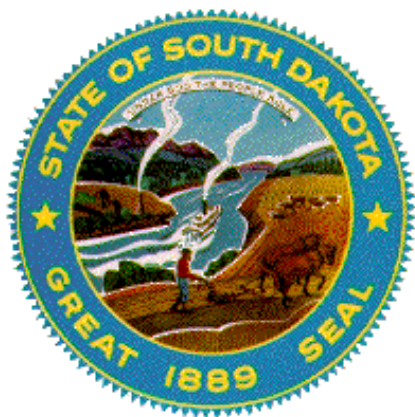


South Dakota Elder Abuse Task Force



Final Report and Recommendations



December 2015

Introduction



The South Dakota Elder Abuse Task Force was the creation of Senate Bill 168, passed during the 2015 Legislative Session. The South Dakota Legislature vested the Task Force with a two-pronged mission: “to study the prevalence and impact of elder abuse in South Dakota and to make recommendations to the Legislature on policies and legislation to effectively address the issue.” To accomplish these ends, the Legislature allotted seventeen seats on the Task Force:

- Three members of the Senate chosen by the President Pro Tempore:
 - **Sen. James Bradford**
 - **Sen. David Novstrup**
 - **Sen. Bruce Rampelberg**
- Three members of the House of Representatives chosen by the Speaker of the House of Representatives:
 - **Rep. Brian Gosch**
 - **Rep. Kris Langer**
 - **Rep. Lee Schoenbeck**
- Three members chosen by the Governor “who have significant experience working with issues related to elder abuse”:
 - **Sarah Dahlin Jennings** (South Dakota State Director – AARP)
 - **Jennifer Murray** (Regional Manager, DSS – Adult Services & Aging)
 - **Robert Kean** (Attorney and Fmr. Exec. Director of South Dakota Advocacy Services)
- Seven members appointed by the Chief Justice of the Supreme Court, specifically “five members who have significant experience working with issues related to elder abuse and two members from the banking industry”:
 - **Justice Steven L. Zinter** (South Dakota Supreme Court)
 - **Dr. Victoria Walker** (Chief Medical & Quality Officer, The Evangelical Lutheran Good Samaritan Society)
 - **Quentin Riggins** (Attorney and Chair of the Real Property, Probate & Trust Law Section, State Bar of South Dakota)
 - **Tim Neyhart** (Executive Director, South Dakota Advocacy Services)

- **Dr. David Brechtelsbauer** (Physician, Geriatrician, and Clinical Faculty at the USD Sanford School of Medicine)
- **Rick Rylance** (Regional President, Dacotah Bank)
- **Kristina Schaefer** (Vice President – General Counsel & Dir. of Risk Management, Fishback Financial Corporation)
- One member “who has significant experience working with issues related to elder abuse” appointed by the Attorney General:
 - **Paul Cremer** (Assistant Attorney General & Division Director, Medicaid Fraud Control Unit)

The Legislature gave the Task Force six months to complete its task. In that time, the Task Force selected a Chair – Justice Steven Zinter – and formed four Committees to focus on specialized areas of interest on the broad topic of elder abuse: (1) Elder Abuse and Neglect, (2) Elder Financial Exploitation, (3) Education, and (4) Guardianships, Wills, and Powers of Attorney.

The Task Force met four times as a group. Public input was solicited and received at all meetings. In between the full group meetings, the Committees conducted numerous teleconferences in which they directed research, drafted proposed legislation, and prepared reports to the full Task Force. The following report reflects the recommendations of the Task Force as a whole. The appendices contain proposed legislation, policies, and commentary from the Task Force.

