The Misuse or Abuse of Continuing Powers of Attorney: What Are Appropriate Safeguards?

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ABSTRACT

With a continuing power of attorney adults may provide for a future period of incapacity. The misuse or abuse of CPAs is a growing concern in many countries, increasingly the question is asked whether CPAs should not be furnished with more safeguards. Article 12(4) UNCRPD requires states to ensure appropriate and effective safeguards are in place to prevent abuse. This article focuses on the question what appropriate safeguards preventing the misuse and abuse of CPAs are. The article starts with an overview of the research on the risk of misuse and abuse that to date has been conducted. This information is subsequently used to operationalise the three categories of safeguards mentioned in article 12(4) UNCRPD, providing directions as to how appropriate safeguards might look like. Based on these directions, the safeguards implemented in five European countries have been studied with a view to providing insight into how these countries have tried to meet the requirement to ensure appropriate safeguards are in place. It is concluded that more can be done to ensure adults who want to be involved in the running of their affairs are given the opportunity to do so. In addition, attorneys should be made aware of their rights and responsibilities upon entry into force of the CPA and provided with the necessary support.

I. INTRODUCTION

Over the years so-called anticipatory decision-making instruments, allowing adults to make their own provisions for an eventual future period of incapacity, have come to the forefront. The continuing power of attorney (CPA) is such an instrument.1 The Council of Europe has defined the CPA as ‘a mandate given by a capable adult with the purpose that it shall remain in force or enter into force, in the event of the grantor’s incapacity.’2 The main attraction of the CPA is that it promotes the autonomy of adults, as it allows adults themselves to appoint an attorney of their own choosing.3 In contrast, in the framework of traditional guardianship measures, a deputy or guardian

1 In some countries this instrument is known as a lasting or enduring power of attorney.
2 Council of Europe, Recommendation CM/Rec (2009)11.
3 The Council of Europe, eg has recommended its Member States by means of Recommendation CM/Rec (2009)11 to ‘promote self-determination for capable adults by introducing legislation on continuing powers of attorney and advance directives.’
is being appointed for adults by a court or tribunal. However, the main concern with CPAs is that they do not, in general, provide the same level of safeguards as traditional guardianship measures, where a deputy or guardian is in most cases supervised by the court. The CPA is an instrument based on a premise of trust, namely the assumption that the adult will choose an attorney who is trustworthy and has the necessary skills to take care of the adult’s affairs. Therefore, many countries have deliberately chosen not to build a substantial security framework surrounding the CPA, but rather to create a low-threshold, relatively cheap, and easy-to-use instrument. Yet, the CPA also requires at least some basic level of safeguards. Adults make CPAs with the intention to create provisions for a future period of incapacity, a time when they are generally no longer able to scrutinise and supervise the actions of the attorney themselves. In practice, adults frequently use CPAs for conferring broad powers to the attorney, without properly regulating the attorney’s accountability or independent monitoring. In these cases, there is a potential risk that the attorney might at a later stage misuse or abuse the CPA. The danger of misuse or abuse of CPAs by the attorney is a growing concern in many countries. Increasingly, the question is asked whether CPAs should not be furnished with more safeguards.

Article 12(4) of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) calls on states to ensure that ‘appropriate and effective safeguards’ are in place to prevent abuse. To date, there is no research data on the effectiveness of current safeguards aimed at the prevention of misuse or abuse of CPAs. As effectiveness can only be assessed through empirical research, nothing can be said at the moment of the conformity of current safeguards with Article 12(4) UNCRPDs requirement to ensure that effective safeguards are in place. Further (empirical) research is needed to establish this. Appropriateness is in contrast a normative rather than empirical notion, it can be assessed by means of a theoretical analysis. Assessing the appropriateness of (current) safeguards, therefore, seems the first step in the process of achieving compliance with the requirements of Article 12(4) UNCRPD. The theoretical assessment of the appropriateness of safeguards can be based on the guidance provided in Article 12(4) UNCRPD itself, where three categories of appropriate safeguards have been distinguished. Article 12(4) UNCRPD states that there should be: (i) safeguards ensuring that the rights, will, and preferences of the adult are respected; (ii) safeguards ensuring that measures and provisions are free from conflict of interest; and (iii) safeguards ensuring that measures and provisions are free from undue influence. Much has already been said about the interpretation of these safeguards in general and about the first category of safeguards in particular. Yet, Stelma-Roorda et al argue that the operationalisation of these safeguards with regard to the CPA, is a challenge that requires further research. An important aspect to consider in this regard, is that the need to create safeguards should be balanced with the need to keep the CPA a simple and easy-to-use instrument. Lush points out

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4 C. Tilse, J. Wilson, B. White, L. Wilmott, and A. McCawley, ‘Enduring Powers of Attorney: Promoting Attorneys’ Accountability as Substitute Decision Makers’ (2014) 33 (3) Australasian Journal on Ageing 193–197.

5 H.N. Stelma-Roorda, C. Blankman, and M.V. Antokolskaia, ‘A Changing Paradigm of Protection of Vulnerable Adults and Its Implications for the Netherlands’ (2019) Family & Law doi: 10.5553/FenR/.000037.
that if anticipatory decision-making instruments become too restrictive and cease to be simple, effective, and inexpensive instruments, people will try to circumvent them and search for alternatives instead. Mitchell et al refer in this regard to research that shows that people are less likely to make formal anticipatory decision-making arrangements if there is a family member whom they could trust to act as an informal decision-maker. This then removes the need for formal arrangements which are considered too restrictive and therefore not ideal. McCawley et al note that if the task of attorney becomes an onerous one, attorney’s might be unwilling to undertake it. Safeguards should, in other words, not restrict either adult or attorney more than is necessary to ensure that the adult is sufficiently protected from misuse or abuse of the CPA. This means the need to offer the adult adequate protection should be carefully balanced with the need to retain an instrument, ie based on trust and informality.

This article aims to explore how the requirement of Article 12(4) UNCRPD to provide for appropriate safeguards against abuse, can be operationalised in the context of the CPA, keeping in mind striking the right balance between protection on the one hand and trust and informality on the other hand. This exploration will be made in three steps. As balancing protection and informality requires an assessment of the risk of misuse or abuse of CPAs, paragraph 2 will provide an outline of the available information on the risk of misuse and abuse of CPAs by attorneys. Building on this information, paragraph 3 will provide directions as to how the three categories of safeguards, included in Article 12(4) UNCRPD, can be operationalised in the context of the CPA. Using these directions as a starting point, paragraph 4 will look at the safeguards currently employed in five European jurisdictions (Belgium, Germany, England and Wales, the Netherlands, and Switzerland). The aim of this exercise is to use these five jurisdictions as an illustration of how European countries are trying to meet the Convention’s requirement to provide for appropriate safeguards in order to prevent misuse or abuse of CPAs and how protection and informality are balanced in this regard.

In conclusion, I will try to delineate the steps that still need to be taken on the way to furnish the CPA with appropriate safeguards, as required by the UNCRPD.

II. THE RISK OF ABUSE OR MISUSE OF CPAS
To date, there is a dearth of research into the nature, cause, and prevalence of abuse in the context of CPAs. This lack of empirical evidence on the risks surrounding the

6 D. Lush, ‘Adult Guardianship and Powers of Attorney in England and Wales’ in L. Ho and R. Lee (eds.), Special Needs Financial Planning: A Comparative Perspective (Cambridge University Press, 2019) pp. 117–148.
7 L.K. Mitchell, N.A. Pachana, J. Wilson, K. Vearncombe, B. Massavelli, G.J. Byrne, and C. Tilse, ‘Promoting the Use of Enduring Powers of Attorney in Older Adults: A Literature Review’ (2014) 33 (1) Australasian Journal on Ageing 2–7.
8 A. McCawley, C. Tilse, J. Wilson, L. Rosenman, and D. Setterlund ‘Access to Assets: Older People with Impaired Capacity and Financial Abuse’ (2006) 8 (1) The Journal of Adult Protection 20–32. See also C. Tilse, D. Setterlund, J. Wilson, and L. Rosenman, ‘Minding the Money: A Growing Responsibility for Informal Carers’ (2005) 25 Ageing and Society 215–227.
9 K. Purser, T. Cockburn, C. Cross, and H. Jacmon, ‘Alleged Financial Abuse of Those under an Enduring Power of Attorney: An Exploratory Study’ (2018) 48 British Journal of Social Work 887–905.
CPA, means the CPA is advocated by some as a protective and safeguarding instrument, enabling adults to prepare for an eventual period when they are no longer able to protect their own interests. At the same time, others highlight the danger that CPAs might be misused or abused.10 This paragraph aims to provide an overview of the available normative and empirical literature on the risk of misuse and abuse of CPAs. In addition to discussing the few studies that have been conducted in this area, it draws on the general literature and research on elder abuse and the abuse of older adults with cognitive impairments to find an answer to the following questions:

• who are at risk of misuse or abuse of CPAs by attorneys;
• what is the nature of misuse of abuse of CPAs;
• what is the profile of ‘wrongdoers’ and what triggers their misuse or abuse of CPAs;
• what is the response to the misuse or abuse of CPAs?

