to find someone to do a good job of being the monitor of the agent’s conduct?”).

as a monitor, because they are not subject to fiduciary duties, and therefore are not liable for an agent's misuse of assets.¹¹⁸

*D. The Special Proceeding*¹¹⁹

The special proceeding allows any party who can demand records of an agent's transactions under General Obligations Law section 5-1505(2) to petition a court for an accounting of the agent's transactions under the DPOA.¹²⁰ The special proceeding can also be used to obtain judicial review of: the validity of the DPOA; the Principal's capacity to execute the instrument; and the agent's fitness or unfitness to serve as agent.¹²¹

The special proceeding is New York's response to the UPOAA section 116, which allows for judicial review of an agent's actions using the DPOA.¹²² However, the special proceeding does not allow for petition by a "person that demonstrates sufficient interest in the principal's welfare," or "[a]ny . . . interested person[.]" both groups given the ability to bring an action in other states and under the UPOAA.¹²³ Instead, it specifies a limited group of people who can initiate a special proceeding outside of those included in section 5-1505(2).¹²⁴ This group includes "the agent, the spouse, child or parent of the principal, the principal's successor in interest, or any third party who may be required to accept a power of attorney."¹²⁵ Third parties required to accept the DPOA are included in this section as a balancing factor due to their inability to refuse a DPOA.¹²⁶ However, the inclusion has created an imbalance of power, and allows a creditor who accepted the agent's authority under a DPOA to use the special proceeding for improper purposes.¹²⁷

VII. CREDITOR EXPLOITATION OF THE SPECIAL PROCEEDING

To understand how creditors have exploited the special

¹¹⁸ See N.Y. PRACTICE PAMPHLET, *supra* note 90, at 469–70.

¹¹⁹ N.Y. GEN. OBLIG. LAW § 5-1510; see *infra* Appendix.

¹²⁰ See *id.* § 5-1510(1).

¹²¹ *Id.* § 5-1510(2)(a), (b), (f).

¹²² See *supra* Part IV.B.

¹²³ CAL. PROB. CODE § 4540(k) (Deering 2015); UNIF. POWER OF ATT'Y ACT § 116(a)(8) (UNIF. LAW COMM'N 2006).

¹²⁴ See *id.* § 5-1510(3).

¹²⁵ *Id.*

¹²⁶ See BLOOM & LAPIANA, *supra* note 93, at 59–62.

¹²⁷ See *infra* Part VII.

proceeding, a short discussion of New York Medicaid nursing home coverage is required. In New York, “Medicaid is a program for [those] who can’t afford to pay for medical care.”¹²⁸ When an elderly person is not able to pay his or her bills, Medicaid will pay for a nursing home to take care of those eligible for the program.¹²⁹ While Medicaid is available for a variety of reasons, including when medical bills are high or an individual is already receiving Supplemental Security Income, the most important reason in relation to elder abuse is that individuals who meet “certain financial requirements” are eligible for Medicaid.¹³⁰ In 2015, to qualify for Medicaid as a person over the age of sixty-five, a single person may earn no more than \$9,900 in a year, and a married couple may earn no more than \$14,500 in a year.¹³¹ Further, a single person over the age of sixty-five may retain no more than \$14,850 in total assets, and the healthy spouse of a person seeking Medicaid nursing home coverage may retain no more than \$119,220 total.¹³² In simple terms, an applicant will not qualify for Medicaid long term nursing home coverage unless he or she is poor. There are exceptions to the basic rule that an individual must be poor that are beyond the scope of this paper. However, an example would be a “Caretaker Child,” who is a child of the applicant and lives in the Medicaid applicant’s house for at least two years prior to the applicant’s institutionalization and, during that period, provided care that allowed the applicant to avoid a nursing home stay.¹³³ The home can be transferred to the child without triggering a period of Medicaid ineligibility.¹³⁴

General Obligations Law section 5-1510(3) allows parties that do not have standing under section 5-1505(2)(a)(3) to petition for review of an agent’s conduct.¹³⁵ In at least three counties of New York, this section has been used by nursing homes to bring actions

¹²⁸ *Medicaid in New York State*, N.Y. DEP’T OF HEALTH (last modified May, 2015), https://www.health.ny.gov/health_care/medicaid/.

