REPORT OF THE VIRGINIA BAR ASSOCIATION ON

CIVIL REMEDIES TO ENHANCE PROTECTION OF VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 24

COMMONWEALTH OF VIRGINIA
RICHMOND
1996

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The Virginia Bar Association

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Chartered 1890

December 26, 1995

Charles B. Arrington, Jr.
Executive Vice President

Sandra P. Thompson
Administrative Director

The Honorable George Allen
Governor
The Commonwealth of Virginia
Richmond, Virginia 23219

The General Assembly
Richmond, Virginia 23219

Re: HJR 84 Report

Dear Governor and Ladies and Gentlemen:

I have the honor of forwarding to you The Virginia Bar Association's Report, *Financial Abuse of Vulnerable Adults and the Durable Power of Attorney*. This Report is submitted in response to House Joint Resolution 84 which asked The Virginia Bar Association to study durable powers of attorney.

The Virginia Bar Association is pleased to have been asked to conduct this study and hopes that its Report will be useful to the Governor's office and the legislature in connection with this important issue.

Sincerely yours,

R. Terrence Ney

enclosure
RTN/sjj

PREFACE

House Joint Resolution 84 passed by the 1994 session of the Virginia General Assembly requested the Virginia Bar Association to study issues related to the financial abuse of elders and of incapacitated adults. The resolution specified that the study:

- examine the use and the potential abuse of powers of attorney; and
- explore methods of strengthening civil remedies to enhance the protection of vulnerable adults from financial exploitation.

The Virginia Bar Association's report on *Financial Abuse of Vulnerable Adults and the Durable Power of Attorney*, House Document No. 13, was submitted to the Governor and the 1995 General Assembly in response to the first study request.

This document was prepared in response to the second study request. The full text of the resolution is provided in Appendix A.

The Virginia Bar Association was responsible for conducting the study. To assist with the study, the Virginia Bar Association formed a study committee of individuals who have relevant professional experience and expertise.

ACKNOWLEDGEMENTS

The Virginia Bar Association conducted this study at the request of the 1994 Virginia General Assembly through House Joint Resolution Number 84. A committee of members from the Virginia Bar Association was instrumental in studying the issues, making recommendations and drafting legislation to implement recommendations. Staff assistance to the study committee was provided by Joy Duke of the Virginia Department of Social Services.

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I. INTRODUCTION

The Virginia Bar Association Committee to study issues related to the financial exploitation of incapacitated adults was created in 1994 in response to House Joint Resolution Number 84. The 1995 General Assembly responded to recommendations from the Committee by enacting legislation to strengthen protection of principals in durable power of attorney relationships. This, the second phase of the study, explores additional remedies for financial exploitation of vulnerable adults.

- Study Charge

The 1994 Session of the General Assembly passed House Joint Resolution 84 requesting the Virginia Bar Association, with the assistance of the Department of Social Services and the Department for the Aging, to study issues which relate to the financial exploitation of elders and of incapacitated adults. The resolution set forth the following two study request:

- an examination of the use and potential abuse of powers of attorney; and
- an exploration of methods for strengthening civil remedies to enhance the protection of vulnerable adults from financial exploitation.

The Virginia Bar Association's report on *Financial Abuse of Vulnerable Adults and the Durable Power of Attorney*, House Document No. 13, responds to the first study request and was submitted to the Governor and the 1995 General Assembly.

This document responds to the second study request; i.e. an exploration of methods for strengthening civil remedies to enhance the protection of vulnerable adults from financial exploitation. A copy of House Joint Resolution 84 is included as Appendix A of this report.

- Study Objectives

An assessment of the study request; i.e., to explore methods of enhancing the protection of vulnerable adults through strengthened civil remedies, led to the following objectives:

- To review situations that create vulnerability to financial exploitation;
- To identify and analyze the potential value of additional statutory authority in protecting vulnerable adults; and

- To make recommendations to enhance protection of older and incapacitated adults who are vulnerable to financial abuse.

