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More Hawaii seniors financially exploited

Lawmakers considering ways to guard against exploitation

By **Christie Wilson**
Advertiser Staff Writer

A trusting 82-year-old 'Aiea man is struggling to restore his financial footing after giving away his durable power of attorney to a female acquaintance who used it to raid his bank account and obtain credit cards and a reverse mortgage that plunged him into staggering debt.

Friends who are helping the elderly man said cash losses and new debt from years of financial exploitation could top \$750,000, with no guarantee of getting any of it back.

The 'Aiea man's predicament, now under investigation by the state Department of Human Services Adult Protective Services, is an example of how powers of attorney — used since ancient times to allow individuals to act on behalf of others in business transactions and other affairs — have become a license to steal from the elderly.

Most often the thieves are relatives or caregivers who take advantage of a senior's poor health or diminished mental capacity to gain control of bank accounts, homes and other assets for their own benefit, according to elder law experts and other advocates for the elderly.

"It's a huge problem," said Bruce Bottorff, associate state director of AARP. "We continue to do education and outreach because it is so prevalent and, frankly, underreported. People need to be vigilant as the population grows older."

The ease at which powers of attorney can be drawn up — blank forms can be downloaded from the Internet, and no witnesses are required — and the significant potential for misuse have led some banks to stop accepting the documents, according to James Pietsch, director of the University of Hawai'i Elder Law Program.

The program offers basic legal assistance, advice and information to needy people 60 and older, and caregivers.

Many elderly residents are unaware of the risks of relinquishing their powers of attorney, and unless the documents are drafted with care, they can be readily abused because they grant broad decision-making authority, fail to explain clear standards of conduct, and lack monitoring mechanisms to detect problems early on or provisions for holding abusers accountable.

"It's very easy to abuse, especially with the increasing number of folks who are going to be suffering from diminished capacity or undue influence due to physical or mental frailty where they are turning over their things to other people," Pietsch said.

"You can't be as trusting as you used to be when there are people lurking out there at Zippy's and

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other places who know the ropes."

The Legislature is considering a measure that would establish additional protections for individuals giving away control over their personal and financial decisions. House Bill 2979 requires that a power of attorney be witnessed by two people who are not related to the "attorney of fact" — the "agent" who is receiving the power of attorney — and acknowledged by a notary public.

"Right now, you can get a notary, and that's good enough to go with, and we just feel there are not enough safeguards in place when working with our elderly," said Rep. John Mizuno, D-30th (Kamehameha Heights, Kalihi Valley, Fort Shafter), who introduced HB 2979.

Mizuno noted Census Bureau predictions that Ha-wai'i's 65-and-older population will double by 2030, making up nearly 1 in 4 residents. "We anticipate that financial exploitation will get worse and worse, so this is a way we can address this. It's a major consumer protection issue," he said.

nationwide problem

Nationally, adult protection and law enforcement agencies report an explosion in all types of financial exploitation, including investment scams, identity theft, forgery of Social Security checks, and coercion in naming beneficiaries or signing over the deed to a home.

A quarter of the 630 cases investigated by Adult Protective Services in fiscal year 2009 involved some form of financial exploitation of adults who, because of mental or physical impairment, are dependent on others for their health, safety or welfare.

Only 15 of the exploitation reports were confirmed, underscoring the difficulty in proving financial abuse.

"It is important to remember that competent

adults have the right to make decisions for themselves, even when other people disagree with those decisions, and even when those decisions are unwise," Department of Human Services spokeswoman Toni Schwartz, said in an e-mail to The Advertiser.

She said state law is very specific about what constitutes financial exploitation, which is defined as the "wrongful taking, withholding, appropriation or use" of money or property. "If the alleged victim is competent and gave consent, then a law is not broken and (Adult Protective Services) cannot confirm abuse," Schwartz said.

"Adults are presumed to be competent when making decisions. If it appears the person has become incompetent, (Adult Protective Services) can take the matter to Family Court and seek a temporary guardianship or an order for immediate protection. Judges will then require a physician evaluation to determine if the alleged victim is competent or incompetent to make decisions."