¹²⁹ *See id.*

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *See id.*; Gen. Info. Sys. Message from Judith Arnold, Dir. of the N.Y. Div. of Eligibility & Marketplace Integration, to Local Dist. Comm’rs & Medicaid Dirs. (Dec. 16, 2014), https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/14ma029.pdf (noting that assets that a spouse may keep are known as “The Maximum federal Community Spouse Resource Allowance”).

¹³³ *See* N.Y. SOC. SERV. LAW § 369(2)(b)(iii)(B) (Consol. 2015); NANCY E. KLINE, *MEDICAID FINANCIAL ELIGIBILITY RULES FOR NURSING HOME CARE IN NEW YORK STATE 12–13* (2011).

¹³⁴ *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 360-4.4(c)(1)(ii)(b)(4) (2015).

¹³⁵ *See* N.Y. GEN. OBLIG. LAW § 5-1510(3).

against agents of individuals residing in nursing homes.¹³⁶

These actions began to appear in 2012, and some are ongoing at the time of this writing.¹³⁷ Each action starts with this requested relief:

[T]o compel Respondent, as the Agent acting pursuant to a Power of Attorney to supply a record of all receipts, disbursements, and transactions entered into by Respondent from the time [she or he] was appointed [Principal's] agent through the present, on behalf of [Principal], to Petitioner and this Court and [to] remov[e] Respondent as Agent [upon the grounds that she has violated her fiduciary duty] under the Power of Attorney by not acting in the best interest of [the Principal,] and surcharging Respondent . . . for his breach of fiduciary duties by refusing to account and come forward with [the Principal's] assets[, which were diverted by the Respondent,] . . . awarding attorneys' fees to Petitioner's counsel . . . and for such other and further relief as this Court may deem just and proper.¹³⁸

Nursing Homes claim standing under section 5-1510(3), "as a third party who may be required to accept the authority of the Agent under the Power of Attorney."¹³⁹ The courts have never specifically addressed standing, and only one court has mentioned it, holding that "petitioner in its individual and particular capacity does have standing to commence this proceeding."¹⁴⁰ Based on the petitioner's memorandum of law in that case, it appears that the courts have interpreted the word "may" within section 5-1510(3) to

¹³⁶ See Verified Petition for Special Proceeding at 1, 3, *M.M. Ewing Continuing Care Ctr. v. Stover* No. 111949-2015 (N.Y. Sup. Ct. Jan. 2, 2015); Verified Petition for Special Proceeding at 1, 2, *Mercy Health and Rehab. Ctr. v. DeFalco* No. 2013-00001326 (N.Y. Sup. Ct. Nov. 20, 2013); Verified Petition for Special Proceeding at 1, 2, *Auburn AGT, LLC v. Deutschman* No. 2013-00001206 (N.Y. Sup. Ct. Oct. 18, 2013); Verified Petition for Special Proceeding at 1, 2, *Loretto Sedgwick Heights Corp. v. Sauter* No. 2013-4512 (N.Y. Sup. Ct. Aug. 26 2013); Verified Petition for Special Proceeding at 1, 2, *Mercy Health and Rehab. Ctr. v. Gelston* No. 2013-00000571 (N.Y. Sup. Ct. May 3, 2013); Verified Petition for Special Proceeding at 1, 2, *Groton Cmty. Health Care Ctr., Inc. v. Bevier* No. 2013-0573 (N.Y. Sup. Ct. May 3, 2013); Verified Petition for Special Proceeding at 1, 2, *Iroquois Nursing Home, Inc. v. Williams* No. 2012-6058 (N.Y. Sup. Ct. Jan. 7, 2013).