Scope of this Study

This study responds to the study request in HJR 84, passed by the 1994 session of the General Assembly, to explore methods for strengthen civil remedies to enhance protection of adults who are vulnerable to financial exploitation. The study builds upon the following previous legislative studies conducted in the Commonwealth:

- *Financial Exploitation of Older Adults and Disabled Younger Adults in the Commonwealth,* Senate Document No. 37, 1994; and

- *Financial Abuse of Vulnerable Adults and the Durable Power of Attorney,* House Document No. 13, 1995.

Background

Financial exploitation refers to the illegal or improper use of an elder or incapacitated adult's resources for another's profit or advantage. Adult protective services (APS) programs operated by local departments of social services have statutory responsibility for investigating reports that elders or incapacitated adults are being abused, neglected, or financially exploited. Financial exploitation in which there has been a transfer of money and/or property from the older or incapacitated adult is probably the least understood of the forms of adult maltreatment and is the most difficult type of case for adult protective services social workers. The 1994 study, *Financial Exploitation of Older Adults and Disabled Younger Adults in the Commonwealth*, finds that the recovery of assets lost through financial exploitation is rare and the perpetrator is not usually held accountable.

In the four year period beginning with fiscal year 1992 through fiscal year 1995, APS investigations have substantiated 469, 543, 637, and 641 financial exploitation cases respectively. A 1993 study of adult protective services cases in which financial exploitation was substantiated, found that the typical victim has a physical or mental impairment or both and is related to the perpetrator.

Although each case is unique and each presents its own set of facts, the common denominator which characterizes all cases is the presences of a relative, friend, caregiver or some other interested person in whom the vulnerable adult placed trust and confidence. Nearly all perpetrators of financial abuse have three things in common: a financial need which may be either real or perceived; an opportunity to exploit with little chance of being detected or held accountable; and an ability to rationalize the theft.

Paul Blunt, a Scottsdale, Arizona attorney, whose practice concentrates on representing elderly victims of financial exploitation, describes three typical scenarios of exploitation:[1]

- The first scenario involves elders who are physically dependent on a caregiver. The caregiver first isolates the elder and then takes financial advantage of the relationship.

- The second scenario is one in which the elder's physical and/or mental ill health results in a loss of interest or ability to manage financially for self. This person typically turns to someone he/she trusts to help manage financial affairs. The trust is betrayed and financial exploitation occurs.

- The third and final scenario involves the bereaved widow(er). In this case a spouse who handled the family finances dies leaving the survivor to cope with very little experience in financial management. This person finds the job of financial manager overwhelming and the door is open for a trusted person willing to take on this task.

Common methods used by perpetrators of financial abuse include the use of a durable power of attorney to transfer assets, converting the elder's separate account to joint accounts with the perpetrator, alteration of testamentary instruments, borrowing money on the elder's credit line or credit card, obtaining loans from the bank holding the elder's account and pledging those accounts as collateral for the loans, and the outright removal of valuable personal property from the elder's possession and the use of the elder's money or other property for the benefit of the exploiter.[2]

- **The Demographic Imperative**

The 1990 census finds 909,906 (15% of the total population) Virginians are 60 years of age or older. Twenty-eight percent of those 60 years and older are in the advanced age category (75 years and older). As the numbers and proportion of the population living to advanced age continues to increase, individual with functional impairments are living longer and requirements for assistance with care and with personal and financial management are similarly increasing. Since 1900, the percentage of Americans age 65 and over has more than tripled, 4.1% in 1900 to 12.7% in 1992, and the total number has increased over 10 times, from 3.1 million in 1900 to 32.3 million in 1992.[3]

The numbers of older Virginians, those most vulnerable to financial abuse, has never been larger. The level of frailty of this vulnerable population is related to advanced age and to disease process, and has never been higher. Consequently the opportunities for financial abuse of this population has never been greater. In view of this reality, consideration of methods of strengthening protection to adults who are vulnerable to financial abuse is timely.

II. Civil Methods of Strengthening Protection of Vulnerable Adults

- Joint Bank Accounts

The Supreme Court of Virginia once referred to the joint bank account as "the poor man's will." To a certain extent, very familiar to those who work with persons of modest means, the joint bank account might also be referred to as "the poor man's durable power of attorney." There are numerous cases where persons, typically as they grow older, fear that they will not be able to access their money in the bank if they become ill or as they become infirm. The standard solution adopted by many of these persons is to simply place the name of a trustworthy friend or family member on their account for purposes of their convenience should the need arise.