1. Who Are at Risk of Misuse or Abuse of CPAs by Attorneys?
Assuming that the CPA itself provides a potential vehicle for abuse in situations where the adult is no longer able to scrutinise the actions of the attorney, every adult with a CPA is upon execution of the instrument potentially at risk of abuse.11 CPAs may after all be granted by adults of all ages as incapacity can suddenly occur at any age (eg a comatose state due to a car accident). Purser et al note, however, that there may be certain factors contributing to and heightening the risk of abuse of CPAs, such as ‘dependence, disability, failing physical health, depression, socio-economic status, cognitive impairments, and social isolation’.12 Although age does not automatically equate with the occurrence of these factors, there is an increased age-related risk with regard to several of these factors, such as increasing physical frailty and the development of cognitive impairments due to a disease such as dementia.13 Research in the field of elder abuse demonstrates that the risk of abuse, financial abuse, in particular, is likely to increase with age. People with dementia or a reduced cognitive function are considered a group particular at risk of abuse.14 Manthorpe et al note that individuals in these groups become increasingly less able to protect themselves,

10 Ibid; Council of Europe Recommendation CM/Rec (2009)11; J. Manthorpe, K. Samsi, and J. Rapaport, ‘Responding to the Financial Abuse of People with Dementia: A Qualitative Study of Safeguarding Experiences in England’ (2012) 24 (9) International Psychogeriatrics 1454–1464; J. Chesterman, ‘Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies’ (2016) 69 (1) Australian Social Work 115–124.
11 D. Setterlund, C. Tilse, and J. Wilson, ‘Older People and Substitute Decision-Making Legislation: Limits to Informed Choice’ (2002) 21 (3) Australasian Journal on Ageing 128–133.
12 K. Purser, T. Cockburn, and E. Ulrick, ‘Examining Access to Formal Justice Mechanisms for Vulnerable People in the Context of Enduring Powers of Attorney’ (2019) 12 (1) Elder Law Review 1–32.
13 Ibid.
14 S. Davidson, P. Rossall, and S. Hart, Financial Abuse Evidence Review (Age UK, 2015); D. Bagshaw, S. Wendt, L. Zannettino, and V. Adams, Financial Abuse of Older People by Family Members: Views and Experiences of Older Australians and their Family Members’ (2013) 66 (1) Australian Social Work 86–103.
have declining abilities to identify and manage risks, and may not report concerns or are not taken seriously when doing so.\textsuperscript{15}

This is particularly important to keep in mind when considering instances where CPAs are granted by adults whose cognitive abilities are already starting to deteriorate. Several research studies indicate that it is not an unlikely occurrence for adults to wait ‘until the 11\textsuperscript{th} hour’ before making a CPA.\textsuperscript{16} This can stem from a lack of knowledge about anticipatory decision-making instruments. In a study looking at the knowledge and experience of older adults with power of attorney arrangements, Setterlund et al identified lower-income and physical disability as two factors associated with a limited understanding of these kinds of arrangements.\textsuperscript{17} But even in cases where people are aware of the possibility, they may be inclined to wait until there is an actual and concrete need to put in place anticipatory decision-making arrangements such as the CPA.\textsuperscript{18} Samsi and Manthorpe have studied the experiences, opinions, and attitudes of older adults regarding planning for the future and concluded that although people in general thought planning would be a good idea, they were keen to postpone any future planning themselves for ‘when they got older, in worse health or when it seemed “more appropriate” to do so’.\textsuperscript{19}

As the next paragraph will explain in more detail, it is in keeping with Article 12 UNCRPD to not exclude adults with deteriorating cognitive abilities from establishing a CPA, if they still have the capacity, albeit diminished capacity, to do so.\textsuperscript{20} The Council of Europe notes in this regard:

Therefore, certain people with some degree of incapacity, including those with lifelong incapacities, may be able to grant a valid continuing power of attorney to appoint a person of their choice to deal with matters which they themselves would find very difficult to handle, if not beyond their capacity.\textsuperscript{21}

The downside is, however, that adults facing a deterioration of their cognitive abilities may have a sense of urgency to establish a CPA, before it is too late. Mitchell et al point out that this urgency often leaves little time to consider who would be most suited as attorney.\textsuperscript{22} They note in this regard: ‘those involved in this process are often already experiencing a high level of distress, which does not necessarily form a sound basis upon which to make informed decisions.’\textsuperscript{23} In these cases, there is also an increased risk that the adult may be unduly influenced by the prospective attorney to establish a CPA and does not fully appreciate the effect of the CPA as to the terms

\begin{itemize}
  \item \textsuperscript{15} Manthorpe et al (n 10).
  \item \textsuperscript{16} Setterlund et al (n 11).
  \item \textsuperscript{17} Ibid.
  \item \textsuperscript{18} Mitchell et al (n 7).
  \item \textsuperscript{19} K. Samsi and J. Manthorpe, ‘I Live for Today’: A Qualitative Study Investigating Older People’s Attitudes to Advance Planning’ (2011) 19 (1) Health and Social Care in the Community 52–59.
  \item \textsuperscript{20} M. Donnelly, ‘Deciding in Dementia: The Possibilities and Limits of Supported Decision-Making’ (2019) 66 International Journal of Law and Psychiatry 1–7.
  \item \textsuperscript{21} Council of Europe Recommendation CM/Rec (2009)11.
  \item \textsuperscript{22} Mitchell et al (n 7).
  \item \textsuperscript{23} Ibid.
\end{itemize}
and scope of the authority being granted. Bielanska notes with regard to England and Wales that it is in practice not uncommon for family members to contact a professional advisor in order to ‘get’ the authority to act on behalf of the adult, rather than wishing the authority to act to be ‘given’ by the adult.

2. What Is the Nature of Misuse or Abuse of CPAs?
As noted above, older adults are a group considered particularly at risk of misuse or abuse of CPAs. In the literature, the misuse or abuse of CPAs is therefore frequently linked to elder abuse, where it is considered one of the forms in which elder abuse can be perpetrated. Elder abuse has been defined by the World Health Organization (WHO) as:

a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.

The emphasis on the phrase ‘expectation of trust’ seems apt given the relationship between adult and attorney underlying the CPA. The WHO has distinguished several forms of elder abuse, including ‘physical, sexual, psychological and emotional abuse, financial and material abuse; abandonment, neglect; and serious loss of dignity and respect’. Although research conducted by Cross et al shows that various of these forms of abuse can occur in the context of a CPA, financial or material abuse seems the most likely to occur as in many cases substantial financial powers are conferred to the attorney. In addition, other forms of abuse, such as physical, psychological, emotional abuse, and neglect, occurring by means of a CPA, can frequently be linked to an underlying financial motive guiding the actions of the attorney. Examples include not providing appropriate care, such as admission to a care home, with the intention to save money. Or the reverse, arranging premature admission to a care home so the attorney may sell the adult’s property.