¹³⁷ See Verified Petition for Special Proceeding, *supra* note 136, at 1, 3 (constituting an ongoing case at the time of writing); Verified Petition for Special Proceeding at 1, 2, *Loretto Health & Rehab. Ctr. v. Costa* No. 2012-3001 (N.Y. Sup. Ct. June 4, 2012) (constituting the earliest filed case).

¹³⁸ Notice of Petition for Special Proceeding at 1, *Groton Cmty. Health Care Ctr., Inc., v. Bevier*, Index No. 13-0573 (N.Y. Sup. Ct. May 3, 2013).

¹³⁹ Verified Petition for Special Proceeding at 2, *Groton Cmty. Health Care Ctr., Inc. v. Bevier*, No. 2013-0573 (N.Y. Sup. Ct. 2013).

¹⁴⁰ Decision at 2, *Iroquois Nursing Home v. Viau*, No. 13-1781 (N.Y. Sup. Ct. Aug. 7, 2013).

mean that the third party could have been compelled to accept the agent's authority, and they should not be denied standing because they accepted the agent's authority without first refusing to recognize the DPOA.¹⁴¹

Within the complaint, Petitioner asserts that "Respondent has wholly failed to make timely and complete payments [to pay the Principal's bills], despite the availability of income and resources."¹⁴² Petitioner further alleges that the agent has breached his or her fiduciary duty because he or she has failed to pay the Principal's past due billings, and therefore respondent is "not acting in [the Principal's] best interest . . ."¹⁴³ Petitioners ask for removal of the agent due to the breach of fiduciary duty.¹⁴⁴ Further, the petition requests that the court hold the agent personally responsible for the Principal's bills, and requests an order that the agent pay Petitioner's attorney's fees.¹⁴⁵ While the specifics vary from case to case, in general, the nursing home is owed money by an incapacitated Principal, and Petitioner brings suit against the agent demanding payment. Not only does the Petitioner request the agent's removal, it also requests that the court hold the agent personally responsible for the Principal's payments and attorney's fees for the petitioner.¹⁴⁶

In only one case, a judge issued a decision that addressed all of the Petitioners' demands, rather than simply granting an accounting.¹⁴⁷ In that case, *Iroquois Nursing Home v. Viau*, the court held that the petitioner was "well within its parameters to request such an accounting[.]" but that petitioner "ha[d] no grounds or basis for" the remaining relief sought.¹⁴⁸ Specifically, the court found that there was no basis for removal of the agent, because "[i]n fact, [the agent] acted appropriately as it appears that petitioner

¹⁴¹ Memorandum of Law in Further Support of Petition for Special Proceeding at 7, 8, *Iroquois Nursing Home v. Viau*, No. 13-18781 (N.Y. Sup. Ct. May 28, 2013) (arguing that petitioner should be able to use § 5-1510 although the nursing home accepted the agent's authority without a court mandate, because it penalizes nursing homes for recognizing that a court will force them to recognize the agent's authority, creating an "incongruous result.").

¹⁴² Verified Petition for Special Proceeding at 4, *Groton Cmty. Health Care Ctr., Inc. v. Bevier*, No. 2013-0573 (N.Y. Sup. Ct. 2013).

¹⁴³ *Id.*

¹⁴⁴ Notice of Petition for Special Proceeding at 1, *Groton Cmty. Health Care Ctr. Inc., v. Bevier*, Index No. 13-0573 (N.Y. Sup. Ct. May 3, 2013).

¹⁴⁵ *See id.*

¹⁴⁶ Verified Petition for Special Proceeding at 5, 6, *Groton Cmty. Health Care Ctr., Inc. v. Bevier*, No. 2013-0573 (N.Y. Sup. Ct. 2013).

