

Summary of Enacted DPA Legislation, 2000-2002

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In the last two years, 14 states have enacted a total of 26 bills relating to durable power of attorney (DPA) reform. The following is a summary of the enacted legislation

California

Legislative activity pertaining to DPAs is almost non-existent. California's approach appears to be more reactive than proactive, as demonstrated by the implementation of numerous penalty provisions for committing financial abuse. In addition, while California has not enacted any forceful legislation restricting or limiting DPA use, it has made a strong effort to study the extent and severity of the problem of financial abuse of the elderly. Unfortunately, the Governor has vetoed each proposed study.

Among the string of vetoes, however, there were three elder law bills that managed to become law. California's S.B. 1742 mandates that any police officer, member of a county financial abuse team, or public guardian with adult protection services (APS) report all incidences of financial abuse against mentally impaired elders. Through A.B. 2107, attorneys are prohibited from selling annuities to elderly clients when there is, or has been a previous attorney-client relationship. In addition, when selling financial products to the elderly for long-term care planning there must be a disclosure regarding the right to rescind the application for 30 days. Finally, A.B. 2107 makes it a felony if any theft or embezzlement exceeds \$100, rather than the previous \$400. A.B. 255, which goes into effect on January 1, 2003, expands the list of mandated reporters to include all clergy members, thus increasing the number of people responsible for reporting elder abuse.

Connecticut

The statutory short form power of attorney (POA) is the main piece of legislation governing DPAs in Connecticut. Public Act 01-209, entitled An Act Concerning Protective Services for Elderly Persons, enacted in 2001, mandates that the Department of Social Services investigate, rather than simply evaluate, any allegations of exploitation, abuse, or neglect. Financial institutions also are discharged from liability when confidential information is disclosed with the consent of the elderly person. Moreover, the financial institution is not required to determine the elderly person's capacity to consent. In addition to legislative actions, the Attorney General's Senior Volunteer Assistance Program employs "senior stingers" to work as undercover agents investigating fraud.¹

Florida

During the 2002 Regular Session there was no activity relating to DPA reform or the financial abuse of the elderly.² However, in 2001, Florida's legislature was much more active and added a springing POA provision to its statute. Originally, the DPA was exercisable from the day it was executed. When the governor approved S.B. 886 on June 15, 2001, the statute was amended to require the attorney-in-fact (AIF), or agent, to execute an affidavit and secure a physician's affidavit attesting to the principal's incapacity to manage property. Moreover, the physician must be the principal's *primary* physician. S.B. 886 also states that "when any affidavit presented has been executed more than six months prior to the first presentation of the DPA to the third party," a third party may not rely on the DPA's authority if conditioned on the principal's

¹ American Society on Aging, Hodge, Paul, Innovative Programs Protect Elders, www.asaging.org/at/at-201/innovative.html.

² Senate Committee on Health, Aging, and Long-Term Care, *Major Legislation Passed*, 129-140.

incapacity. The lack of capacity to manage property is defined as including the ability to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.³

Illinois

Legislative amendments in Illinois revolved around minor grammatical changes to existing penalty language. In addition, the majority of legislative activity surrounding DPA reform took place on the criminal side. H.B. 4321 was adopted to amend the section of Illinois Criminal Code of 1961 relating to the offense of financial exploitation of an elderly person. What was once a Class II felony, is now a Class I felony when the victim is over 70 years old and the property value exploited exceeds \$15,000, or if the victim is over 80 years old and the property value exploited exceeds \$5000.

H.B. 4034 amends Illinois' Elder Abuse and Neglect Act by mandating that the Department of Aging establish and maintain a clearinghouse for all reports of abuse, including financial, from every state agency. Moreover, to strengthen the POA a witness attestation clause and an incapacitated principal provision were added.

Indiana

S.B. 252, which became effective July 1, 2002, amended IC 30-5-6-4 by adding a new section (IC 30-5-6-4.5) that addresses the authority an AIF has as an employer. For instance, an AIF can hire attorneys, accountants, investment advisers, and agents to assist in performing the AIF's duties. All reasonable costs will be paid from the principal's asset holdings. This provision also deals with the costs of accounting. If an accounting is requested and the AIF incurs costs to defend his actions as AIF with regard to preparing the accounting or to defend any other of his actions, the costs shall be paid from the principal's asset holdings. However, if the court finds that the AIF breached his fiduciary duty or engaged in self-dealing then the court may rule that the AIF is responsible for the costs.

H.B. 1385 pertains to an individual refusing to accept the authority of an AIF and the ensuing penalties, such as treble damages. It also directs the accounting scheme and procedure the AIF will utilize. S.B. 190 also addresses the penalties for failure to recognize the authority of an AIF.