24 The Law Commission of England and Wales, The Incapacitated Principal (Law Com. No. 122, 1983); T.L. Hafemeister, ‘Financial Abuse of the Elderly in Domestic Settings’ in R.J. Bonnie and R.B. Wallace (eds.), Elder Mistreatment: Abuse, Neglect, and Exploitation in Aging America (National Academies Press, 2003) pp. 382–445; See also the study conducted by C. Cross, K. Purser, and T. Cockburn, Examining Access to Justice for Those with an Enduring Power of Attorney (EPA) Who Are Suffering Financial Abuse (Crime and Justice Research Centre, Queensland University of Technology, 2017) pp. 1–61.
25 Bielanska, Can Legal Professionals Do More to Safeguard Against the Abuse of Lasting Powers?, https://cbielanska.com/articles (last accessed 23 July 2019).
26 See, eg: Purser et al (n 9); Purser et al (n 12); D. Setterlund, C. Tilse, J. Wilson, A. McCawley, and L. Rosenman, ‘Understanding Financial Elder Abuse in Families: The Potential of Routine Activities Theory’ (2007) 27 (4) Ageing and Society 599–614.
27 WHO Elder Abuse (2020) https://www.who.int/en/news-room/fact-sheets/detail/elder-abuse (last accessed 6 July 2020).
28 Purser et al (n 12)
29 WHO (n 27).
30 Cross et al (n 24); Tilse et al (n 4).
31 F. Matthews, ‘Doctors, Elder Abuse, and Enduring Powers of Attorney’ (2004) 117 The New Zealand Medical Journal 1–8; The Law Commission of New Zealand, Misuse of Enduring Powers of Attorney (Law Com. No. 40, 2000).
Two categories of elder abuse, related to the specific nature of the CPA, have been specified in the literature.\(^{32}\) The first concerns so-called ‘procedural abuse’, where the adult either lacks sufficient capacity to grant the CPA or is unduly influenced by the attorney to grant the CPA.\(^{33}\) As noted before, adults are particularly vulnerable to this form of abuse when their cognitive abilities are declining. The second category of abuse has been characterised by Gordon as a ‘violation of trust’ and concerns situations in which the attorney uses the CPA for purposes beyond those for which it was intended.\(^{34}\) The two types of abuse are connected in a sense that ‘procedural abuse’ may serve as a prelude to the inappropriate use of the CPA by the attorney.\(^{35}\) Although this categorisation is helpful in terms of distinguishing two important forms of abuse that can occur with regard to the CPA, the second category is considerably broad. Langan and Means note in this regard that in addition to a categorisation of the various types of abuse, attention should be given to the different levels or degrees of abuse.\(^{36}\)

In distinguishing different levels or degrees of abuse, it is important to realise that the inappropriate use of the CPA is not necessarily intentional. Research shows that there may be various underlying reasons for the inappropriate use of CPAs by attorneys. Manthorpe et al note in this regard that people ‘may not intend to abuse but may be confused when managing other people’s money or hold “distorting” views about their “entitlement” to these assets.’\(^{37}\) McCawley et al point out that the task of being an attorney for some people may not be so easy or straightforward after all.\(^{38}\) Tilse et al argue that in addition to the trustworthiness and willingness to accept responsibility, it is of paramount importance that attorneys understand their responsibility and are capable of carrying out the responsibilities granted to them by means of the CPA.\(^ {39}\) Based on this the following distinction as to the nature of misuse and abuse of CPAs by attorneys could be made:

1. Misuse of the CPA because the attorney is ill-informed or unaware of (certain) responsibilities;
2. Misuse (or a neglect of duties) of the CPA because the attorney lacks the necessary time, skills, motivation, or capacity to act as attorney;
3. Abuse of the CPA because the attorney intentionally deviates from the powers conferred to him by means of the CPA, with a view to advancing his own interests.\(^ {40}\)

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\(^{32}\) R.M. Gordon, ‘Material Abuse and Powers of Attorney in Canada: A Preliminary Examination’ (1993) 4(1–2) *Journal of Elder Abuse and Neglect* 173–193.; Hafemeister (n 24).

\(^{33}\) Gordon (n 32).

\(^{34}\) Ibid; Hafemeister (n 24).

\(^{35}\) Ibid.

\(^{36}\) J. Langan and R. Means, ‘Financial Management and Elderly People with Dementia in the UK: As Much a Question of Confusion as Abuse?’ (1996) 16 *Ageing and Society* 287–314; See also Setterlund et al (n 26) who place financial elder abuse at the end of a continuum of familial asset-management practices.

\(^{37}\) Manthorpe et al (n 10) referring to Langan and Means (n 36); C. Tilse, J. Wilson, D. Setterlund, and L. Rosenman, ‘Older People’s Assets: A Contested Site’ (2005) 24 *Australasian Journal on Ageing* S51–S56; Setterlund et al (n 26).

\(^{38}\) McCawley et al (n 8); See also Setterlund et al (n 26).

\(^{39}\) Tilse et al (n 4).

\(^{40}\) A similar though slightly different differentiation has been made by Gordon (n 32).
3. What Is the Profile of ‘Wrongdoers’ and What Triggers Their Misuse or Abuse of CPAs?

To date, few research studies have looked specifically into the profile of wrongdoers accused or guilty of misuse or abuse of a CPA. Research on financial elder abuse shows that although financial abuse may be committed by professionals such as care workers, financial advisors, or solicitors, in most cases, wrongdoers are close family members or relatives.\textsuperscript{41} This seems to fit the particular context of the CPA, as often a close family member such as a son or daughter, is appointed as attorney.\textsuperscript{42} When addressing the question what triggers the misuse or abuse of CPAs by family members acting as attorney, it should again be stressed that misuse of the CPA is not necessarily intentional. In their research on familial management of older adult’s assets, Setterlund et al conceptualise financial abuse as being at the end of a continuum of familial asset-management practices.\textsuperscript{43} They argue that in order to gain an understanding of what drives a person to abuse or misuse arrangements such as the CPA and to gain insight into why some practices may eventually turn into illegitimate or abusive practices, a contextual approach is needed.\textsuperscript{44} Often several factors play a role in enabling misuse or abuse.\textsuperscript{45} One example in this regard has already been mentioned before and concerns the attorney’s ignorance of the rights and obligations under a CPA. Combined with the adult’s complete and unfailing trust in the attorney, resulting in insufficient monitoring of the attorney’s actions, these two factors can create a setting in which misuse of the CPA by the attorney may occur.\textsuperscript{46} In some cases, the attorney’s task of looking after the adult’s affairs, is part of a whole range of caregiving tasks.\textsuperscript{47} Misuse or abuse of the CPA in these cases may be underpinned by the attorney’s desire ‘to make tasks as easy as possible.’\textsuperscript{48} Setterlund et al point out that an extensive caring role may also come with certain stress and the possibility of the caregiver getting overburdened, which may result in misuse of the CPA.\textsuperscript{49}

These two examples show the context in which an attorney needs to manage the adult’s affairs can be a complex one. Tilse et al note that this context may become even more complex by the competing interests of the state, service providers, and family members, when it comes to the use of the adult’s assets to provide for their own (health)care expenses and accommodation.\textsuperscript{50} They note in this regard:

Whereas policy changes increasingly promote planning for self-provision of retirement incomes and the use of capital assets to fund care choices, families

\textsuperscript{41} Purser et al (n 12); Davidson et al (n 14) 8; Bagshaw et al (n 14); Setterlund et al (n 26).
\textsuperscript{42} Bagshaw et al (n 14); Setterlund et al (n 26).
\textsuperscript{43} Setterlund et al (n 26).
\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid.
\textsuperscript{46} Setterlund et al (n 26). See also J. Wilson, C. Tilse, D. Setterlund, and L. Rosenman, ‘Older People and Their Assets: A Range of Roles and Issues for Social Workers’ (2009) 62 (2) Australian Social Work 155–167.
\textsuperscript{47} Tilse et al (n 37).
\textsuperscript{48} Wilson et al (n 46).
\textsuperscript{49} Setterlund et al (n 26).
\textsuperscript{50} Tilse et al (n 37); Tilse et al (n 8).
and older people often retain the view that income and care in older age should be primarily funded by the state.\textsuperscript{51}

Both Bagshaw et al and Wilson et al point out that older adults are increasingly under pressure to use their assets to provide for their own healthcare costs and what else is needed to ensure a comfortable old age, but also for their children.\textsuperscript{52} Linked to this, the attorney’s so-called ‘sense of entitlement’ to the adult’s assets is frequently mentioned as an underlying motive for the misuse or abuse of CPAs in the literature.\textsuperscript{53} This sense of entitlement may be based on various underlying feelings. Purser et al note in this regard the ‘early inheritance syndrome’ where a child acting as attorney feels entitled to the adult’s assets since ‘he will inherit these anyway’.\textsuperscript{54} This ‘syndrome’ might be exacerbated by the feeling that the adult no longer needs his financial assets or at least not all of it, whereas the attorney has good use for it. Or in cases where the attorney has an extensive caring role, the feeling of entitlement to assets as a reward for services rendered.\textsuperscript{55} The attorney’s sense of entitlement can lead to what is by Tilse et al referred to as ‘asset-stripping’, where the attorney is taking steps to ensure that his future inheritance is not exhausted to fund the care and accommodation expenses of the adult.\textsuperscript{56} As noted before, misuse of this kind is not necessarily intentional. Conrad et al talk in this regard about ‘honest confusion’ as the desire to pass down assets may be mutually shared by both parent and child.\textsuperscript{57} An attorney may act in the mistaken belief that he acts appropriately as the adult would have wanted him to use the assets in this way.\textsuperscript{58} Abuse of the CPA for this purpose can, however, also be intentional or become intentional over time. For instance, in cases where the attorney does not act in accordance with the wishes and instructions of the adult and is taking the adult’s assets purely for his own interests, thereby reducing the inheritance of other heirs.