¹⁴⁷ Order at 2, 3, *Iroquois Nursing Home v. Viau*, No. 13-1781 (N.Y. Sup. Ct. Dec. 3, 2013).

¹⁴⁸ Decision at 2, 3-4, *Iroquois Nursing Home v. Viau*, No. 13-1781 (N.Y. Sup. Ct. Aug. 7, 2013).

was overcharging. And if he paid the amount petitioner demanded, he would have overspent his father's assets and funds. Moreover, respondent was advised by the Department of Social Services not to pay the amounts petitioner demanded."¹⁴⁹ The court also held that the agent was not responsible for his father's debts, because the agent did not "individually guarantee . . . payment."¹⁵⁰

While this case suggests that Petitioner Nursing Homes have the right to an accounting by the agent, it shows that an agent is not acting in bad faith or violating a fiduciary duty by refusing to pay nursing home debt, at least when there is a Medicaid determination pending.¹⁵¹ The *Viau* case is notable because it ended in a decision and order, and Respondent had the benefit of counsel.¹⁵² In many filed cases, Respondents were *pro se*.¹⁵³

Given the benefit of counsel, *pro se* respondents may not agree to pay nursing homes based upon the nursing home's initiation of a special proceeding. If *pro se* respondents knew that this type of action is not likely to end in their removal as agent, much less a charge that they breached their fiduciary duty and were personally responsible for the principal's debts, the respondents may choose to give Petitioners the requested records, rather than simply pay the overdue bill. However, when someone who cannot afford to pay a lawyer is faced with court documents that demand the person is removed as agent, and the petitioner seeks to hold the agent personally responsible for the principal's debts, it is understandable that an agent would give in to the petitioner's demands rather than face what appear to be severe and punitive repercussions.

¹⁴⁹ *Id.* at 2–3.

¹⁵⁰ *Id.* at 3.

¹⁵¹ *See id.* at 3, 4.

¹⁵² *See id.* at 4.

¹⁵³ While it is not possible to be certain that a respondent is *pro se* if the special proceeding never gets past the petition phase, a good indicator is that the Notice of Petition for Special Proceeding is sent directly to the Respondent. *See* Notice of Petition for Special Proceeding at 2, Loretto Health and Rehab. Ctr. v. Green, No. 2013-00001062 (N.Y. Sup. Ct. Sept. 4, 2013); Notice of Petition for Special Proceeding at 2, Loretto Sedgwick Heights Corp. v. Sauter, No. 2013-4512 (N.Y. Sup. Ct. Aug. 22, 2013); Notice of Petition for Special Proceeding at 2, Cayuga Cnty. Nursing Home v. Whiting, No. 2013-00000865 (N.Y. Sup. Ct. July 22, 2013); Notice of Petition for Special Proceeding at 2, Groton Cmty. Health Care Ctr., Inc., v. Bevier, No. 13-0573 (N.Y. Sup. Ct. May 3, 2013); Notice of Petition for Special Proceeding at 2, Iroquois Nursing Home v. Williams, No. 2012-6058 (N.Y. Sup. Ct. Nov. 20, 2012).

VIII. REFORMING 5-1510(3) TO PREVENT USE OF THE SPECIAL
PROCEEDING AS A DEBT COLLECTION TOOL

The purpose of petitioner's action is to obtain payment for services rendered, illustrated by a copy of a debt collection letter attached as an exhibit to one of the petitions, and by petitioners reference to their "injury" as a creditor.¹⁵⁴ In one ongoing case, a respondent filed an answer alleging that the nursing home's "request for a full accounting . . . is unduly burdensome and serves no purpose to recovering the Petitioner's alleged debt other than to harass and intimidate the Respondents."¹⁵⁵ Further example of this is that in at least one case, multiple actions using section 5-1510(3) were filed on the same day.¹⁵⁶ If each action was filed for the intended purpose, to protect a principal from abuse, it is likely that they would have been filed as soon as abuse was suspected. Instead, multiple actions were filed at once, all against principals who owed the nursing homes substantial amounts of money.¹⁵⁷ Further, many cases never ended in an order, suggesting that the Respondents acquiesced to Petitioner's demands and paid the overdue bill before a judge granted an accounting.