Maine

Maine enacted Public Law No. 121, which repealed the prohibition against an electronic or digital signature on a DPA or deed, mortgage, or other document affecting title to real property, and brought Maine's law into conformity with federal law. Maine's legislation is limited in reference to DPA reform. Rather, Maine's focus is on combating the problem of financial exploitation of the elderly with increased public awareness. Maine's Legal Services for the Elderly (LSE) estimates that there were close to 8,000 cases of elder abuse in Maine in 2000, with 84% being unreported.⁴ In response, Maine has launched a strong educational outreach effort and visible public awareness campaign. As part of that effort, Maine's LSE has added to its website a number of consumer information documents, including *Planning Ahead: The Basics of Durable Financial Powers of Attorney and Advance Directives* and *Power of Attorney Using Pre-Printed Forms to Make a Power of Attorney*.⁵

³ Senate Staff Analysis and Economic Impact Statement, March 20, 2001

⁴ Maine Legal Services, *Elder Abuse: Still a "Dirty Little Secret,"*
<http://www.mainelse.org/client%20ed/AbuseI.htm>

⁵ Maine Legal Services, <http://www.mainelse.org/educate.html>.

The LSE article published last year, “Elder Abuse: Getting Legal Help,”⁶ states that Maine does not have a comprehensive law addressing financial exploitation and remedies for the victims. Plaintiffs have attempted to seek relief via a claim of fraud, misrepresentation, breach of contract, or undue influence. Maine’s Improvident Transfer of Title Law also provides relief for some seniors. Finally, LSE created an “Elder Abuse and Financial Exploitation” attorney position to last for two years that will represent needy elderly Maine residents in select counties.

Missouri

S.B. 684 adds the positions of funeral director, embalmer, in-home services provider, home health agency or home health agency employee, and employee for a local area agency on aging or for an organized area agency on aging program to the list of mandated reporters. Training opportunities are provided to help mandated reporters detect and report abuse and neglect effectively. Missouri also relies on senior sting programs, which employs older adults to combat telemarketing and direct-mail scams.⁷

New Hampshire

New Hampshire has had limited discussion of the issue of financial abuse via DPAs. The Department of Elderly Legal Affairs produces fact sheets on how to recognize and avoid financial exploitation. However, the legislature did introduce three bills addressing DPA reform. The following three bills all took effect on January 1, 2002. H.B. 703 mandates that the DPA explicitly authorize the AIF to make gifts, which narrows the agent’s gift-giving power (the most common authority used to financially exploit the principal).

H.B. 377 allows the Department of Health and Human Services to file petitions to seek judicial review of the validity of a POA or to validate the authority of an agent acting under a POA . Furthermore, the interested party no longer needs to have established prior contact with the principal in order to file the petition. H.B. 463 clarifies that financial exploitation, as well as abuse, neglect, and exploitation of adults is to be reported to the Department of Health and Human Services and that information provided in good faith is immune from liability. Moreover, the term “incapacitated” is changed to “vulnerable.”

New York

New York passed into law, S.B. 4499, which clearly defines a caregiver as a person who holds a POA or other legal or fiduciary relationship with a vulnerable elderly person. A.B. 3174 also expanded the net of prosecution to include the financial exploitation of the elderly or disabled within the definition of the crime of larceny and included the term “person in a position of trust” as someone who has a fiduciary obligation to the elderly or disabled.

A.B. 3175 establishes the crime of criminal neglect of a vulnerable elderly person as a Class A misdemeanor if the caregiver knowingly acted in a manner likely to cause endangerment. A.B. 3614 establishes the crime of financial exploitation of a vulnerable elderly person in the first through fourth degree. It also mandates that there is no defense to a prosecution claiming that the defendant lacked knowledge of facts or conditions responsible for making the victim a vulnerable person.

Project 2015, sponsored by the New York State Office for the Aging, is designed to provide a means for increasing public awareness about financial abuse and exploitation, and a dialogue on how best to plan for the aging population in New York. The state recognizes that there is an elder abuse problem and cites Project statistics that approximately 130,000 New Yorkers (out of more than 3 million) are victims of abuse or neglect (with the number suspected to be much higher). Project 2015 believes that before the problems of elder abuse can be rectified,

⁶ <http://www.mainelse.org/client%20ed/AbuseII.htm>

⁷ *Supra* note 1.

there must be a clear and uniform definition of elder abuse and neglect. In addition, the Project stresses the need for policy uniformity among New York's criminal justice, social welfare, legislature, and service systems. If these two goals are met, Project 2015 believes it will be easier to recognize trends of elder abuse, and more importantly, to develop plans to combat it.⁸

New York's Attorney General implemented a training program for bank employees that will help them understand those who typically commit financial exploitation of the elderly, common scenarios that lead up to the exploitation, and ways to prevent further abuse.⁹

Oregon

Lacking in detailed DPA for property statutes, Oregon's legislature has begun to address this dearth. For example, H.B. 2365 includes an important provision that aids in combating financial exploitation of the elderly: "Unless otherwise provided in the power of attorney document, an attorney-in-fact or agent must use the property of the principal for the benefit of the principal." This provision attempts to warn AIFs and principals that self-dealing is not allowed.