4. What Is the Response to the Misuse or Abuse of CPAs?

Based on the previous section, one must conclude that the basic premise of the CPA, ie the assumption that attorneys in all cases and situations act for the benefit of the adult, does not always hold true.\textsuperscript{59} There are cases in which the adult’s trust and confidence are betrayed by the attorney. The breadth of powers often conferred by means of CPAs, means that in these cases the attorney can, eg sell the adult’s property or withdraw money from the adult’s bank account to use these assets to his own

\textsuperscript{51} Tilse et al (n 37).
\textsuperscript{52} Bagshaw et al (n 14); Wilson et al (n 46).
\textsuperscript{53} Purser et al (n 12); Bagshaw et al (n 14); Davidson et al (n 14); K.J. Conrad, M. Iris, J.W. Ridings, K.P. Fairman, A. Rosen, and K.H. Wilber, ‘Conceptual Model and Map of Financial Exploitation of Older Adults’ (2011) 23 (4) Journal of Elder Abuse and Neglect 304–325; D.J. Rabiner, J. O’Keeffe, and D. Brown, ‘A Conceptual Framework of Financial Exploitation of Older Persons’ (2005) 16 (2) Journal of Elder Abuse and Neglect 53–73; Tilse et al (n 37).
\textsuperscript{54} Purser et al (n 12).
\textsuperscript{55} Davidson et al (n 14); Rabiner et al (n 53); See also Setterlund et al (n 26).
\textsuperscript{56} Tilse et al (n 8); Rabiner et al (n 53).
\textsuperscript{57} Conrad et al (n 53).
\textsuperscript{58} Bagshaw et al (n 14).
\textsuperscript{59} McCawley et al (n 8).
advantage. As Gordon notes, this can be done ‘virtually undetectable’ unless a third party such as a friend, relative or professional is keeping a watchful eye and reports his suspicions to the authorities.\(^{60}\) Bond notes that even in cases where the authorities become aware of the misuse or abuse, the full extent of this abuse might be difficult to uncover. For instance, in cases where the adult, due to physical frailty or a decline of cognitive capabilities, is no longer able to provide the authorities with the necessary information.\(^{61}\) Alternatively, the adult might be unwilling to provide information out of fear of jeopardising the relationship with the attorney.\(^{62}\) Moreover, as concluded by Purser et al, even in cases where adults want to report the misuse or abuse of their CPA, there are significant barriers to access justice.\(^{63}\) The most predominant barrier in this regard is the ability of adults to obtain (legal) advice and assistance, especially in cases where the adult has been isolated by the attorney who is denying friends and family access to the adult and has taken away means of communication.\(^{64}\) As to the impact of this abuse, Hafemeister notes that beside the risk of financial ruin, the abuse might also have psychological consequences. He notes in this regard: ‘losing assets accumulated over a lifetime, often through hard work and deprivation, can be devastating.’\(^{65}\)

The aforementioned underlines the importance of appropriate safeguards preventing misuse and abuse of CPAs from occurring. However, as has become clear in this paragraph, designing these safeguards cannot be considered an easy task. Not only can different levels and degrees of misuse and abuse be distinguished, but research also shows that often several factors play a role in enabling the abuse or misuse of CPAs.\(^{66}\) In addition, the competing interests of actors such as the state, service providers, family members, and attorneys with regard to the financial assets of the adult, mean that what is considered abuse or misuse might also be dependent on the eye of the beholder. Further research looking into the various factors and underlying dynamics enabling misuse and abuse of the CPA remains therefore important in order to ensure that safeguards are as appropriate and targeted as possible.

### III. APPROPRIATE SAFEGUARDS IN THE CONTEXT OF THE CPA

In the previous paragraph, an overview of the literature on the misuse or abuse of CPAs has been presented. Bows and Penhale note that such a knowledge and understanding are necessary in order to determine which safeguards to prevent and address the various types of abuse are most appropriate.\(^{67}\) As noted in the introduction, this article explores the question what appropriate safeguards preventing misuse or abuse of CPAs look like, within the framework of Article 12(4)

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60 Gordon (n 32).
61 J.B. Bond, R. Cuddy, G.L. Dixon, K.A. Duncan, and D.L. Smith, ‘The Financial Abuse of Mentally Incompetent Older Adults: A Canadian Study’ (2000) 11 (4) *Journal of Elder Abuse & Neglect* 23–38.
62 Purser et al (n 9).
63 Purser et al (n 9); Purser et al (n 12).
64 Ibid.
65 Hafemeister (n 24).
66 Setterlund et al (n 26).
67 H. Bows and B. Penhale, ‘Editorial: Elder Abuse and Social Work: Research, Theory and Practice’ (2018) *48 British Journal of Social Work* 873–886.
UNCRPD. Article 12(4) UNCRPD entails an obligation for States Parties to provide for three categories of safeguards preventing abuse: respect for the rights, will, and preferences of the adult, avoiding undue influence, and managing conflicts of interest. After highlighting the literature on the operationalisation of these three categories of safeguards in general, each subparagraph focuses on the question how these safeguards can be operationalised in the context of the CPA. Building on the information presented in the previous paragraph, directions as to how appropriate safeguards look like in the context of the CPA are presented.

1. Safeguards Ensuring Respect for the Rights, Will, and Preferences of the Adult

Article 12(4) UNCRPD’s requirement to provide for safeguards ensuring respect for the rights, will, and preferences of the adult is best understood in conjunction with Article 12(3) UNCRPD, requiring States Parties to take appropriate measures to provide persons with disabilities with the support they need in the exercise of their legal capacity. Article 12(3) UNCRPD has been the subject of much debate. Although it goes beyond the scope of this article to delve into the depths of this debate, it is necessary to provide a synopsis as a basis upon which further operationalisation of Article 12(4) UNCRPD’s first category of safeguards in the context of the CPA, can take place.68 With regard to Article 12(3) UNCRPD, a distinction is often made between substitute and supported decision-making. Substitute decision-making is frequently characterised as amounting to a situation in which ‘a decision is made on behalf of a person who is unable to make that decision.’69 This is then contrasted with supported decision-making where the adult is provided with the support needed to make a decision himself.70 The Committee on the Rights of Persons with Disabilities (the Committee) has with regard to Article 12(3) UNCRPD noted that ‘support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and never amount to substitute decision-making.’71

In this regard, it is necessary to clarify a misunderstanding with regard to CPAs. In the majority of the literature to date, the CPA is classified as an instrument of substitute decision-making and the aspect of representation including the appointment of an attorney, albeit by the adult himself, is emphasised.72 However, this focus on representation creates the risk that the possibility for the adult to provide the attorney with instructions as to how to act and informing the attorney of his wishes and preferences, before or during use of the CPA, is overlooked. Martin et al and Stelma-

68 The reader is for more information referred to, eg Stelma-Roorda et al (n 5) and W. Martin, S. Michalowski, J. Stavert, A. Ward, A. Ruck Keene, C. Caughey, A. Hempsey, and R. McGregor, The Essex Autonomy Project Three Jurisdictions Report. Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK (University of Essex, 2016).
69 P. Webb, G. Davidson, R. Edge, D. Falls, F. Keenan, B. Kelly, A. McLaughlin, L. Montgomery, C. Mulvenna, B. Norris, A. Owens, and R.S. Irvine, ‘Key Components of Supporting and Assessing Decision Making Ability’ (2020) 72 International Journal of Law and Psychiatry 1–9.
70 Ibid; UNCRPD, General Comment No. 1. Article 12: Equal recognition before the law.
71 Ibid. Although the phrase ‘substitute’ and ‘supported decision-making’ are used by the Committee, both phrases do not feature in the UNCRPD itself and it has been argued that a framing of the requirements of Article 12 UNCRPD in such a dichotomy is unhelpful as both phrases are mired with ambiguity.
72 See, eg McCawley et al (n 8); Purser et al (n 9); Purser et al (n 12).
Roorda et al argue that it is this aspect that signifies the potential value of the CPA as an instrument fulfilling the requirements of Article 12(3) UNCRPD. Martin et al note in this regard, that the requirement of Article 12(3) UNCRPD is broader than support for decision-making. States are required to provide adults with the support in the exercise of their legal capacity. Two categories of support are distinguished by Martin et al in this regard:

- support enabling an adult to make a decision himself; and
- support in the absence of decision-making capacity of the adult.