Debt collection is a distinct area of the law.¹⁵⁸ The purpose of GOL section 5-1510(3) is to allow parties who do not have standing

¹⁵⁴ Verified Petition for Special Proceeding at 5, *Mercy Health and Rehab. Ctr. v. DeFalco*, No. 2013-00001326 (N.Y. Sup. Ct. Nov. 20, 2013); Verified Petition for Special Proceeding at Exh. B, *Loretto Health and Rehab. Ctr. v. Green*, No. 2013-00001062 (N.Y. Sup. Ct. Sept. 4, 2013). In *Green*, Petitioner moved to hold Respondent in contempt for failing to provide records. Petitioner's Memorandum of Law in Support of Order to Show Cause for Punishment of Contempt of Court, *Loretto Health and Rehab. Ctr. v. Green*, No. 2013-1062 (N.Y. Sup. Ct. July 18, 2014). The only response filed by Respondent, who was *pro se*, was an affidavit stating she kept no records regarding her parents' finances. Affidavit in Opposition to Petitioner's Motion for Contempt, *Loretto Health and Rehab. Ctr. v. Green*, No. 2013-1062 (N.Y. Sup. Ct. Nov. 10, 2014).

¹⁵⁵ Verified Reply, Affirmative Defenses, and Application for Sanctions at 3, *M.M. Ewing Continuing Care Ctr. v. Stover*, No. 111949-2015 (N.Y. Sup. Ct. Mar. 16, 2015).

¹⁵⁶ Three petitions were filed on May 3, 2013. See Notice of Petition for Special Proceeding at 1, *Mercy Health and Rehab. Ctr. v. Gelston*, No. 2013-00000571 (N.Y. Sup. Ct. May 3, 2013); Notice of Petition for Special Proceeding at 1, *Mercy Health and Rehab. Ctr. v. Tata et al.*, No. 2013-00000572 (N.Y. Sup. Ct. May 3, 2013); Notice of Petition for Special Proceeding at 1, *Groton Cmty. Health Care Ctr. Inc. v. Bevier*, No. 13-0573 (N.Y. Sup. Ct. May 3, 2013).

¹⁵⁷ See *e.g.*, Notice of Petition for Special Proceeding at 4, *Mercy Health and Rehab. Ctr. v. Gelston*, No. 2013-00000571 (N.Y. Sup. Ct. May 3, 2013) (noting that the Principal owed the nursing home \$175,960); Notice of Petition for Special Proceeding at 4, *Mercy Health and Rehab. Ctr. v. Tata et al.*, No. 2013-00000572 (N.Y. Sup. Ct. May 3, 2013) (noting that the Principal owed the nursing home \$244,448); Notice of Petition for Special Proceeding at 4, *Groton Cmty. Health Care Ctr. Inc. v. Bevier*, No. 13-0573 (N.Y. Sup. Ct. May 3, 2013) (noting that the Principal owed the nursing home \$44,601).

¹⁵⁸ See N.Y. DEBT. & CRED. LAW § 1 (Consol. 2015).

under section 5-1505(2) to bring agent abuse of principals to the attention of the courts, not to provide a new avenue for debt collection.¹⁵⁹

How can creditors be prevented from abusing section 5-1510(3), while leaving it in place for those individuals concerned about a Principal's welfare not within a statutorily allowed group under section 5-1505(2)(a)(3)?¹⁶⁰ Under the current interpretation of the special standing provision in section 5-1510(3), those who may be required to accept the DPOA include creditors, and therefore any creditor could use this special proceeding in a similar manner to the nursing homes in the actions discussed above. As the judiciary's current interpretation of section 5-1510(3) allows creditors to petition the court, the law itself must be amended to prevent creditor's improper use of special proceedings for debt collection.