Unfortunately, the financial exploitation problem associated with the durable power of attorney that was reported to the General Assembly in this Committee's 1995 report (House Document Number 13) is also present in this "poor man's power of attorney" -- the joint bank account. The decided cases and anecdotal evidence indicate that the misuse of these joint accounts by the trusted party is a matter of significant concern. Indeed, the personal experience of the Committee, which was confirmed by its research and the testimony it heard, was that more cases of financial exploitation of the elderly occur through the abuse of a joint bank account than through a power of attorney. However, as was the case under the durable power of attorney in Virginia prior to July 1, 1995, unless a guardian has been appointed for the depositing party, there is no person who has standing to make the other party account for his actions, formally or informally.

Whether these joint bank accounts provide for survivorship or not, Virginia law provides that, during the lifetimes of the parties, a joint account is owned by the parties in proportion to their deposits therein (except for cases of husband and wife where the rule provides for equal ownership in the absence of evidence to the contrary.) See Virginia Code § 6.1-125.3.A. However, each party has complete signatory authority over the entire account pursuant to Virginia law and the typical signature card contract with the bank. See Virginia Code § 6.1-125.10. Accordingly, traditional principles of agency law are applicable to joint bank accounts, with each party standing as principal to the extent of his own deposits and as agent to the extent of the other party's deposits.

As the principles of agency law are applicable to these joint bank accounts, the Committee believes that the simplest and most effective way to address the joint account problem is by making the 1995 power of attorney legislation applicable to them. See Virginia Code § §11-9.6, and 37.1-132.1. This approach would permit a person interested in the welfare of a depositor who is unable to properly attend to his affairs (i) to seek an informal accounting from the other party or, if the other party refuses to account, (ii) to bring an action in circuit court to obtain discovery and further appropriate relief.

- **Durable Power of Attorney, Education of Agents**

All of the evidence heard by the Committee, and the research literature which it examined, caused the Committee to conclude that the typical agent who used a durable power of attorney to financially exploit an incapacitated principal did not obtain the power with that goal in mind. Although there would be some instances where this deliberateness has occurred, the root cause in the typical case appears to be the agent's ignorance of his duties and responsibilities which, when coupled with the temptation to which the steward of another's wealth is naturally exposed, too often results in the agent exploiting the one he is duty bound to protect. The agent's mismanagement can begin very early with the unknowledgable agent failing to maintain accurate (or any) records of receipts and disbursements, commingling the principal's property with his own, making unauthorized loans (or gifts) to himself or family members, determining his own compensation in an excessive amount, etc., until the border of outright theft is crossed, using the power of attorney as the vehicle of accomplishment.

In order to provide a mechanism for obtaining an accounting by the agent in these cases, the 1995 Session of the General Assembly created an informal accounting remedy by adding § 11-9.6 to the Code, and it also created a more formal discovery remedy by adding § 37.1-132.1 to the Code. Each of these remedies can be employed by a person interested in the welfare of a principal believed to be unable to property attend to his affairs, without the necessity of a guardianship, and both of them appear to have been well-received.

The focus of the Committee's 1996 power of attorney recommendation shifts from the therapeutic to the prophylactic -- as it now recommends legislation it believes will significantly reduce the incidence of financial exploitation by way of a durable power of attorney. Acting on the premise stated above, that most of this exploitation stems from the agent's ignorance of his duties and responsibilities, and the fact that a day of accounting will come, the simple solution is to educate the agent regarding these matters prior to any action being taken under the power of attorney. The same conclusion was reach by the American Bar Association's TASK FORCE ON DURABLE POWERS OF ATTORNEY (Section of Real Property, Probate and Trust Law) in its *Report on Survey "Use of Durable Powers of Attorney for Financial Affairs,"* February 1, 1995. The concluding recommendation in this American Bar Association report provides in part as follows:

> **The real need is not for increased regulation but for better education.** Principals need to be taught the risk inherent in a durable power of attorney and the importance of selecting a trustworthy agent. **Agents need to be educated about their responsibilities.** (Emphasis added.)