The CPA can play a role with regard to both these forms of support. When it comes to the first category of support, ie support enabling the adult to make a decision himself, it is important to realise that the entry into force of a CPA not necessarily coincides with full incapacity of the adult. Capacity is time and decision-specific, meaning that although a person may lack the capacity to take, eg a decision on the sale of the house, he may be perfectly able to decide on a birthday gift for his grandchild. In other words, there may be certain decisions an adult with declining decision-making capacity is still able, with support, to make himself. In these cases, the attorney can provide the adult with the support needed to make his own decisions. The second category of support becomes relevant when an adult lacks the ability to make his own decisions. With regard to this second category of support, Martin et al argue that the challenge is to find ways to support the adult in the exercise of his legal agency. To demonstrate this, Martin et al disentangle the concept of legal capacity. Two components are generally distinguished: ‘legal standing’ and ‘legal agency’. The first concerns the ‘ability to hold rights and duties’, the second concerns ‘the power to engage in transactions and create, modify or end legal relationships’. Martin et al note that even in cases where the decision-making capacity of the adult is impaired or absent, there might be ways to support the adult in the exercise of his legal agency. The CPA might provide such a way. An attorney can take over the handling of those affairs for which the adult is no longer, or not at present, able to act and decide. By subsequently acting according to the previously recorded wishes and instructions of the adult, the attorney supports the adult in the exercise of his legal agency.

Taking the aforementioned into account and building on the information presented in paragraph 2, three directions as to appropriate safeguards ensuring respect for the adult’s rights, will, and preferences can be inferred.

A. The will, preferences, and instructions of the adult should be clearly documented

Emphasising the value of the CPA as an instrument providing the adult with support in the exercise of his legal capacity, not only ensures the adult’s autonomy is as much
as possible respected, but it also has an important advantage with regard to the adult’s protection against the misuse or abuse of CPAs. As noted, misuse or abuse of CPAs is not necessarily intentional. Attorneys may act in the mistaken belief that their actions are perfectly legitimate because they are based on ‘what the adult would have wanted’. Langan and Means argue that in determining whether actions should be classified as abuse, too little attention is paid to the view of the adult either before the onset of diseases impairing capacity or during lucid intervals.79 With regard to, eg gifts from the adult to the attorney, they note that older adults may indeed ‘feel a strong drive to leave their money to their children rather than have it all consumed by the costs of services received in the last few years of their life.’80 The issue here seems a lack of clear documentation as to the adult’s wishes and instructions, with the result that it becomes unclear whether the attorney is acting on behalf of the adult or purely in his own interest. Clear documentation of the adult’s wishes and instructions as to, eg gifts the attorney may give to himself or to others, seems a potential way forward in this regard.

B. Support of the first category (support enabling the adult to make a decision himself) should be ensured for adults who want to be involved in the execution of their CPA

As noted above, the entry into force of the CPA not necessarily coincides with full incapacity of the adult. Indeed, research shows that CPAs are sometimes also made by adults who due to physical frailty are less able to act themselves or adults who are not digitally proficient, therefore preferring someone else to take care of their affairs for them.81 Linked to this, various types of CPAs can be distinguished. There are CPAs entering into force immediately after the adult’s signature, remaining in force upon the adult’s incapacity. There are also CPAs entering into force upon a specified time in the future, most commonly a time when the adult becomes less able to act and decide himself.82 The advantage of the first type of CPA is that it provides more room for a gradual transfer of responsibilities from the adult to the attorney. However, regardless of which type of CPA is chosen, it is important that there are safeguards ensuring the adult’s involvement in the execution of the CPA in cases where the adult desires involvement and still has decision-making capacity with regard to the affair at hand. Tilse et al conducted a study looking at the experiences of older adults who still had capacity but needed help with managing their financial affairs.83 They found that although some adults were perfectly happy to relinquish complete control over their financial affairs to someone else and did not need to be kept informed, there were also adults seeking more involvement in the running of their (financial) affairs. These adults either found their carer or attorney unwilling or unable to involve them in the decision-making process or were afraid to ask due to

79 Langan and Means (n 36).
80 Ibid; See also Conrad et al (n 53).
81 Stelma-Roorda et al (n 5); Wilson et al (n 46).
82 Council of Europe Recommendation CM/Rec (2009)11; Hafemeister (n 24).
83 C. Tilse, D. Setterlund, J. Wilson, and L. Rosenman, ‘Managing the Financial Assets of Older People: Balancing Independence and Protection’ (2007) 37 (3) The British Journal of Social Work 565–572.
fear of disrupting the relationship.\textsuperscript{84} Change at this point naturally begins with the attorney’s willingness to involve the adult in the decision-making process when possible. However, a greater understanding and more awareness of the dynamic nature of the concept of capacity, may help attorneys to assess when to provide support of the first category (enabling the adult to make a decision himself) and when to act on behalf of the adult according to the adult’s (previously expressed) wishes and instructions. This also applies to professionals. Gordon highlights the risk that professionals in cases where a CPA is in place, ignore the adult and instead turn to the attorney for all forms of decision-making.\textsuperscript{85} Adequate training might help professionals to assess whether the adult is still able, with support, to make his own decision, instead of turning to the attorney by default.

C. States should ensure attorneys are ‘up to the task’ and receive sufficient support
As noted, misuse of the CPA is not necessarily intentional in cases where the attorney lacks the necessary time, skills, motivation, or capacity to act as attorney. A direction following from this is that countries should provide safeguards ensuring that upon entry into force of the CPA, the attorney is ‘up to the task’. Preferably, adults themselves should, already at the time the CPA is made, consider the suitability of the attorney and discuss with the prospective attorney whether he or she is willing to undertake this task. Adults should have the opportunity to appoint a substitute or replacement attorney in case the prospective attorney is, upon entry into force of the CPA, unable or unwilling to carry out the task. States should ensure that attorneys who are ‘up to the task’ receive sufficient support with the execution of this task. This support can consist of professional assistance for attorneys helping them to assess the decision-making capabilities of the adult. Support can also include the availability of financial advice, in cases where the attorney is responsible for complex financial decisions. Or legal advice in cases, where the attorney is, eg experiencing difficulties in the execution of his task due to disturbed family relationships.\textsuperscript{86}

2. Safeguards Ensuring that There Is No Undue Influence
Although a lot has been said about the operationalisation of the first category of safeguards, safeguards ensuring respect for the rights, will, and preferences of the adult, much less has been said about safeguards ensuring there is no undue influence. In General Comment No. 1, the Committee merely notes that undue influence occurs in situations ‘where the quality of the interaction includes signs of fear, aggression, threat, deception or manipulation.’\textsuperscript{87} Both Martin et al and Series note that it is difficult to determine what the precise turning point is; which level of manipulation, eg makes influence undue?\textsuperscript{88} The Committee leaves this question unanswered and confines itself to stating that safeguards addressing undue influence should be balanced with the rights,

\begin{itemize}
\item \textsuperscript{84} Ibid.
\item \textsuperscript{85} Gordon (n 32).
\item \textsuperscript{86} Tilse et al (n 8); Setterlund et al (n 26).
\item \textsuperscript{87} UNCRPD, General Comment No. 1. Article 12: Equal recognition before the law.
\item \textsuperscript{88} Martin et al (n 68); L. Series, ‘Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms’ (2015) 40 International Journal of Law and Psychiatry 80–91.
\end{itemize}
will, and preferences of the adult, which ‘includes the right to take risks and make mistakes’. Further research looking into, eg the question which levels of influence in practice amount to undue influence, seems in other words called for. The information presented in paragraph 2 cannot provide an answer to this question. However, it does provide information as to how situations of undue influence can potentially be avoided. In this regard, the following two directions as to appropriate safeguards can be inferred:

A. States should consider strategies promoting the timely drafting of CPAs

Although undue influence can be encountered by anyone, it seems evident that the risk is exacerbated in cases where the decision-making capabilities of the adult are declining. As it is not an unlikely occurrence for adults to wait until the ‘11th hour’, states should consider strategies ensuring that adults who want to make a CPA, do so ‘on time’. Education and awareness campaigns could promote the early drafting of CPAs, for instance, by pointing out to adults that timely drafting ensures that there is no rush to take decisions on the wishes and instructions to be included in the CPA and on the choice of attorney. In addition, states could provide training for professionals, helping them to find the ‘right time’ to introduce the notion of future planning in cases where the 11th hour is fast approaching. Samsi and Manthorpe note in this regard that professionals might find it difficult to determine the appropriate moment to introduce the idea of future planning in cases where the adult is still adjusting to a diagnosis of dementia.

