

Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney

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Summary

Nearly half of Americans age fifty or older have executed a durable power-of-attorney (DPOA), and almost three-quarters of those age 80 or older have done so. The popularity of the DPOA reflects the fact that it is a powerful and cost-effective tool for planning for future incapacity. Unfortunately, while it is often appropriate to advise elders to execute broad, immediately effective DPOA, such documents can jeopardize elders' financial and personal well-being. As has been well-recognized, DPOAs can expose elders to significant risk of financial exploitation. In addition, DPOAs can transform elders' roles within their own families. This, in turn, can significantly reduce elders' perceived control over themselves and their affairs, and, in so doing, negatively affect their physical and psychological well-being.

An analysis of the DPOA relationship indicates that the twin threats of outright exploitation and more subtle disempowerment are the natural result of the simultaneously ambiguous and largely autonomous role of the agent under states' durable power-of-attorney enabling statutes. States could significantly reduce both problems by clarifying the agent's role and reigning in agent autonomy to create a system consistent with traditional agency principles, including the duty of obedience. To this end, the author proposes a mechanism that would do so by providing the principal with the opportunity to play a more meaningful role in governing and monitoring the DPOA relationship.

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The Current Legal Relationship Between Principals and Agents under DPOAs

The role of the agent, or "attorney-in-fact" (AIF), is characterized by two underlying problems in the DPOA relationship: (1) lack of clarity as to the decision-making rule that an AIF is to use to make decisions on behalf of a principal, and (2) exceedingly broad autonomy afforded to the AIF.

A. Lack of Clarity as to Decision-Making Rules

Suppose Amy Agent is appointed as the AIF for her mother Patty Principal, who lives in the home where Amy was raised. As Patty's health declines, she becomes increasingly confused and has difficulty communicating her wishes. Patty's doctor indicates that Patty either needs in-home help or to move to a more supervised setting. Given Patty's limited resources, Amy is concerned that Patty will not be able to afford in-home health for very long and thinks it would be best for Patty to sell the home and move into an assisted living community. However, she knows that Patty always said that she wanted to die in her family home and that she never wanted to be "put in a home." How is Amy to decide what approach to take? Should she follow her mother's previously stated wishes, or should she focus on protecting her mother's long-term safety? Should she involve her mother in the decision? Must she do so?

The fact that an AIF is a fiduciary does not by itself tell Amy how she must make this difficult decision because it does not answer the question of what decision-making rule the AIF should apply. DPOA enabling statutes also provide little guidance. There is currently wide variety both within states and between states as to the decision-making rule an AIF is to employ. For example, New York's enabling statute provides five separate descriptions of the AIF's duty. The AIF is variously described as being permitted to act "as the agent finds desirable or necessary," as the agent finds desirable, as the agent finds useful, as is necessary, and as is reasonable. Moreover, even states that purport to impose only one decision-making rule, commonly that the AIF act in the "best interest" of the principal, fail to effectively do so. For example, as has been recognized in other contexts, the term "best interests" can be understood in a multitude of ways because an individual can have multiple types of interests.

B. Vast Agent Autonomy

All fiduciaries are granted the power to exercise discretion. After all, it is the discretion entrusted to the fiduciary that necessitates the imposition of the duty of loyalty. The AIF, however, enjoys particularly broad discretion. The agent acting pursuant to a DPOA generally is able to act on his or her own initiative, generally has no duty to act despite his or her appointment, and generally is free to choose the nature and manner of his actions subject only to the basic limitations of a fiduciary.

While the scope of discretion alone is noteworthy, in most states the AIF is also granted the right to exercise that discretion in a virtually unsupervised - and largely unreviewable - manner. Unlike a court-appointed guardian or conservator, an AIF generally does not provide an accounting to any court system or third party. Moreover, state DPOA enabling statutes also generally make no provision for meaningful oversight by the principal. Only six states have statutory requirements mandating that the AIF keep in contact with or communicate with the principal. Only three of these states' statutes set forth a general duty of communication and contact. The other three states have statutes requiring communication but not consultation. Similarly, AIFs are generally not under any recognized common law duty to communicate with principals as to their actions or inactions.

The failure to require consultation or communication with principals results in large part from the incorrect assumption that misuse of DPOAs almost always occurs during periods in which a principal suffers from severe incapacity. It also reflects a failure to appreciate what appears to be a relatively common, but nevertheless largely unrecognized, form of DPOA abuse: over-reaching. Over-reaching (a term coined by the author) occurs when agents "over-reach" traditional fiduciary duties to make decisions about the principal's life in a manner inconsistent with the principal's preferences.

