POWERS OF ATTORNEY IN GEORGIA: A PRIMER ON HOW THE GEORGIA LEGISLATURE IS ATTEMPTING TO CURB THE PROBLEM OF ELDER FINANCIAL EXPLOITATION

Authored by:

Jason R. Doss
Joy L. Doss

THE DOSS FIRM LLC
36 Trammell Street, Suite 101
Marietta, Georgia 30064
www.dossfirm.com
(770) 578-1314 (t)

Introduction

The Georgia Legislature passed the Uniform Power of Attorney Act (H.B. 221) (the "Act"), which became effective on July 1, 2017. One of the reasons for passing the Act was to respond to concerns over unscrupulous individuals using powers of attorney to prey on Georgia's elderly population. In addition, the Legislature passed the Act to streamline the process by which financial institutions and other third parties accept powers of attorney.

The purpose of this article is to discuss the prevalence of financial exploitation, describe its underlying causes, explain how the Act attempts to provide additional protections to Georgia's seniors, as well as how the Act streamlines the process of requiring financial institutions and other third parties to accept powers of attorney in Georgia.

As explained in more detail below, financial exploitation is a prevalent problem throughout our country, and it appears to only be getting worse. There is no silver bullet that fully corrects the problem, and the solution to preventing it requires the proverbial village. As a result, the importance of groups like the Cobb Elder Abuse Task Force cannot be overstated, because collaboration among different professionals that encounter elder financial exploitation is the best way to arrive at the best imperfect solution to try and prevent it.

FAQs

1. What is financial exploitation?

Pursuant to the Georgia Code, "exploitation" means the illegal or improper use of a disabled adult or elder person or that person's resources through undue influence, coercion, harassment, duress, deception, false representation, false pretense, or other similar means for one's own or another's profit or advantage. O.C.G.A. § 16-5-100.

2. Who commits elder financial exploitation?

There have been many studies conducted in recent years trying to measure the prevalence of financial exploitation and to identify its perpetrators. The studies vary in quantifying the prevalence. However, based on many of these studies, it appears that the perpetrators of financial exploitation can be broken down into two groups, family members and friends, and third-party strangers.

3. How prevalent is elder financial exploitation?

In June 2011, MetLife released a study entitled the *MetLife Study of Elder Financial Abuse* (the "MetLife Study"). According the MetLife Study, the annual financial loss by victims of elder financial abuse was estimated to be at least $2.9 billion dollars, a 12% increase from the $2.6 billion estimated in 2008. Family members were perpetrators in 34% of the cases while third parties committed 51%. Other studies, such as a 2010 study conducted by the National Center on Elder Abuse, found that about 90% of financial abuse is committed by an elder's family member or close friend.

Third parties, including but not limited to financial services companies, such as brokerage firms and investment advisors, significantly contribute to victims' losses as well. For example, according to a FINRA study entitled *Financial Fraud and Fraud Susceptibility in the United States* (the "FINRA Study"), financial fraud solicitations by unscrupulous financial advisors are commonplace. The FINRA study found that more than 8 in 10 respondents in its survey were solicited to participate in potentially fraudulent investment offers. In addition, 11% of all respondents lost a significant amount of money after engaging with an offer.

The problem appears only to be getting worse. In 2013, the FINRA Foundation released a report entitled *Non-Traditional Costs of Financial Fraud* and concluded that $50 billion is lost annually to financial fraud. According to an

April 21, 2017 article entitled *Here's How Much Phone Scams Cost Americans Last Year*, that type of scam was up nearly 60% from about a year ago, totaling $9.5 billion in losses overall.

As explained below, these statistics do not paint the complete picture because most financial fraud goes unreported. For example, according to the FINRA Study:

> Under-reporting is a concern. Although 11% of respondents lost money in a likely fraudulent activity, only 4% admitted to being a victim of fraud when asked directly—an estimated under-reporting rate of over 60%.

4. Why does financial exploitation go unreported?

According to the FINRA Study:

> There are several reasons for under-reporting. A small group of respondents who admitted to investing in a fraudulent investment, but did not report the fraud, indicated that reporting would not have made a difference, they did not know where to report it or they were too embarrassed.

5. What are some red flags of elder financial exploitation?

According to Georgia Adult Protective Services, signs of Financial Abuse or Exploitation include:

- Misuse of financial resources for another's gain;
- Missing money or valuables;
- Credit card charges the individual did not make;
- Unusual activity in bank accounts, depleted bank accounts;
- **Legal documents (such as will or power of attorney) signed by a person who does not understand what s/he is signing;**

- Checks/documents signed when person cannot write; signatures on checks that don't resemble the person's signature;
- Eviction notice arrives when person thought s/he owned the house;
- Unpaid bills (rent, utilities, taxes) when someone is supposed to be paying them for the person.

See https://aging.georgia.gov/abuse-neglect-and-exploitation-risk-adults-georgia

(Emphasis added).