B. States should provide for safeguards ensuring that CPAs are made by adults with capacity, who are not unduly influenced by the attorney

As noted, undue influence can result in procedural abuse, where the attorney is using improper means to persuade the adult to make a CPA. In all cases, but especially in cases where CPAs are made at the 11th hour, it is therefore important that states provide for safeguards ensuring that CPAs are only made by adults who still have sufficient capacity. Adults, who understand the scope and implications of the CPA and who are not unduly influenced by the prospective attorney or any other person. Unfortunately, it is not always the case that adults have sufficient capacity, eg in a small-scale exploratory study Cross et al identified several cases where CPAs had been signed by adults who did not fully understand the implications of their CPA. In another small-scale study, Bagshaw et al found that many adults, especially adults with declining decision-making capabilities, were not mindful of potential risks to their (financial) wellbeing. The involvement of a third party or person to assess whether an adult sufficiently understands the scope and implications of the CPA, seems essential in this regard. There are some who argue or imply that this third party should be a professional. The advantage is that professionals may be better

89 UNCRPD, General Comment No. 1. Article 12: Equal recognition before the law; Stelma-Roorda et al (n 5).
90 Ibid.
91 Mitchell et al (n 7); Setterlund et al (n 11).
92 Samsi and Manthorpe (n 19).
93 Cross et al (n 24).
94 Bagshaw et al (n 14).
95 Purser et al (n 12); Hafemeister (n 24).
equipped or can receive training to adequately assess whether or not an adult has the capacity to make a CPA and may be in a better position to identify any signs of undue influence or other forms of procedural abuse occurring. In addition, they can discuss the question of suitability of the attorney with the adult, advise on the scope of the authority being granted to the attorney and discuss with the adult which safeguards to supervise the attorney, should be included in the CPA.

3. Safeguards Ensuring that Conflicts of Interest Are Managed

Although the Committee has said little about safeguards ensuring that there is no conflict of interest, Martin et al highlight an important point, namely that safeguards should not be focussed on the elimination of conflicts of interest, but rather ensure that (potential) conflicts of interest are managed. In other words, safeguards should not have the undesirable effect of excluding suitable attorneys. In this regard, the following two directions as to appropriate safeguards can be inferred.

A. States should provide for safeguards ensuring attorneys are aware of their rights and responsibilities

Aside from situations where adults were insufficiently aware of the implications of their CPA, Cross et al also identified situations where attorneys did not fully understand their role and responsibilities. Setterlund et al note in this regard that attorneys should be aware that ‘although they act in private spaces and in the context of family relationships, whatever the circumstances legal and ethical obligations to others always apply.’ In order to combat the, eg distorting views attorneys may have about their ‘entitlement’ to assets and to avoid inadvertent misuse of the CPA, states should provide safeguards ensuring attorneys are aware of their rights and responsibilities. These safeguards can once again take the form of training or awareness campaigns. A more stringent alternative is to provide attorneys, prior to the entry into force of the CPA, with information and require them to confirm they are aware of their rights and responsibilities.

B. States should provide for safeguards ensuring there is some form of ‘oversight’ on the actions of the attorney

A declining ability of the adult to manage his own affairs is often accompanied by a declining ability to supervise and monitor the attorney’s actions. This means that some form of ‘oversight’ on the actions of the attorney is needed. This is particularly important in situations where there are conflicting interests, eg gifts made on behalf of the adult to the attorney. Oversight can be based on stringent safeguards, such as the obligation to submit a detailed annual financial statement to a supervisory institution such as a court or tribunal. States should, however, ensure that safeguards are

96 Purser et al (n 12).
97 Martin et al (n 68).
98 Ibid.
99 Cross et al (n 24).
100 Setterlund et al (n 26).
101 McCawley et al (n 8).
102 Hafemeister (n 24).
not too stringent. As already described in the introduction of this article, too stringent safeguards may result in adults choosing other (informal) anticipatory decision-making mechanisms, which offer less protection than the CPA. In addition, prospective attorneys might be unwilling to take up the position of attorney as this task is considered too burdensome. Donnelly notes in this regard that there is, as yet no empirical evidence regarding a link between stringent measures and reduced instances of abuse.103 States could therefore also recommend or require the inclusion of safeguards in the CPA by the adult and the (prospective) attorney. As noted, professionals could play an important role in this regard by encouraging adult and attorney to put safeguards in place. Wilson et al justly note that the absence of safeguards not only creates a risk for the adult, but also for the attorney, namely being accused of the inappropriate management of the adult’s affairs by others such as family members.104

4. General Safeguards

As the abuse or misuse of CPAs falls within the broader area of abuse of elderly and adults with cognitive impairments in general, more general safeguards moving beyond the specific context of the CPA, are also required. A few examples are mentioned here, although it should be noted that this list is by no means exhaustive. In addition to providing safeguards geared towards the prevention of misuse or abuse, states should also provide safeguards ensuring misuse or abuse is detected and stopped. Efforts in this regard could consist of public campaigns creating more awareness of the risk factors and indicators of abuse among professionals as well as the general public.105 In addition, it should for both these groups be abundantly clear, where suspicions of misuse or abuse can be reported (e.g., the police or an adult protection authority). Finally, states should ensure that there is access to justice for the victims of the abuse or misuse. Chesterman warns in this regard against strategies focusing solely on the vulnerability of the victim. He points out that the standard response to abuse in cases where the adult has a cognitive impairment, often includes the appointment of a deputy or guardian and the removal of decision-making authority.106 Chesterman notes in this regard:

A number of factors render guardianship a problematic response to elder abuse. Key among these is that guardianship is a future protective response that focuses on the victim. It does not deal with past wrongdoing. Rather than focusing on the victim’s vulnerability, elder abuse response strategies could be improved by prioritising what service responses, if any, the person wants even when the person has a significant cognitive impairment.107

In this paragraph, the information on the risk of misuse and abuse presented in paragraph 2 has been used to operationalise the three categories of safeguards

103 Donnelly (n 20).
104 Wilson et al (n 46).
105 Bond et al (n 61)
106 Chesterman (n 10)
107 Ibid.
mentioned in Article 12(4) UNCRPD and directions as to how appropriate safeguards should look like, have been presented. These directions remain, however, somewhat abstract. They are broadly phrased and leave room for implementation in various ways by means of a range of safeguards. The next paragraph will therefore focus on the safeguards currently employed in five European countries to examine how these countries are trying to meet the requirement of Article 12(4) UNCRPD to provide for appropriate safeguards, in the context of the CPA.

IV. SAFEGUARDS IN BELGIUM, ENGLAND & WALES, GERMANY, THE NETHERLANDS, AND SWITZERLAND

Safeguards ensuring adequate protection for the adult against misuse or abuse of the CPA, are relevant at three different stages in the so-called ‘life-span’ of CPAs: (i) when the adult makes a CPA, (ii) when the CPA enters into force, and (iii) when the CPA has become ‘active’ and the attorney has started to act on behalf of the adult. This paragraph will look at the safeguards in each of these three phases, implemented in Belgium, England and Wales, Germany, the Netherlands and Switzerland.

In these countries, adults have the opportunity to establish either a zorgvolmacht (Belgium), a lasting power of attorney (England and Wales), a Vorsorgevollmacht (Germany), a levenstestament (The Netherlands), or a Vorsorgeauftrag (Switzerland). All countries were included in a comparative study looking at best practices as a solution to problems with the CPA in the Netherlands and the selection of legal systems was in first instance geared towards this. For the purpose of this article, an external normative approach has, however, been adopted. This means that neither the Netherlands, nor any of the other four countries, has been used as a starting point for the comparative study. Instead, all countries were looked at with a view to providing insight into how these countries try to meet the requirement of Article 12(4) UNCRPD, ensuring that appropriate safeguards are in place, and the steps that are in this regard still to be taken. Although the selection of legal systems may at first glance seem somewhat arbitrary in this regard, this is certainly not the case. Included are countries where the possibility to make a CPA has been in place for some time (England and Wales and Germany) and where legislation is more recent (Belgium and Switzerland). In addition, both common law (England and Wales) and civil law jurisdictions are included. Finally, included are countries where there is an extensive regulatory framework (Belgium, England and Wales, and Switzerland), a country where this regulatory framework is less extensive (Germany), and a country where there is no specific regulatory framework at all (the Netherlands).