The High Cost of the Status Quo

A. Costs to Agents

Lack of clarity as to decision-making rules and broad agent autonomy allow AIFs significant flexibility and freedom from oversight. Yet they are a double-edged sword for AIFs. They can leave the AIF confused and frustrated as he or she tries to make decisions with limited guidance as to how to make them. They can also leave AIFs vulnerable to formal and informal challenge by third parties. Increasingly, AIFs' actions are being challenged in probate proceedings by individuals contending that AIFs' actions improperly reduced their inheritance. Without clear rules, AIFs cannot defend their actions merely by showing compliance with established decision-making rules.

B. Costs to Principals

Psychologists have long recognized that an individual's sense of control over him or herself can significantly affect his or her physical and psychological well-being. The perception of dependence on others, by contrast, has been found to correlate with decreased well-being. Thus, even if agents were to make decisions completely consistent with principals' wishes, we could expect the DPOA relationship to have some negative impacts on principals simply by decreasing to extent to which principals perceive themselves to be in control of their own affairs. When agents make decisions inconsistent with principals' wishes and values, the sense of control is likely to be even further compromised. Unfortunately, as discussed at length in the underlying paper, agents are prone to "over-reach" traditional fiduciary duties to make decisions about the principal's life in a manner inconsistent with the principal's preferences. Such over-reaching sends a powerful signal to the principal that he or she is perceived as no longer having the exclusive right or ability to make decisions about his or her life. Principals are likely to internalize this attribution, and begin to see themselves as helpless or incapacitated.

The lack of clarity as to decision-making rules undoubtedly contributes to agents' willingness to make decisions that are inconsistent with principals' wishes and values. Research on surrogate decision-making in the health care context indicates that agents are significantly more likely to respect elders' wishes when agents are explicitly instructed to do so. Such instructions are largely absent under the current DPOA legal regime.

A New Role for Communication and Consultation

Creating a norm of communication and consultation could clarify the agent's role and reign in agent autonomy while simultaneously empowering elders. With this in mind, the author proposes that states (1) legislate a general duty of communication and consultation; and (2) require advance notification for certain "fundamental transactions."

A. Require Communication

Making communication and consultation with the principal an explicit element of the agent's duty is an essential first step in curbing over-reaching by agents. Communication can (1) enable principals to guide agents' actions, (2) enable principals to better monitor agents' actions, and (3) decrease the likelihood that the DPOA relationship will unnecessarily diminish principals' perceptions of control. Indeed, principals are often in the best position to monitor the DPOA relationship. In many cases, an AIF's actions occur while the principal retains full capacity. Moreover, even persons with fairly advanced dementia may be able to judge whether a particular action is consistent with their values.

British Columbia's consultation requirements for agents acting pursuant to a representative agreement provide an attractive model for states to consider when drafting their own requirements. Under the statute governing such agreements, an agent must "consult, to the extent reasonable, with the adult to determine his or her current wishes," and "comply with those wishes if it is reasonable to do so." In situations in which "... the adult's current wishes cannot be determined or it is not reasonable to comply with them, the representative must comply with any instructions or wishes the adult expressed while capable." An exception may be made only with Court permission. Finally, "[i]f the adult's instructions or expressed wishes are not known, the representative must act (a) on the basis of the adult's known beliefs and values, or (b) in the adult's best interests, if his or her beliefs and values are not known." The British Columbia approach adds a degree of complexity, but facilitates the agent's task by recognizing that there are different ways of ascertaining a principal's interest, and prioritizing those ways to create clear rules for agents to follow.

B. Require Advance Notification of Fundamental Transactions

In most situations sufficient principal involvement and oversight can be provided for merely by holding agents to a general duty of communication and consultation with principals. However, a more robust requirement is appropriate when the agent is engaging in a transaction that has the potential to significantly alter the principal's lifestyle, such as the sale of the principal's primary residence. AIFs should be required to notify principals a reasonable time prior to undertaking such "fundamental transactions." This is similar to the corporate law approach in which some transactions - such as a merger or sale of substantially all assets - are considered too fundamentally altering to the corporation to allow corporate agents to undertake them without shareholder involvement.

A simple enforcement mechanism would give the requirement force: if the agent failed to notify the principal, and the principal later objected, the agent would have the burden of showing that the action was consistent with his or her fiduciary duties. The agent could do so by showing that (1) there was notification and no objection, (2) there was actual consent, or (3) the principal was incompetent and the action was consistent with the principal's values and wishes or, if those could not be determined, the principal's best interest. An agent unable to meet this burden would be personally liable for its consequences.

Advance consultation for fundamental transactions would give the principal the opportunity to object and the opportunity, if competent, to revoke the DPOA. It would also give the principal an opportunity to voice objections to third parties who might be in a position to intervene with the AIF.