The Committee believes that agents under a power of attorney could be effectively educated about their fundamental duties and responsibilities by adopting a rule that

requires either (1) certain descriptive language to be included in the power of attorney document (signed by the principal), or (2) the same descriptive language to be placed in a separate writing (signed by the agent) that must be attached to the power of attorney.

And, in order to insure that an agent will be aware of the duties and responsibilities contained in the descriptive language prior to taking any action under a power of attorney, legislation can provide that no actions taken under a non-complying power will be valid. Such a rule would not operate to the prejudice of a principal who has become incapacitated because alternative (2) would enable the agent acting alone to comply with the requirement, and it appears to be the only realistic way to insure the desired education. Lastly, in those cases where action which is otherwise valid is inadvertently taken prior to satisfying the requirement, the rule can provide for the agent's ratification (after compliance), if the ratification does not adversely affect the intervening rights of any third party.

- **Criminal Law Options -- Financial Exploitation**

The Code of Virginia, § 18.2-369, identifies physical abuse and neglect of incapacitated adults as a crime and establishes a penalty. In this section, an incapacitated adult is defined as "any person eighteen years or older who is impaired by reason of mental illness, mental retardation, physical illness or disability, advanced age or other causes to the extent the adult lacks sufficient understanding or capacity to make, communicate or carry out reasonable decisions concerning his well-being." Adults, described by this definition, are presumed unable to protect themselves from malicious conduct of others that results in physical injury or pain and unable to protect self against the failure of a responsible person to provided needed personal or health care.

Just as an incapacitated adult lacks the ability to protect self from physical abuse and neglect, he is also unable to act to protect self from one who will use a position to financially exploit. Although each situation in which an incapacitated adult is financially exploited is unique and each presents its own set of facts, there are common denominators which characterize all cases. The common denominators are: the presences of a relative, friend, or other person in whom the incapacitated adult has placed trust; the real or perceived financial need of the perpetrator; an opportunity to steal with little chance of being detected or held accountable; and an ability to rationalize the theft.

There can be no doubt that the need to protect incapacitated adults is growing. With elders comprising an increasing segment of the population, it can be expected that financial exploitation, and other forms of abuse, will occur at an ever increasing rate. The Virginia Department of Social Services reports that adult protective services investigations substantiated 641 financial exploitation cases in the Commonwealth in fiscal year 1994 - 1995. Financial crimes against those whose earning capacity has ended and who will be financially devastated by such crimes is especially heinous. Legislation

is needed to provide the state with added tools to hold the perpetrators criminally accountable for financial exploitation and to insure penalties against those who steal from incapacitated persons, or obtain their property through deception or fraud.

- **Guardianship**

Guardianship is frequently used as a tools for assisting incapacitated adults who are unable to manage financial affairs for themselves. It may also be useful in protecting vulnerable adults from financial exploitation. In 1993 the Virginia Guardianship Association, in response to concerns expressed at a series of Guardianship Town Meetings, established a committee to review Virginia's guardianship law and propose a comprehensive reform of that law. This Committee is supportive of the work being done by the Virginia Guardianship Association committee.

The draft of the legislation which will be proposed by the Virginia Guardianship Association is currently being reviewed by interested parties. The committee will review comments, revise the draft and prepare legislation to be introduced for consideration by the General Assembly as early as 1997. Major components for consideration are expected to include:

- → consolidation of the current three basis for appointment of a guardian or committee into one single authority;

- → for the purpose of clarification of duties, the use of the term "conservator" for a person responsible for another's property and the term "guardian" for a person responsible for another's personal affairs;

- → a required report from a professional who evaluated the person's mental and physical condition;

- → the inclusion of specific duties of the guardian ad litem; and

- → reporting by the guardian to the Commissioner of Accounts, concerning the incapacitated person's condition.

III. CONCLUSIONS AND RECOMMENDATIONS

Those adults least able to act or advocate on their own behalf are most defenseless against unscrupulous persons who would abuse a position of trust for his/her own personal gain. Because of the continuing increase in the most vulnerable population over the next quarter of a century, it is anticipated that financial abuse will continue to be a problem and that its incidence will continue to increase.

As a result of the study committee's exploration of methods for strengthening civil remedies to enhance the protection of vulnerable adults from financial exploitation the following recommendations are presented.