S.B. 956 allows for a person who is 65 years or older, an incapacitated person by a guardian, conservator, or AIF to bring an action against any person who has caused physical or financial abuse to them or against anyone who has permitted another person to engage in physical or financial abuse. This proves beneficial because currently there is no definition of financial abuse or exploitation in Oregon's statute. The court also can award all economic damages, all non-economic damages, reasonable attorney fees, and reasonable fees for the services of a conservator or guardian ad litem incurred from the lawsuit.

Currently, Oregon's Department of Human Services works with banks and other financial institutions to train tellers to be aware of any signs of elder financial abuse, and to report their findings to APS. The Elder Law Section of the Oregon Bar also is planning to put forth statutory proposals of their own that will dramatically change Oregon's DPA Laws.

Texas

Texas has been prolific in the field of DPA reform, with four of the five bills proposed pertaining to DPAs signed into law in 2001. The only bill pending is H.B. 330, which calls for the principal, upon execution of the DPA, to give notice by certified mail, return-receipt requested, to each person who is related to the principal within the second degree by consanguinity or affinity and whose address is known. The notice is required to state the AIF's/agent's identity. The DPA will only take effect if notice is given properly. H.B. 330 also includes an AIF/agent under the definition of "fiduciary."

The four remaining bills amend either Texas' Probate or Penal Code. H.B. 1132 amends the Probate Code and authorizes a court to suspend the powers of the AIF/agent if a temporary guardian is appointed. It also calls for the full termination of the agent's powers if there is a permanent appointment of a guardian. H.B. 1083 also amends the Probate Code by providing that after execution of a DPA, the filing of a bankruptcy petition in connection with a principal's debts will not revoke or terminate the agency relationship with the principal's AIF/agent. H.B. 1883 states that an AIF/agent is a fiduciary and has a duty to inform the principal of all actions he takes

⁸ Project 2015: The Future of Aging in New York State, Articles and Briefs for Discussion, Brownell, Pat et al., *Summary: Elder Abuse and Neglect*, available at <http://aging.state.ny.us/explore/project2015/artsum11.htm> (last visited June 10, 2002).

⁹ Office of New York State Attorney General Eliot Spitzer, Press Release, *Financial Abuse of Elderly*

Targeted: Bank Employees to Receive Training to Combat Exploitation (Sept. 21, 2000) available at

http://www.oag.state.ny.us/press/2000/sep/sep21b_00.html (last visited June 24, 2002).

under the POA. The AIF/agent also has to maintain records of each of those actions or decisions. The principal may demand an accounting, which should include: any property belonging to the principal that is in the AIF/agent's possession or they have knowledge of; all actions or decisions made by the AIF/agent; complete record of receipts, disbursements, and other actions; listing of all property over which AIF/agent has exercised control, with an adequate description of each asset and its current value; cash balance on hand and name and location of the depository where the balance is kept; all known liabilities; and any other information that may be necessary for an accurate accounting. If an AIF/agent fails to produce an accounting within 60 days, the principal may file suit to compel the accounting.

H.B. 1813 amends the Penal Code by providing that an AIF/agent under a DPA who knowingly, intentionally, or recklessly misapplies property they hold as a fiduciary that involves substantial risk of loss the property owner will have committed the offense of misapplication. H.B. 1813 also includes an AIF/agent under the definition of "fiduciary," which helps law enforcement officials prosecute an agent who may be acting under the power of a POA, but is not acting in the best interests of the principal.

Utah

S.B. 1006 became effective on July 5, 2001, and amended section 75-5-501 of Utah's code by adding subsections 2 and 3, which state that if a POA is to remain in effect when the principal becomes incapacitated or disabled, then the agent has to notify all interested parties that he is the agent within 30 days of the principal's incapacitation and provide them with his name and address. Moreover, an agent must comply with a written request from an interested party to see a copy of the POA and a statement of the assets to which the POA applies.

Vermont

One of the most recent and comprehensive attempts to reform DPA laws took place in Vermont. Before the enactment of S.B. 224, which became effective July 1, 2002, Vermont had little to no statutory provisions addressing DPAs. Numerous key players in the field of elder law in Vermont convened to form a task force and proposed legislation. Virtually all of their legislative proposals were adopted and enacted into law. Including, accountings by AIFs, or when there is no appointed guardian and the principal is incompetent, the Probate Court will have jurisdiction; an execution provision requiring the POA to be signed in front of a witness and notarized; an agent also must sign the POA attesting that he understands his duties under the POA and the law. The new law also provides a clear, concise, definition of an AIF's duties, has an accounting petition to determine the legality of acts, enjoins the AIF from taking more illegal actions, or can compel the agent to submit an accounting if he has good cause to believe the AIF has violated the statute.

Washington

Washington's dearth of DPA regulation spawned the enactment of H.B. 1135. It added the provision that a DPA will be revoked if a principal's spouse is the agent and the marriage is dissolved during that time. It also establishes a means for an interested person to petition the court to inquire into the agent's actions.