Index



Summary of Findings	1
Summary of Recommendations	6
Proposed Legislation & Policy Recommendations	14
1) Criminalize “Emotional and Psychological Abuse”	14
2) Expand Protection Orders for Elders & Adults with a Disability.....	18
3) Recommend No Action on the Use of Arbitration in Long-Term Care Agreements	28
4) Assess Elderly Dementia Commitments to the Human Services Center	34
5) Recommend No Action to Create a New Central Registry for Elder Abuse Reports	35
6) Punish All Theft by Exploitation of Vulnerable Adults as a Felony	40
7) Clarify Standards for Reporting Abuse, Neglect, and Exploitation	42
8) Employ Specialized Asst. Atty. Gen. & Investigator for Vulnerable Adult Crimes	47
9) Create a Civil Action for Exploitation of Vulnerable Adults	48
10) Improve Power of Attorney Resources and Statutory Protections	52
11) Craft Educational & Public Awareness Resources on Elder Abuse	54
12) Ensure Guardian/Conservator Powers Preempt Conflicting Powers of Atty. .	56
13) Establish a Statutory Training Requirement for Guardians/Conservators ...	58
14) Encourage Additional Court Monitoring of Guardians/Conservators	60
15) Require Background Checks to Exclude Felons for Guardians/Conservators	61
16) Obligate Sureties to Provide Notification When Guardian/Conservator Bonds Are Not Renewed.....	64

Summary of Findings



The Nature and Scope of Elder Abuse Generally:

Elder abuse, neglect, and exploitation has been described at various times as “hiding in plain sight,”ⁱ a “hidden epidemic,”ⁱⁱ and a “silent crisis”ⁱⁱⁱ—all despite the fact that “there are no official national statistics” on elder abuse.^{iv} This has been attributed to a lack of uniform reporting systems in states, as well as a dearth of reporting by victims of such incidents and their caregivers.^v

In 2004, it was estimated that there were 381,430 reports of elder abuse to adult protective services in the United States, or 8.33 reports for every 1,000 elders.^{vi} What makes this number striking is that two studies have found that only about one out of fourteen^{vii} or one out of every 23^{viii} cases of elder abuse is actually reported to law enforcement or adult protective services. The “majority” of seniors so abused are those “who live in the community rather than in nursing homes or other senior living facilities;”^{ix} indeed, approximately one in ten elders living in their homes experience abuse, neglect, or exploitation each year.^x These findings are consistent with another national study finding that approximately 90% of abusers were known perpetrators, and 66% were adult children or spouses.^{xi}

As for elder financial exploitation, a study estimated that reporting occurred in only one out of every 25 incidents, amounting to at least five million financial abuse victims each year.^{xii} According to a separate 2009 study, the loss attributed to these incidents amounted to \$2.6 billion annually in the United States.^{xiii}

Beyond the financial costs of exploitation and obvious injuries caused by abuse and neglect, there are aggravating factors that make such acts against the elderly particularly harmful. It should be no surprise that elders’ relative physical and mental frailty makes them susceptible to long-term harm from abuse. Indeed,

Elder Abuse & Neglect

- *Between 1 in 14 and 1 in 23 instances of abuse/neglect are reported.*
- *Up to a million elders abused and neglected annually in the U.S.*
- *Creates heightened risk of premature death and nursing home placement, depression, exacerbates existing conditions.*

Elder Financial Exploitation

- *1 in 25 financial exploitation instances reported*
- *Five million elder financial exploitation victims annually in the U.S.*
- *\$2.6 billion in financial exploitation annually*