1. Safeguards at the time the CPA is made

Several of the directions as to appropriate safeguards highlighted in the previous paragraph are important around the time the adult decides to make a CPA. It is first of all important that there are safeguards in place ensuring that the adult still has sufficient capacity to make the CPA and is not unduly influenced by the attorney. When the adult has sufficient capacity to make a CPA, it is subsequently important that wishes and instructions are clearly documented in the CPA.
A. States should provide for safeguards ensuring that CPAs are made by adults with capacity, who are not unduly influenced by the attorney

When studying the efforts undertaken in the various countries to incorporate this direction, the tension between ease of use and protection becomes clearly visible. Countries on the one hand do not want to create too big a hurdle for adults to make a CPA, but at the same time also want to ensure that sufficient protection is in place. Although adults are in most countries advised to use the services of a professional (often a notary) to draft a CPA, in Belgium, Germany, the Netherlands, and Switzerland, CPAs may also be drafted by adults themselves, without the involvement of a third party. In order to provide some form of safeguard and to prevent situations where the adult simply signs a document drafted by someone else, in Switzerland, the CPA has to be handwritten from beginning to end when drafted without the involvement of a third party. The question is whether safeguards such as these offer sufficient protection in practice. As noted in the previous paragraph the involvement of a third party assessing whether the adult understands the scope and implications of the CPA seems essential. This third party can be a professional, but also someone who knows the adult well, as is the case in England and Wales where a so-called ‘certificate provider’ needs to confirm that the adult understands the significance of the CPA and has not been unduly influenced to make it. This certificate provider can be a professional such as a lawyer or physician, but also someone who has known the adult well for at least 2 years, such as a friend or colleague (family members cannot act as certificate provider). Professionals must, when asked to assess the capacity of the adult, have the skills to do so. Significant efforts have been undertaken in the Netherlands to provide notaries with the tools and assistance to carry out such an assessment. A roadmap has been developed, offering notaries a framework for the assessment of capacity, not only with regard to CPAs, but other notarial deeds such as wills as well. In case a notary is unsure, the client can be referred to a so-called ‘VIA-arts’, an independent physician who can be approached to assess whether the adult still has sufficient capacity to make a CPA.

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108 Article 490 Belgian Civil Code; Article 167 German Civil Code (GCC); W. Zimmermann, Vorsorgevollmacht, Betreuungsverfügung, Patientenverfügung für die Beratungspraxis (Erich Schmidt Verlag, 2017) 50–54; Zimmerman notes that in Germany with regard to some affairs (eg registrations in the land register) a so-called 'beglaubigung' of the Vorsorgevollmacht is required. In these cases, a third party, such as a notary, has to confirm the signature is that of the person who made the CPA. A beglaubigung, however, does not involve a verification as to whether the will of the adult corresponds with what has been recorded in the CPA, meaning the involvement of the third party can be considered rather limited; C.G.C. Engelbertink, 'Het levenstestament in de maatschappij' in: Notarie¨le bescherming ouderen, pre-advisies KNB (SDU Uitgevers, 2013) 69–74; Article 361(1) Swiss Civil Code (SCC).

109 Article 361(2) SCC; Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Erwachsenenschutz, Personenrecht und Kindesrecht, 2006).

110 D. Lush and C. Bielanska, Cretney & Lush on Lasting and Enduring Powers of Attorney (LexisNexis, 2017); Office of the Public Guardian https://www.gov.uk/government/publications/make-a-lasting-power-of-attorney/lp12-make-and-register-your-lasting-power-of-attorney-a-guide-web-version#A10 (last accessed 26 October 2020).

111 A.R. Autar, 'Inleiding' in A.R. Autar, J.P.M. Stubbe, and L.C.A. Verstappen (eds.), Compendium Levenstestament (Sdu, 2018) pp. 19–27; Vereniging Artsen Volksgesondheid https://vavolksgesondheid.nl/wilsbekwaamheid/ (last accessed 26 October 2020).
B. The will, preferences, and instructions of the adult should be clearly documented
When the adult has sufficient capacity and is not unduly influenced the CPA can be made. At this stage, it is important that the adult’s wishes and instructions are documented clearly and concise. When the adult, eg directs the attorney to consult a designated person with regard to ‘major decisions’, it should be clear which ‘major decisions’ the adult has in mind. In addition, wishes and instructions may not be contrary to the law. In England and Wales, there are eg, restrictions regarding gifts the attorney may make on behalf of the adult and the adult cannot authorise the attorney to disregard these restrictions. A third aspect that must be considered concerns the influence of wishes and instructions, addressed to the attorney, on the acceptance of the CPA by, eg banks. An example is the instruction, included in some CPAs, obliging the attorney to obtain the consent of a third-party regarding expenses that exceed a certain amount. In cases where banks lack the facility to check whether this consent has been obtained, they might be unwilling to accept the CPA in order to avoid potential liability claims in the future. The adult should consider the aforementioned aspects, preferably when the CPA is made, which once again makes the involvement of a professional advisable. A solution proposed in Germany and Belgium regarding the acceptance by organisations such as banks, is the distinction between an internal mandate and an external power of attorney. In the internal mandate between adult and attorney, the wishes and instructions of the adult can be recorded. The external power of attorney subsequently provides the attorney with the authority to act on behalf of the adult. This opens up the possibility for the adult to provide the attorney with a detailed account of his wishes and preferences, which is preferable to a scenario where compromises have to be made to ensure the acceptance of the CPA. The alternative in cases where the CPA has already been made and where there is a risk of the CPA not being accepted, is damage-control. In England and Wales, the court has the authority to sever provisions that are ineffective or illegal and in Switzerland where the protection of adults falls under the remit of cantonal adult protection authorities, these authorities may interpret the Vorsorgeauftrag and add clarifications or adjustments on minor, secondary points. It goes without saying that with regard to practices like these, it is important that the will and preferences of the adult are respected as much as possible.

2. Safeguards around the Entry into Force of the CPA
Upon the entry into force of the CPA, it is important that attorneys are aware of their rights and responsibilities and are ‘up to the task’, meaning they at least have the necessary time, motivation, and capacity to act as attorney.

112 See, eg the case of Re Thrussell (Lush and Bielanska n 110).
113 See, eg section 12(2) of the Mental Capacity Act 2005 (MCA 2005).
114 T. Wuyts, ‘Een kritische doorlichting van (modellen inzake) zorgvolmachten’ in G. Verschelden (ed.), Rechtskroniek voor het Notariaat. Deel 37 (Knops Publishing, 2020) pp. 91–131; G. Müller and T. Renner, Betreuungsrecht und Vorsorgeverfügungen in der Praxis (Carl Heymanns Verlag, 2018) pp. 67–304.
115 Section 23(1) of the MCA 2005; Article 364 SCC.
A. States should provide for safeguards ensuring that attorneys are aware of their rights and responsibilities

Attorneys should, upon the entry into force of the CPA, be aware of their rights and responsibilities. Fassbind notes that prospective attorneys often agree to be nominated, without fully realising and understanding what the role entails. In Switzerland, the adult protection agencies are therefore obliged to inform attorneys of their rights and responsibilities. This is particularly important in cases where the attorney must consider restrictions and obligations imposed by law. Examples are the restrictions regarding gifts that can be made on behalf of the adult and the obligation for attorneys to keep accounts, applicable in England and Wales. Attorneys should be made aware of these rights and obligations, preferably in an active manner as is the case in Switzerland.

B. States should ensure attorneys are ‘up to the task’

An assessment of the skills of the attorney is preferably left to the discretion of the adult at the time the CPA is made. Most countries confine themselves to an exclusion of certain persons from the role of attorney. In England and Wales, eg a person who has recently been declared bankrupt, cannot act as attorney. At first glance, this seems different in Switzerland, where the adult protection agencies, according to Article 363(2) of the Swiss Civil Code, are obliged to assess the suitability of the prospective attorney upon the entry into force of the CPA. In practice, most authorities check whether the prospective attorney has a criminal record or appears in the insolvency register. The process can be more extensive in situations where there seems to be a blatant mismatch between attorney and adult, eg a situation in which a billionaire with complex financial interests has appointed a person who has never dealt with such interests before.

3. Safeguards When the CPA Has Become ‘Active’

There are several safeguards important when the CPA has become ‘active’ and the attorney, in other words, has assumed his responsibility.