1. To address problems identified with the abuse or misuse of joint accounts in financial institutions, the Committee proposes a new section (§ 11-9.7) be incorporated into the Code of Virginia. (See Appendix B). The proposed new section builds upon § 11-9.6 and § 37.1-132.1 by recognizing that parties to a joint account in a financial institution occupy the relation of principal and agent to each other, with each standing as principal in regard to his ownership interest in the joint account and as agent in regard to the ownership interest of the other party. The proposed section specifies that the informal accounting and discovery provisions of § 11-9.6 and § 37.1-132.1 apply to the principal-agent relationships. The ownership interest of the parties to a joint account is determined in accordance with the provisions of Chapter 2.1 (§§ 6.1-125.1 --.16) of Title 6.1.

2. The Committee's recommended power of attorney legislation provides for the agent's education to be accomplished in one of two alternative ways: (1) by requiring certain language to be included in the power of attorney document (signed by the principal), or (2) by requiring the same language to be placed in a separate writing (signed by the agent) that must be attached to the document. (See Appendix C). The text of this statement is as follows:

   "Statement of Agent's Duties and Responsibilities under Virginia Law --

   An agent who acts under a durable power of attorney (1) must use due care to act in the best interests of the principal in accordance with the terms of the power of attorney, (2) is liable for any breach of legal duty owed to the principal as a fiduciary under Virginia law, (3) must not allow any of the principal's property to become commingled with the agent's property, (4) must keep a record of all receipts, disbursements, and significant actions taken as agent under the power of attorney, and (5) upon proper demand, must make an accounting of all receipts, disbursements, and significant actions under the power of attorney (i) to the principal, (ii) to a person interested in the welfare of a principal who is unable to property attend to his affairs (unless specifically prohibited by the terms of the power of attorney), (iii) to the guardian or committee of an incapacitated or incompetent principal, and (iv) upon the principal's death, to the principal's

executor or administrator. An agent is entitled to obtain the advice of a lawyer concerning these and any other of the agent's duties and responsibilities under a durable power of attorney and to be reimbursed for such expense from the principal's assets."

In order to insure that an agent will be aware of this statement prior to taking any action under the power of attorney, the legislation provides that no actions taken thereunder prior to compliance are valid. This rule should not operate to the prejudice of a principal who has become incapacitated because alternative (2) enables the agent acting alone to satisfy the statute's requirement. And, in those cases where action which is otherwise valid is inadvertently taken prior to satisfying the statutory requirement, the statute expressly authorizes the agent to ratify the act, if the ratification does not adversely affect the intervening rights of any third party.

3. The Committee recommends that the option for criminal prosecution of persons found guilty of financially exploiting incapacitated adults be strengthened by amending § 18.2-369 to:

- to include exploitation, along with abuse and neglect, as unlawful according to this section; and

- to define "exploit" to mean the wrongful use of the resources of an incapacitated adult for another's profit or advantage.

(See Appendix D.)

4. The Committee supports the concepts which are directing the work of the Virginia Guardianship Association and which includes consideration of:

- → consolidation of the current three basis for appointment of a guardian or committee into one single authority;

- → for the purpose of clarification of duties, the use of the term "conservator" for a person responsible for another's property and the term "guardian" for a person responsible for another's personal affairs;

- → a required report from a professional who evaluated the person's mental and physical condition;

- → the inclusion of specific duties of the guardian ad litem; and

- → reporting by the guardian to the Commissioner of Accounts, concerning the incapacitated person's condition.

5. The Committee recommends legislation which extends the protection in § 37.1-132.1 (Discovery of information and records regarding actions of certain agents and attorneys-in-fact), to grantors of revocable trusts (Discovery of information and records regarding actions of certain trustees). However, crafting appropriate legislation has been most difficult. The dilemma involves creating a mechanism for protecting the interests of the grantor of the trust and the potential beneficiaries under the trust from financial exploitation while preserving the values of privacy for the grantor. A subcommittee of the Virginia Bar Association council on Wills, Trusts and Estates is to report its further efforts in this regard to the council in the spring of 1996. Accordingly, the House Joint Resolution 84 Committee defers action on this matter to that council.