Schwartz said the number of financial exploitation reports has increased since the state enacted laws in 2007 requiring financial institutions to report suspected financial abuse committed against anyone 62 or older. The new laws also set severe penalties for mortgage and

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securities brokers who defraud seniors.

recent local cases

Although data on how many of the reports involve misuse of powers of attorney are not available, Ha-wai'i has seen its share of cases in recent years:

- In 2006, a caregiver was charged with abusing her power of attorney to steal \$86,000 from a 91-year-old Hawai'i Kai man to pay off credit cards and take vacations to the Mainland.
- A woman was convicted of theft and forgery in 2005 after stealing thousands of dollars from her 60-year-old boyfriend by obtaining a fraudulent power of attorney while he was incapacitated from a severe stroke.
- The state sued a self-employed insurance agent in 2004 for financially exploiting an elderly couple he befriended by taking control of their million-dollar estate. After the husband died, the agent had the widow, who was suffering from dementia, assign full power of attorney to him and created a revocable living trust that named him as the trustee.

Pietsch said such crimes may happen more frequently in a recession, when family members with good intentions may be tempted to dip into an elderly relative's bank accounts.

"The tough part of bad economic times is that some children and other people are just desperate, and you could have a child who runs into trouble and abuses the privilege, and then you have outright criminals who prey upon older people," he said.

reducing risk

Durable powers of attorney still have value as a low-cost, flexible and private form of surrogate decision-making that serve as an alternative to court-appointed guardianship or conservatorship.

And even though some financial institutions have lost confidence in the documents, Pietsch said, powers of attorney remain useful for other purposes, such as applying for benefits or entering into a nursing home contract.

He supports the safeguards proposed in HB 2979.

"Something needs to happen, because otherwise why have these powers of attorney anymore if everybody is afraid of getting involved in a lawsuit? If two witnesses are signing in front of a notary and they are not related to the individual (gaining power of attorney), then it's a little harder to get a conspiracy together," he said.

To lessen the risk of abuse, Pietsch recommends including provisions requiring that regular financial accounting be provided to family members or an adviser, and approval from more than one person for major transactions.

A check-off list for each power that is being granted to the agent is another safeguard, he said.

"What we recommend is that individuals plan for the worst and think of every possible bad thing that can happen, and go to a family lawyer to chart out how the family would best handle the

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situation," Pietsch said.

For anyone with more than \$100,000 in assets — essentially, anyone owning a home — he recommends a living revocable trust in place of a durable power of attorney.

The arrangement, which can cost several thousand dollars in attorney's fees to draw up, transfers a person's assets into a living trust that the individual may control as trustee. The trust can be revoked or amended as the person wishes, and a successor trustee designated to follow the individual's directions upon incapacity or death.

"That's sort of where it's leading without reform to powers of attorney," Pietsch said.

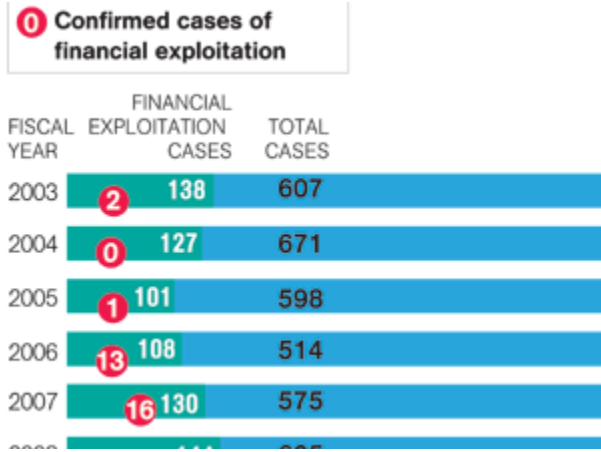
The Uniform Law Commission, which drafts and proposes model laws, devised the Uniform Power of Attorney Act in 2006 to guide states in legislating requirements for powers of attorneys.

The commission identified possible provisions that promote autonomy and protect against abuse. These include a clear statement of an agent's duties and specific language regarding "hot powers" such as disposing of property, making gifts, substantially altering an estate plan or changing beneficiary designations.

Powers of attorney also should spell out what to do if an agent resigns, and remedies and sanctions for abuse, such as restoring the value of mishandled assets and reimbursement of legal costs.

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