There are a number of ways that the law could be amended to prevent creditors from using section 5-1510(3) as a debt collection tool. The most direct option would be to remove "third part[ies] who may be required to accept [the] power of attorney" from the list of those allowed to petition the court.¹⁶¹ However, it is important that these third parties have standing to challenge an agent, because organizations that may be required to accept an agent's authority are the final barrier before a dishonest agent can actually steal from a principal.¹⁶² One option would be to rely on section 5-1504(1)(a)(2), which defines reasonable cause to refuse to accept a DPOA as "[a] good faith referral of the principal and the agent to the local adult protective services."¹⁶³ This section allows a third party to refuse to accept an agent's authority under a DPOA if the third party informs the local adult protective services about their refusal.¹⁶⁴ This would negate the need for third parties to have the ability to initiate a special proceeding, because if the Principal is being abused, Adult Protective has standing to bring a special proceeding under GOL section 1505(2)(a)(3)(iii).

Another option is to allow the respondent to dismiss the action if the respondent shows that the petitioner is a creditor of the principal. An amended version of section 5-1510(3) would read:

¹⁵⁹ See N.Y. GEN. OBLIG. LAW § 5-1510(3).

¹⁶⁰ See *id.* § 5-1505(2)(a)(3).

¹⁶¹ *Id.* § 5-1510(3).

¹⁶² *Id.* § 5-1504; BLOOM & LAPIANA, *supra* note 93, at 60.

¹⁶³ N.Y. GEN. OBLIG. LAW § 5-1504(1)(a)(2).

¹⁶⁴ See *id.*

3. A special proceeding may be commenced pursuant to subdivision two of this section by any person identified in subparagraph three of paragraph (a) of subdivision two of section 5-1501 of this title, the agent, the spouse, child or parent of the principal, the principal's successor in interest, or any third party who may be required to accept a power of attorney. *However, if Petitioner is a creditor and brings this action in an attempt to collect a debt, the petition shall be dismissed.*

This approach is not ideal, because it is not guaranteed that those proceeding *pro se* would avail themselves of the protections of the statute. However, if a *pro se* respondent looks at the applicable law, they will know that the special proceeding is being used improperly if his or her principal's creditors initiated the action. Additionally, *pro se* parties may be less worried about losing their authority as an agent if the law acknowledges that section 5-1510(3) is not properly used as a debt collection tool.

The purpose of amending General Obligations Law section 1510(3) is to stop creditors from using the special proceeding to pursue debts. Therefore, the most narrowly focused amendment to the statute would stop only a creditor, but no other third party, from initiating the special proceeding. An amended version of 5-1510(3) that accomplishes this purpose would read:

3. A special proceeding may be commenced pursuant to subdivision two of this section by any person identified in subparagraph three of paragraph (a) of subdivision two of section 5-1501 of this title, the agent, the spouse, child or parent of the principal, the principal's successor in interest, or any third party who may be required to accept a power of attorney.

(a) If petitioner has standing to bring this proceeding solely through 1510(3) of this title, the petitioner must submit an affidavit stating that it does not initiate this special proceeding for the purpose of collecting a debt, and additionally, that respondent has no outstanding debt owed to petitioner when the special proceeding is initiated.

This reform would stop creditors from scaring unsophisticated agents who do not have access to counsel. A creditor could not petition the court for removal of an agent under this amended section. Further, this amendment would not preclude a creditor from notifying a government agency of suspected elder abuse. While it is not ideal to stop every party in a debtor-creditor

relationship from bringing a special proceeding, it may be the only way to stop misuse of the law as it is currently applied.