NOTES

1. Blunt, A. Paul, "Financial Exploitation: The Best Kept Secret of Elder Abuse," May 30, 1992. (unpublished paper)

2. Ibid.

3. Reams, Betty J., *Identifying Curriculum and Resources for the Long-Term Care Workforce*, Virginia Department for the Aging, Virginia Department of Social Services, Virginia Association of Area Agencies on Aging, September, 1994.

1994 SESSION

LD8143761

HOUSE JOINT RESOLUTION NO. 84

Offered January 21, 1994

Requesting the Virginia Bar Association, with the assistance of the Department of Social Services and the Department for the Aging, to study the use and potential abuse of durable powers of attorney and the need for strengthening civil remedies for financial exploitation.

Patrons—Giesen, Diamonstein, Heilig and Mayer

Referred to Committee on Rules

WHEREAS, some older adults and disabled younger adults who are victims of financial exploitation are victimized by persons to whom they have given their power of attorney; and

WHEREAS, 11 percent of all cases in which financial exploitation was substantiated in fiscal year 1993 involved a perpetrator who held the victim's power of attorney or guardianship; and

WHEREAS, vulnerable adults sometimes do not know how or may not be able to rescind the power of attorney, or the power of attorney may be durable; and

WHEREAS, residents of long-term care facilities are at high risk of being discharged for non-payment when persons holding their power of attorney fail to use the residents' resources to pay for care; and

WHEREAS, adult protective services investigations document a lack of accountability of persons holding durable powers of attorney for persons who are not competent; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia Bar Association, in collaboration with the Department of Social Services and the Department for the Aging, be requested to conduct a study to (i) examine the use and potential abuse of powers of attorney and (ii) explore methods for strengthening civil remedies to enhance the protection of vulnerable adults from financial exploitation.

In conducting the study, input shall be sought from agencies and organizations representing the elderly and individuals with disabilities. The Department of Social Services and the Department for the Aging shall assist the Virginia Bar Association in conducting the study and other agencies of the Commonwealth shall provide assistance upon request.

The Virginia Bar Association shall complete its work in time to submit its findings and recommendations to the Governor and the 1995 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for processing legislative documents.

Official Use By Clerks	
Agreed to By The House of Delegates	Agreed to By The Senate
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
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JOINT BANK ACCOUNTS
Discovery of Information and Records Regarding Actions of Co-Tenant
Proposed New § 11-9.7

§ 11-9.7. Certain duties of parties to joint accounts in financial institutions.— Parties to a joint account in a financial institution occupy the relation of principal and agent as to each other, with each standing as principal in regard to his ownership interest in the joint account and as agent in regard to the ownership interest of the other party, and the provisions of § 11-9.6 and § 37.1-132.1 shall apply to such principal-agent relationships. For purposes of this section, the definition of a joint account in a financial institution, and the ownership interest of the parties therein, are determined in accordance with the provisions of Chapter 2.1 (§§ 6.1-125.1 —.16) of Title 6.1.

AGENT—DISCOVERY CLEANUP
Amendment to § 37.1-132.1

§ 37.1-132.1. Discovery of information and records regarding actions of certain agents and attorneys-in-fact.— A. Any person interested in the welfare of a principal believed to be unable to properly attend to his affairs, may, for the purpose of obtaining information pertinent to the need or propriety of (i) instituting a proceeding under this chapter or (ii) terminating, suspending or limiting the authority of an attorney-in-fact or other agent, petition a circuit court for discovery from the attorney-in-fact or other agent of information and records pertaining to actions taken within the past two years from the date the petition is filed pursuant to powers or authority conferred by a power of attorney or other writing described in § 11-9.1.