A. Support of the first category (support enabling the adult to make a decision himself) should be ensured for adults who want to be involved in the execution of their CPA

A first direction that was mentioned in paragraph 2, is that there should be safeguards ensuring that adults who still want to be involved in the running of their affairs are given the opportunity to do so. This is clearly something with which in terms of safeguards more can be done in the various countries. A striking observation in this regard is that not all countries seem to be aware of the dynamic nature of

116 https://www.aelterbasel.ch/finanzen-sicherheit/vorsorge/prima-bs-beratungsstelle-fuer-private-beistandspersonen-und-vorsorgebeauftragte/ (last accessed 25 October 2020).
117 Article 363(3) SCC.
118 Section 12 MCA 2005 and Section 7.58 MCA 2005 Code of Practice.
119 Section 10 MCA 2005.
120 Article 363(2) SCC.
121 This observation is based on enquiries I made at two adult protection authorities.
capacity as being time- and decision-specific. In Switzerland, the CPA can only enter into force when the adult is ‘no longer capable of judgement’ (Article 360(1) SCC). This severely limits the possibilities of the CPA being used as an instrument for adults who, with support, are still able to make their own decision. In other countries, attorneys are legally obliged to consult and involve the adult in the execution of the CPA. In England and Wales, this follows from section 9(4) of the MCA 2005, where it states that attorneys should act in accordance with the principles of the MCA 2005. These principles include, among others, the principle that ‘a person must be assumed to have capacity unless it is established that he lacks capacity’ and the principle that ‘a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.’ In Belgium, attorneys are according to Article 490/2 (2) of the Belgian Civil Code (BCC) obliged to involve the adult as much as possible in the execution of the CPA. In addition, the attorney needs to consult either the adult or a, by the adult, designated person at regular intervals and at least once a year. As has been noted, it is important that representatives are aware of such obligations and in addition receive support when needed.

**B. States should ensure attorneys receive sufficient support**

The need for adequate support is something that has been mentioned several times throughout this article. It is something, ie slowly getting more attention in all five countries. In Germany, support is provided by so-called ‘Betreuungsvereine’, associations focusing predominantly on the recruitment, training, and support of so-called ‘ehrenamtliche Betreuer’ (volunteers who can be appointed as guardian by the court). Pursuant to section 1908f of the German Civil Code, the activities of these associations must also include the provision of support for attorneys. A quick search of the web pages of several local ‘Betreuungsvereine’ shows that activities in this regard are often linked to already existing support initiatives open to voluntary guardians. Examples of the support provided are training, discussion groups focusing on the exchange of experiences and the possibility to consult a professional. In Switzerland, the first initiatives to organise support for attorneys are also emerging. An example is the adult protection authority of Basel-Stadt, which has opened a helpdesk for attorneys. It is, however, unknown whether these initiatives sufficiently meet the attorney’s need for support and whether attorneys are at all able to find these organisations when they have questions or require assistance.

**C. States should provide for safeguards ensuring there is some form of ‘oversight’ on the actions of the attorney**

The attorney’s need for support should not only be considered by states, but also by adult and attorney at the time the CPA is made. This can go hand in hand with

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122 Section 1 of the MCA 2005.

123 See, eg the webpage of the Betreuungsverein Nordhessen-Kassel https://www.caritas-kassel.de/ich-suche-hilfe/allgemeine-hilfen/betreuungsverein/betreuungsverein (last accessed 25 October 2020).

124 https://www.aelterbasel.ch/finanzen-sicherheit/vorsorge/prima-bs-beratungsstelle-fuer-private-beistandspersonen-und-vorsorgebeauftragte/ (last accessed 25 October 2020).
creating some form of oversight on the actions of the attorney. All countries offer adults various possibilities to include their own safeguards in the CPA. Examples are the appointment of more than one attorney, the appointment of a ‘supervisor’, or the appointment of so-called ‘trusted persons’ with whom the attorney has to confer with regard to certain decisions. An interesting safeguard is the appointment of a so-called ‘ad hoc attorney’ in Belgium, a temporary attorney who is to act on behalf of the adult, instead of the ‘regular’ attorney, in cases where there is a conflict of interest. Some authors note that counting on the adult to include these and other safeguards might be problematic as adults in most cases will not want to include safeguards as these might give the impression that the attorney is not trusted after all. As noted earlier, however, safeguards are not only in the interest of the adult, but also in the interest of the attorney. In addition, safeguards do not only create some form of oversight, but may also provide the attorney with support. There are people in place with knowledge of affairs whom the attorney can turn to for assistance and advice.

D. General safeguards
In cases where there are suspicions of abuse or misuse of the CPA, it is important that it is clear where these suspicions can be reported. In Belgium, the ‘alarmbelprocedure’ (alert procedure) has been included in the law for this purpose. Suspicions of misuse or abuse can be reported to the court and the court has according to Article 490/2(2) BCC the authority to replace the CPA partially or completely with an adult guardianship measure. Again, as noted throughout this article, it is important that the (previously recorded) wishes and instructions of the adult are respected as much as possible in these situations. In Belgium, the courts can also partially revoke the CPA, which means judges have room to conduct a tailor-made assessment of the responsibilities that should remain with the attorney and responsibilities that should be taken over. This seems appropriate, especially in cases where there has been unintentional misuse of the CPA by the attorney. Another example of a best practice in this regard is Germany, where the court can appoint a so-called ‘Kontrollbetreuer’, a supervisor who has to monitor the actions of the attorney, meaning the attorney can remain in place.

As noted, the directions as to appropriate safeguards formulated in paragraph 3 leave considerable room for implementation by means of a range of safeguards. This has become apparent in this paragraph where the development of safeguards is different from country to country and also differs from phase to phase. Safeguards are in some cases in the early stages of development. States can do, eg more to ensure that adults who want to be involved in the running of their affairs are given the opportunity to do so. Initiatives creating more awareness of the concept of capacity and the various ways in which adults can be provided with support in the exercise of their legal capacity, might help in this regard. In addition, states can do more to ensure

125 490/2 (1) BCC
126 490/2 (1) BCC
126 Autar (n 111); Zimmermann (n 108).
127 Wuyts (n 114).
128 Zimmermann (n 108).
attorneys are informed of rights and obligations in an active manner. Initiatives providing attorneys with support are slowly getting more attention. Steps could be taken to examine whether current initiatives meet the support needs of attorneys. Article 12(4) in the first instance creates an obligation for States Parties to provide for appropriate safeguards, but, as has become clear, adults and attorneys also have a responsibility in ensuring appropriate safeguards are in place to prevent situations of misuse. In that regard, states could, eg encourage adults and attorneys to think, at the time the CPA is made, about the inclusion of appropriate forms of oversight and other means to ensure the attorney is in the future adequately supported.

V. CONCLUSION

There is an increasing awareness of the risk of misuse or abuse associated with the use of CPAs. When contemplating which safeguards should be adopted to prevent this misuse or abuse, states must keep the need to strike a balance between protection on the one hand and trust and informality on the other hand in mind. In this regard, it is important to realise that the risk of misuse or abuse of CPAs can never be avoided completely. This has to do with the intrinsic nature of the CPA: it is based on a premise of trust, namely the assumption that the adult will choose an attorney who is trustworthy and has the necessary skills to take care of his affairs. This means there will always be situations in which this trust put in the attorney by the adult, turns out to be misplaced, and is abused by the attorney. This risk can at best be managed, it can never be avoided completely. In other words, efforts should be directed towards managing this risk of misuse or abuse as best as possible by adopting appropriate safeguards. As has become clear, designing such safeguards cannot be considered an easy task. Different levels and degrees of misuse and abuse can be distinguished, and various factors may play a role in enabling the misuse and abuse of CPAs. Further research looking into the various factors and underlying dynamics remains important to ensure safeguards are as targeted as possible. Article 12(4) UNCRPD, nevertheless, requires States Parties to provide for appropriate safeguards preventing abuse. Based on the available information on the risk of misuse and abuse of CPAs, this article has provided directions as to how the three categories of safeguards, included in Article 12(4) UNCRPD, can be operationalised in the context of the CPA. These directions have subsequently been used to examine the safeguards implemented in five European countries with a view to providing insight into how these countries have tried to meet the requirement to ensure appropriate safeguards are in place. As has become clear, the development of safeguards differs from country to country and in some cases, safeguards are in the early stages of development. Steps can be taken by States to ensure that adults who want to be involved in the running of their affairs are given the opportunity to do so. In addition, States could do more to ensure that attorneys are aware of their rights and responsibilities upon the entry into force of the CPA and are provided with the support needed in the execution of the CPA. Future comparative research monitoring the development of these and other safeguards might be of value so that countries may continue to learn from one another. Assessing the appropriateness of safeguards has been the first step in ensuring compliance with Article 12(4) UNCRPD. However, Article 12(4)
UNCRPD also requires safeguards to be ‘effective’ in preventing abuse. Further (empirical) research is, in other words, needed to assess whether safeguards that in the first instance seem appropriate, also work as intended and are effective in practice.

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