IX. CONCLUSION

The 2009 New York Power of Attorney Revision followed the general contours of reform in other states, and loosely adheres to the UPOAA. The Fiduciary Duties and Standard of Care in New York and in the UPOAA are markedly similar. Each uses a statutory short form power of attorney, along with a SMGR. However, New York State's approach to judicial review has proven problematic because, as set out in this paper, creditors have been able to subvert the intent of the special proceeding and appropriated the expanded standing provisions for use as an alternate avenue to bring debtors into court. To prevent misuse of the special proceeding by the creditors of an incompetent principal, New York needs to amend the General Obligations Law.

APPENDIX

Uniform Probate code provisions (REVISED 2010)**SECTION 5B-114.** Agent's Duties.

(a) Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

(1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(2) act in good faith; and

(3) act only within the scope of authority granted in the power of attorney.

(b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(1) act loyally for the principal's benefit;

(2) act so as not to create a conflict of interest that impairs the agent's 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 a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(A) the value and nature of the principal's property;

(B) the principal's foreseeable obligations and need for maintenance;

(C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

(D) eligibility for a benefit, a program, or assistance under a statute or regulation.

(c) An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(d) An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest

in relation to the property or affairs of the principal.

(e) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(f) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(g) An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

(h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.¹⁶⁵

SECTION 5B-116. Judicial Relief.

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

- (1) the principal or the agent;
- (2) a guardian, conservator, or other fiduciary acting for the principal;
- (3) a person authorized to make health-care decisions for the principal;
- (4) the principal's spouse, parent, or descendant;
- (5) an individual who would qualify as a presumptive heir of the principal;

¹⁶⁵ UNIF. PROBATE CODE § 5B-114 (amended 2010).

(6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

(8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) a person asked to accept the power of attorney.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.¹⁶⁶

SECTION 5B-201. Authority That Requires Specific Grant; Grant Of General Authority.

(a) An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(1) create, amend, revoke, or terminate an inter vivos trust;

(2) make a gift;

(3) create or change rights of survivorship;

(4) create or change a beneficiary designation;

(5) delegate authority granted under the power of attorney;

(6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or]

(7) exercise fiduciary powers that the principal has authority to delegate[; or]

(8) disclaim property, including a power of appointment].

(b) Notwithstanding a grant of authority to do an act described in subsection (a), unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation,

¹⁶⁶ *Id.* § 5B-116.

disclaimer, or otherwise.

(c) Subject to subsections (a), (b), (d), and (e), if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 5B-204 through 5B-216.

(d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to Section 5B-217.

(e) Subject to subsections (a), (b), and (d), if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(f) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(g) 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.¹⁶⁷

**NEW YORK GENERAL OBLIGATIONS LAW – ARTICLE 5
TITLE 15 (2015)**

§ 5-1505. Standard of care; fiduciary duties; compelling disclosure of record

1. Standard of care. In dealing with property of the principal, an agent shall observe the standard of care that would be observed by a prudent person dealing with property of another.

2. Fiduciary duties. (a) An agent acting under a power of attorney has a fiduciary relationship with the principal. The fiduciary duties include but are not limited to each of the following obligations:

(1) To act according to any instructions from the principal or, where there are no instructions, in the best interest of the principal, and to avoid conflicts of interest.

(2) To keep the principal's property separate and distinct from any other property owned or controlled by the agent, except for property that is jointly owned by the principal and agent at the time of the execution of the power of attorney, and property that becomes jointly owned after the execution of the power of attorney as the

¹⁶⁷ *Id.* § 5B-201.

result of the agent's acquisition of an interest in the principal's property by reason of the agent's exercise of authority granted in a statutory gifts rider or in a non-statutory power of attorney signed and dated by the principal with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and which is executed pursuant to the requirements of paragraph (b) of subdivision nine of section 5-1514 of this title. The agent may not make gifts to the principal's property to himself or herself without specific authorization in a power of attorney.