B. Such petition may be filed in the circuit court of the county or city in which the attorney-in-fact or agent resides or has his principal place of employment, or if a nonresident, in any court in which a determination of incompetency, incapacity or impairment of the principal is proper under this title, or, if a committee or guardian has been appointed for the principal, in the court which made the appointment. The court, after reasonable notice to the attorney-in-fact or agent and to the principal if no guardian or committee has been appointed, may conduct a hearing on the petition. The court, upon the hearing on the petition and upon consideration of the interest of the principal and his estate, may dismiss the petition or may enter such order or orders respecting discovery as it may deem appropriate, including an order that the attorney-in-fact or agent respond to all discovery methods that the petitioner might employ in a civil action or suit subject to the Rules of the Supreme Court of Virginia. Upon the failure of the agent or attorney-in-fact to make discovery, the court may make and enforce such further orders respecting discovery as would be proper in a civil action subject to such Rules, and may award expenses, including reasonable attorney's fees, as therein provided. Furthermore, upon completion of discovery, the court, if satisfied that prior to filing the petition the petitioner had requested the

information or records that are the subject of ordered discovery, and the attorney-in-fact or agent had been informed of the intention of the petitioner to file a petition hereunder if the request were not fully honored, may, in its discretion upon finding that the failure to comply with the request for information was unreasonable, order the attorney-in-fact or agent to pay the petitioner's expenses in obtaining discovery, including reasonable attorney's fees.

C. A "principal believed to be unable to properly attend to his affairs" means an individual believed in good faith by the petitioner to be a person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other causes to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

A "person interested in the welfare of a principal" ~~includes~~ is any member of the principal's family, ~~persons who are co-agents or co-attorneys-in-fact and alternate and successor agents and attorneys-in-fact~~ a person who is a co-agent or of co-attorney-in-fact, an alternate agent or attorney-in-fact, or a successor agent or attorney-in-fact designated under the power of attorney or other writing described in § 11-9.1 and; if none of the preceding individuals are reasonably available and willing to act, the adult protective services unit of the local social services board for the city or county where the principal resides or is located at the time of the request. ~~"Members~~ A "member of the principal's family" ~~shall include~~ is an adult parent, brother or sister, niece or nephew, child or other descendent, spouse of a child of the principal, spouse or surviving spouse of the principal.

D. A determination to grant or deny in whole or in part discovery sought hereunder shall not be considered a finding regarding the competence, capacity or impairment of the principal, nor shall the granting or denial of discovery hereunder preclude the availability of other remedies involving protection of the person or estate of the principal or the rights and duties of the attorney-in-fact or other agent.

DURABLE POWERS OF ATTORNEY — EDUCATION
AGENT'S STATEMENT OF DUTIES

§ 11-9.1. When power of attorney, etc., not terminated by principal's disability; exception; statement of responsibilities. — A. Whenever any power of attorney or other writing, in which any principal shall vest any power or authority in an attorney-in-fact or other agent, shall contain the words "This power of attorney (or his authority) shall not terminate on disability of the principal" or other words showing the intent of the principal that such power or authority shall not terminate upon his disability, then all power and authority vested in the attorney-in-fact or agent by the power of attorney or other writing shall continue and be exercisable by the attorney-in-fact or agent on behalf of the principal notwithstanding any subsequent disability incompetence, or incapacity of the principal at law; and such a power of attorney shall be known as a "durable" power of attorney. All acts done by the attorney-in-fact or agent, pursuant to such power or authority, during the period of any such disability, incompetence or incapacity, shall have in all respects the same effect and shall inure to the benefit of, and bind the principal as fully as if the principal were not subject to such disability, incompetence or incapacity. If any guardian or committee shall thereafter be appointed for the principal, the attorney-in-fact or agent shall, during the continuance of such appointment, account to such guardian or committee as he would otherwise be obligated to account to the principal.

The appointment of a guardian or committee pursuant to Title 37.1 shall not of itself revoke or limit the authority of the attorney-in-fact or other agent. However, in a proceeding in which the attorney-in-fact or other agent is made a party, the court which appointed the guardian or committee may revoke, suspend, or otherwise limit such authority. Furthermore, where no guardian or committee has been appointed, the circuit court of the city or county where the principal resides or is located, in a proceeding brought by a person interested in the welfare of the principal as defined in § 37.1-132.1, and in which the attorney-in-fact or other agent and the principal are made parties, may terminate, suspend, or otherwise limit the authority of the attorney-in-fact or other agent upon a finding that such termination, suspension or limitation is in the best interests of the principal or his estate.

