

Protecting Vulnerable Adults By Cindy J. Ackerman | 612.877.5330 | Cindy.Ackerman@lawmoss.com

By 2050, the number of people age 65 years and older will double, and the population of those age 85 years and older will nearly quadruple. As baby boomers are becoming senior citizens, financial exploitation and abuse of vulnerable adults is on the rise. For example, in 2010, older Americans lost at least \$2.9 billion to financial exploitation, a 12% increase from the \$2.6 billion in losses estimated in 2008. Unfortunately, for each reported case of financial exploitation, an estimated 42 other cases go unreported.

Over the past few years, the Minnesota legislature has enacted several safeguards designed to strengthen the protections for vulnerable adults. These safeguards include, among other things, changes to the power of attorney statute and refinements to the Minnesota Vulnerable Adults Act.

Statutory Short Form Power of Attorney

When a vulnerable adult is no longer able to manage his or her finances, court involvement may be necessary to appoint an agent to manage the finances. To avoid the expense and delay of a court action, an individual (the "principal") may use a Statutory Short Form Power of Attorney to appoint an attorney-in-fact (the "agent") to manage his or her finances when he or she is no longer able to do so.

Under Minnesota law, a principal may confer upon an agent either limited or general authority to act on the principal's behalf. An agent granted all of the powers in a Statutory Short Form Power of Attorney has full control over the principal's assets. Although full control enables the agent to properly manage the principal's assets, it also could leave the principal vulnerable to financial exploitation.

The Minnesota legislature recently added safeguards to the power of attorney statute to help prevent financial exploitation of vulnerable adults who use a Statutory Short Form Power of Attorney. First, the statute

was changed to clarify the persons who can seek court action to protect the principal's assets when controlled by an agent acting under a power of attorney. Effective August 1, 2013, and applicable to all Statutory Short Form Powers of Attorney, regardless of the date of execution, the principal or any interested person (e.g., guardian, conservator, legal representative, spouse, parent, adult child, sibling, attorney for the principal, or health care agent) may petition the court for a protective order directing the agent to provide an accounting or for other relief, such as the appointment of a conservator.

Second, the statute was changed to require the principal to name specifically the agents who have the authority to make gifts of the principal's assets to the agent or the agent's dependents. The amount that an agent may gift to himself or herself, or his or her dependents, has been changed from a fixed \$10,000 to an amount equal to the then-current federal gift tax annual exclusion (\$14,000 in 2013). If the principal does not specifically authorize the agent to make such gifts, the agent continues to have the power to make gifts to anyone other than the agent or the agent's dependents.

Finally, some misuse of the Statutory Short Form Power of Attorney occurs simply because the agent does not understand his or her duties and obligations when managing the assets of another. The Minnesota legislature adopted a new form "Statutory Short Form Power of Attorney," effective January 1, 2014, that identifies an agent's duties and obligations to:

- (1) act with the interests of the principal utmost in mind;
- (2) exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs;

- (3) render accountings as directed by the principal or whenever the agent reimburses himself or herself for expenditures made on behalf of the principal;
- (4) act in good faith in the best interests of the principal, using due care, competence, and diligence;
- (5) cease acting on behalf of the principal if the agent learns of any event that terminates the power of attorney or the agent's authority under the power of attorney, such as revocation by the principal of the power of attorney, the death of the principal, or the dissolution of the agent's marriage to the principal; and
- (6) disclose his or her identity as an attorney-in-fact whenever the agent acts for the principal by signing in substantially the following manner:

(Signature), "as attorney in fact for (name of principal)," or

(Signature), "(name of principal) by (name of the attorney-in-fact), the principal's attorney-in-fact."

The new form requires the agent to acknowledge affirmatively that he or she has read the Statutory Short Form Power of Attorney and understands it.

While the new Statutory Short Form Power of Attorney will not prevent intentional misuse of a principal's trust by an unscrupulous agent, it may prevent unintentional misuse by an uninformed agent.

Minnesota Vulnerable Adults Act

The Minnesota Vulnerable Adults Act expresses the State of Minnesota's policy to protect adults who, because of physical or mental disability or dependency on institutional services, are vulnerable to maltreatment and financial exploitation. The Act applies to anyone in a fiduciary relationship who has the duty to act



on behalf of someone else, such as an attorney-in-fact, a trustee, or a conservator.

For example, a child managing his or her parent's assets under a Statutory Short Form Power of Attorney has a fiduciary duty to manage the parent's assets as an ordinarily prudent person of discretion and intelligence would manage his or her own assets. It is not enough for the child to manage the parent's assets in the same manner as the parent managed his or her own assets. The child must act in the best interests of the parent.

Children acting as agents for their parents sometimes run afoul of the Vulnerable Adults Act by using their parents' assets for their own personal benefit. For example, a child of an incapacitated parent might use the parent's funds to purchase a home for the child and the parent to reside in. If the child titles the home in his or her own name, the child has now converted the parent's asset to the child's asset, which is an action of financial exploitation that can result in criminal and civil penalties against the child.

Last year, the Minnesota legislature strengthened the criminal penalties for financial exploitation of vulnerable adults. At the same time, in honor of World Elder Abuse Awareness Day, the Hennepin County Attorney's Office announced that it was stepping up prosecutions of crimes against the elderly, primarily those crimes based on financial exploitation and willful neglect. The maximum sentence for criminal financial

exploitation is 20 years imprisonment and a fine of up to \$100,000. Effective August 1, 2013, the courts may consider the aggregated value of what the exploiter received within any six-month period when sentencing the exploiter for criminal financial exploitation. Also effective August 1, 2013, all offenses committed, regardless of the county where the offense took place, may be prosecuted together. The legislature extended the statute of limitations for criminal prosecution of financial exploitation for losses exceeding \$35,000 to five years.

To encourage financial institutions to report suspected financial exploitation, the law was changed to clarify a financial institution's immunity from legal challenges when it reports suspected abuse in good faith. In addition, to assist in the recovery of assets converted by an alleged exploiter, the Minnesota Vulnerable Adults Act provides the vulnerable adult with a civil cause of action against the alleged exploiter. The vulnerable adult may recover civil damages equal to the greater of three times the amount exploited or \$10,000, plus reasonable attorney's fees and costs.

Protecting Vulnerable Adults in Care Facilities

In addition to the risks of financial exploitation, the elderly in care facilities are particularly vulnerable to maltreatment. The State of Minnesota Compliance Monitoring Division has an obligation to investigate complaints against care facilities regarding

the care and treatment of vulnerable adults. Too often, family members of vulnerable adults are excluded from this process. This year, to address this issue, the Minnesota legislature amended an existing law to require the Commissioner of Health to interview at least one family member of the vulnerable adult during the investigation. If the vulnerable adult or the person making the complaint expressly requests that no family member be interviewed, the request must be included in the investigative file.

Conclusion

The Minnesota legislature continues to strengthen the laws to protect vulnerable adults from financial exploitation and abuse, and government and financial institutions continue to educate and develop policies to protect vulnerable adults. Even so, the best protection may be for an individual to plan proactively for incapacity by selecting appropriate agents and developing a team of trusted advisors before the need arises.



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