(3) To keep a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and to make such record and power of attorney available to the principal or to third parties at the request of the principal. The agent shall make such record and a copy of the power of attorney available within fifteen days of a written request by any of the following:

- (i) a monitor;
- (ii) a co-agent or successor agent acting under the power of attorney;
- (iii) a government entity, or official thereof, investigating a report that the principal may be in need of protective or other services, or investigating a report of abuse or neglect;
- (iv) a court evaluator appointed pursuant to section 81.09 of the mental hygiene law;
- (v) a guardian ad litem appointed pursuant to section seventeen hundred fifty-four of the surrogate's court procedure act;
- (vi) the guardian or conservator of the estate of the principal, if such record has not already been provided to the court evaluator or guardian ad litem; or
- (vii) the personal representative of the estate of a deceased principal if such record has not already been provided to the guardian or conservator of the estate of the principal.

The failure of the agent to make the record available pursuant to this paragraph may result in a special proceeding under subdivision one of section 5-1510 of this title.

(b) The agent may be subject to liability for conduct or omissions which violate any fiduciary duty.

(c) The agent is not liable to third parties for any act pursuant to a power of attorney if the act was authorized at the time and the act did not violate subdivision one or two of this section.

3. Resignation. (a) An agent who has signed the power of attorney may resign by giving written notice to the principal and

the agent's co-agent, successor agent or the monitor, if one has been named, or the principal's guardian if one has been appointed. If no co-agent, successor agent, monitor or guardian is known to the agent and the principal is incapacitated or the agent has notice of any facts indicating the principal's incapacity, the agent may give written notice to a government entity having authority to protect the welfare of the principal, or may petition the court to approve the resignation.

(b) The principal may provide for alternative means for an agent's resignation in the power of attorney.¹⁶⁸

§ 5-1509. Appointment of monitor

A principal may appoint a monitor or monitors in the power of attorney who shall have the authority to request, receive and compel the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal, to request and receive such records held by third parties, and to request and receive a copy of the power of attorney. Nothing in this title shall be construed to impose a fiduciary duty on the monitor.¹⁶⁹

§ 5-1510. Special proceedings

1. If the agent has failed to make available a copy of the power of attorney and/or a record of all receipts, disbursements, and transactions entered into by the agent on behalf of a principal to a person who may request such record pursuant to subparagraph three of paragraph (a) of subdivision two of section 5-1505 of this title, that person may commence a special proceeding to compel the agent to produce a copy of the power of attorney and such record.

2. A special proceeding may be commenced pursuant to this section for any of the following additional purposes:

- (a) to determine whether the power of attorney is valid;
- (b) to determine whether the principal had capacity at the time the power of attorney was executed;
- (c) to determine whether the power of attorney was procured through duress, fraud or undue influence;
- (d) to determine whether the agent is entitled to receive compensation or whether the compensation received by the agent is reasonable for the responsibilities performed;

¹⁶⁸ N.Y. GEN. OBLIG. LAW § 5-1505 (McKinney 2015).

¹⁶⁹ *Id.* § 5-1509.

(e) to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal;

(f) to remove the agent upon the grounds that the agent has violated, or is unfit, unable, or unwilling to perform, the fiduciary duties under the power of attorney;

(g) to determine how multiple agents must act;

(h) to construe any provision of a power of attorney;

(i) to compel acceptance of the power of attorney in which event the relief to be granted is limited to an order compelling acceptance.

A special proceeding may also be commenced by an agent who wishes to obtain court approval of his or her resignation.

3. A special proceeding may be commenced pursuant to subdivision two of this section by any person identified in subparagraph three of paragraph (a) of subdivision two of section 5-1505 of this title, the agent, the spouse, child or parent of the principal, the principal's successor in interest, or any third party who may be required to accept a power of attorney.

4. If a power of attorney is suspended or revoked under this section, or the agent is removed by the court, the court may require the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal and to deliver any property belonging to the principal and copies of records concerning the principal's property and affairs to a successor agent, a government entity or the principal's legal representative.¹⁷⁰

¹⁷⁰ *Id.* § 5-1510.