6. How does financial fraud occur?

Based on our experience in representing investors who are victims of financial fraud, virtually all cases involve situations where victims essentially **delegate duties** they would ordinarily undertake themselves to a **trusted person**. The trusted person violates their fiduciary obligations to the victim for their own financial gain.

7. What is a financial power of attorney?

It is a written document that memorializes a **trust relationship** and the **delegation of duties** to another person. In legal terms, a power of attorney is a document that evidences delegation by a principal to an agent. As a result, the Uniform Power of Attorney Act can be found in the section of Georgia statutes involving agency laws. O.C.G.A. s. 10-6B-1, *et. seq*.

According to the Georgia Court of Appeals in *Harris v. Peterson*, 318 Ga. App. 382 (2012):

> "[A]s a general rule, a power of attorney merely authorizes another agent to do what the grantor principal could do with respect to the recited subject matter. The grantor retains the right to act in his own name with respect to that subject matter, notwithstanding his execution of the power of attorney." (Punctuation omitted.) *Thornton v. Carpenter*, 222 Ga.App. 809, 812(2)(b), 476 S.E.2d 92 (1996).

8. What are the legal duties owed by agents to principals?

They are fiduciary in nature. The Georgia Supreme Court has stated:

> The relationship of principal and agent is a confidential one, and may arise where one party is so situated as to exercise a controlling influence over the rights or interest of another, or it may arise upon a relation of mutual confidence, and in every instance the law requires that there be the utmost good faith between the principal and the agent."

Larkins v. Boys, 205 Ga. 69, 72 (1949).

9. How does the Act help to better protect the potential victims of financial exploitation?

Under the Act, an agent that accepts appointment under a power of attorney must comply with all applicable fiduciary duties that are contemplated by the Act. O.C.G.A. § 10-6B-14. Section 10-6B-14(a) states mandatory duties that cannot be modified by the power of attorney. Those duties include that an agent who has accepted appointment shall act: (1) 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) in good faith; and (3) only within the scope of authority granted in the power of attorney.

Section 10-6B-14(b) provides a list of default fiduciary duties that apply unless otherwise provided in the power of attorney. Those default, yet non-mandatory duties, include, among other things, the duty of loyalty; the duty to avoid conflicts of interest; the duty to act with a level of care, competence and diligence that would ordinarily be exercised by agents in similar circumstances (i.e., the prudent person standard); the duty to keep records of all receipts, disbursements, transactions made under the power of attorney.

In addition, the requirements to create a valid power of attorney under the new Act are more stringent than the prior law.

O.C.G.A. § 10-6B-5 states:

> (a) A power of attorney shall be:
>
> (1) Signed by the principal or by another individual in such principal's presence at the principal's express direction;
>
> (2) Attested in the presence of the principal by one or more competent witnesses; and
>
> (3) Attested in the presence of the principal before a notary public or other individual authorized by law to administer oaths who is not a witness for purposes of paragraph (2) of this Code section.
>
> (b) All signatures and attestations required by subsection (a).

10. How does the Act streamline the process of requiring financial institutions to accept powers of attorney?

Under the old Georgia power of attorney laws, third parties were not required to accept a power of attorney. As a result, financial institutions, for

example, commonly required principals to execute a new power of attorney using the financial institution's forms even if there was already an existing power of attorney in place. This caused a number of logistical and legal problems between financial institutions and their customers, including but not limited to situations in which the validity of the financial institution's power of attorney form was called into question due to uncertainty about the legal competence of the principal.

The Act changed the old law by creating provisions that allow a third party to be forced to accept a power of attorney if certain requirements are met. To accomplish this goal, the Act states that the principal must use the statutory form provided for in O.C.G.A § 10-6B-70, a military power of attorney, or a power of attorney that substantially reflects the language in the form set forth in code section 10-6B-70.

If a principal provides a third party with a power of attorney that conforms to the requirements stated above, the third party has up to seven business days after being presented with the power of attorney to request either an agent certification, an English translation or an opinion of an attorney. O.C.G.A. § 10-6B-20(b)(1). If any of these documents are requested, the agent must present them. After the requested documents are presented by the agent, the third party has up to five business days after receipt of the requested documents to accept the power of attorney. O.C.G.A. § 10-6B-20(b)(2).

Even if the requested documents are provided, however, the third party may still refuse to accept the power of attorney under certain circumstances, including situations where the third party makes, or has actual knowledge that another person has made, a report to adult protective services stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent, or a person acting for or with the agent. O.C.G.A. § 10-6B-20(c).

If all the above steps are taken by the principal and agent, and the third party still refuses to accept the power of attorney, the Act provides a statutory remedy in that a court can force the third party to repay the principal for the principal's reasonable attorney's fees and expenses for the litigation that was required to force the third party to accept the power of attorney. O.C.G.A. § 10-6B-20(d).