B. No action taken under any durable power of attorney executed after January 1, 1997, whether executed within or without this Commonwealth, shall be effective unless the statement set forth in subsection C. is quoted either

(1) in the power of attorney that is signed by the principal; or

(2) in a writing attached to the power of attorney that is signed by the agent taking the action in question. The agent's writing may be signed and attached to the power after the principal becomes disabled, incompetent, or incapacitated.

Any action taken by an agent that is ineffective under this subsection solely because of a failure to comply with clause (1) or (2) hereof, may be ratified by the agent after complying with clause (2) if the ratification does not adversely affect the intervening rights of any third party. This subsection shall not apply to a power of attorney limited to one or more specific purposes.

C. The statement required by subsection B. shall be as follows:

"Statement of Agent's Duties and Responsibilities under Virginia Law

An agent who acts under a durable power of attorney (1) must use due care to act in the best interests of the principal in accordance with the terms of the power of attorney, (2) is liable for any breach of legal duty owed to the principal as a fiduciary under Virginia law; (3) must not allow any of the principal's property to become commingled with the agent's property, (4) must keep a record of all receipts, disbursements, and significant actions taken as agent under the power of attorney, and (5) upon proper demand, must make an accounting of all receipts, disbursements, and significant actions under the power of attorney (i) to the principal, (ii) to a person interested in the welfare of a principal who is unable to properly attend to his affairs (unless specifically prohibited by the terms of the power of attorney), (iii) to the guardian or committee of an incapacitated or incompetent principal, and (iv) upon the principal's death, to the principal's executor or administrator. An agent is entitled to obtain the advice of a lawyer concerning these and any other of the agent's duties and responsibilities under a durable power of attorney and to be reimbursed for such expense from the principal's assets."

PROPOSED AMENDMENTS TO § 18.2-369
ABUSE AND NEGLECT OF INCAPACITATED ADULTS; PENALTY

A. It shall be unlawful for any responsible person to ~~abuse or neglect~~ **abuse, neglect or exploit** any incapacitated adult as defined in this section. Any responsible person who ~~abuses or neglects~~ **abuses, neglects or exploits** an incapacitated adult in violation of this section shall be guilty of a Class 1 misdemeanor. Any responsible person who is convicted or a second or subsequent offense under this section shall be guilty of a Class 6 felony.

In any event, if a violation results in serious bodily injury or disease to another, conviction of an offense shall be punishable as a Class 6 felony. For purposes of this subsection, "*serious bodily injury or disease*" shall include but not be limited to (1) disfigurement, (ii) a fracture, (iii) a severe burn or laceration, (iv) mutilation, (v) maiming, or (vi) life threatening internal injuries or conditions, whether or not caused by trauma.

B. For purposes of this section:

"*Abuse*" means (i) ~~malicious~~ conduct that causes physical ~~injury or pain or~~ **injury, pain or mental anguish or** (ii) malicious use of physical restraint, including confinement, as punishment, for convenience or as a substitute for treatment, except where such conduct or physical restraint, including confinement, is a part of care or treatment and is in furtherance of the health and safety of the incapacitated person.

"*Incapacitated adult*" means any person eighteen years or older who is impaired by reason of mental illness, mental retardation, physical illness or disability, advanced age or other causes to the extent the adult lacks sufficient understanding or capacity to make, communicate or carry out reasonable decisions concerning his well-being.

"*Neglect*" means the willful failure by a responsible person to provide treatment, care, goods or services which results in injury to the health or endangers the safety of an incapacitated adult.

"*Responsible person*" means a person who has responsibility for the care, custody or control of an incapacitated ~~person~~ **adult or his resources** by operation of law or who has assumed such responsibility voluntarily, by contract, **by power of attorney**, or in fact.

"Exploit" means the ~~illegal using~~ **wrongful use of the resources of an incapacitated adult for another's profit or advantage.**

C. No responsible person shall be in violation of this section whose conduct was (i) in accordance with the informed consent of the incapacitated person or a person authorized to consent on his behalf; (ii) in accordance with a declaration by the incapacitated person under the Natural Death Act of Virginia (Section 54.1-2981 et seq.) or with the provisions of a valid medical power of attorney; or (iii) in accordance with the wishes of the incapacitated person or a person authorized to consent on behalf of the incapacitated person and in accord with the tenets and practices of a church or religious denomination.