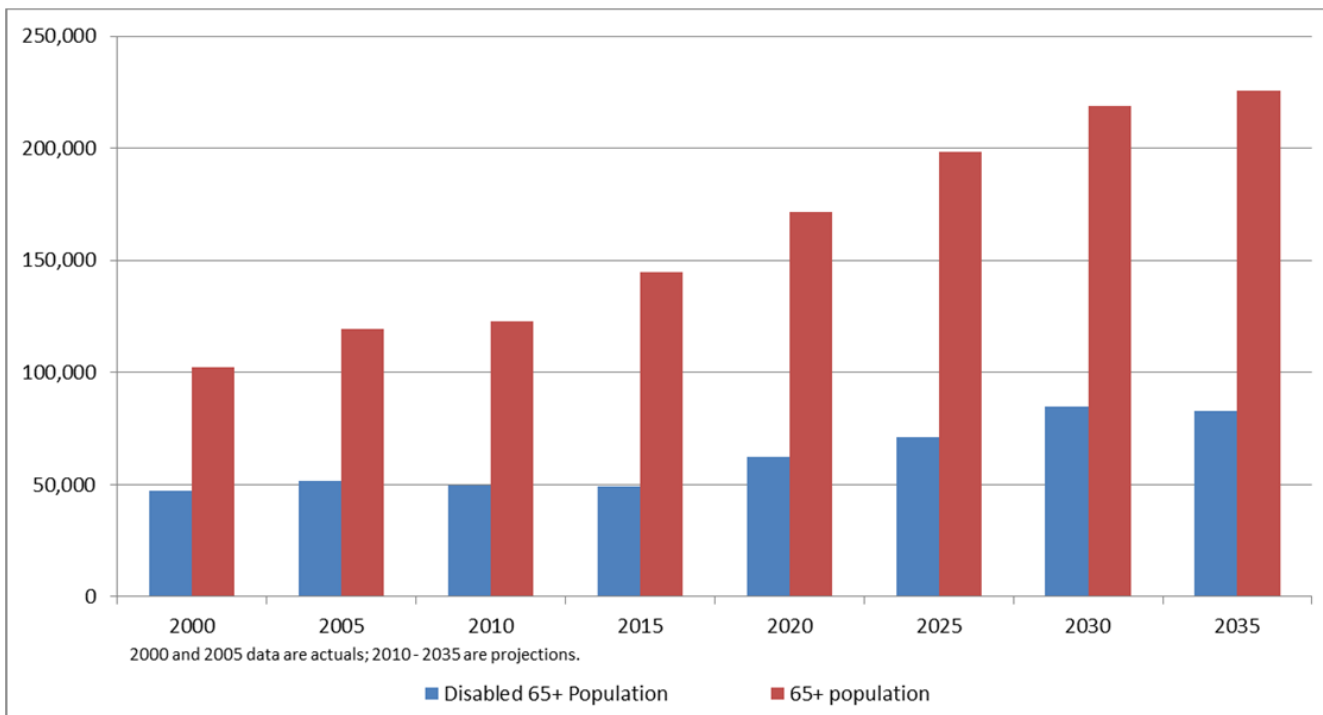
studies confirm that elder abuse victims face a five times greater risk of premature death, suffer poorer health and functioning, and experience a three-to-four times higher discharge rate to a nursing home after a hospital stay.^{xiv}

Given the aging profile of this country’s population, upward trends in elder abuse, neglect, and exploitation are likely to continue. South Dakota is no exception to this dynamic.

Scope of Challenges in South Dakota – A Matter of Demographics:

Because of reporting challenges, it was not possible to obtain a large amount of South Dakota-specific statistics on the prevalence of elder abuse. Some state statistics did, however, emerge. For instance, the Department of Social Services (DSS) reported receiving an annual average of 661 Adult Protective Service calls in the last five years. And according to the Unified Judicial System’s (UJS) criminal charging information, in the past ten years, there were eight charges of theft by exploitation under SDCL 22-46-3, and ninety-two charges of adult abuse or neglect under SDCL 22-46-2. Considering the number of elders in South Dakota, the Task Force felt this number was exceedingly low.

Projections of South Dakota’s Elderly and Disabled Population (2000 – 2035)



-From Abt Associates, *Evaluating Long-Term Care Options for South Dakota: Update, 2015*

According to a 2015 study prepared by Abt Associates for DSS’s Division of Adult Services and Aging (DSS-ASA), the number of South Dakota citizens age 65 and older will increase nearly 84% from 2010 to 2035, from “approximately 103,000 to 226,000.”^{xv} Within this age cohort, the most vulnerable to elder abuse—disabled elders—will peak in 2030 at 85,000, increasing 71% from the 2010 Census total of about 33,000.^{xvi} Put in different terms:

By 2035, in all but 10 South Dakota counties elders will make up over 20 percent of the population. In 27 counties, elders will be over 40 percent of the local population. Even in the growing population centers, around Sioux Falls and Rapid City, elders will make up 29-30 percent of residents.^{xvii}

While the most substantial population growth in the elder age cohort will occur in high population areas, areas of the state not surrounding Sioux Falls and Rapid City will still see their elder populations increase by between 25,000 and 50,000.^{xviii} Resources in these rural areas, including specialized assistance from DSS-ASA, will be stretched even thinner. These resource concerns, coupled with national estimates and South Dakota’s demographic outlook, indicate that elder abuse will have a profound impact on our state’s future—an impact requiring a coordinated and planned response.

of Adult Protective Service Calls to DSS-ASA

	Unduplicate Calls	Investigations
FY2011	561	450
FY2012	818	709
FY2013	602	424
FY2014	659	417
FY2015	665	446

*Calls are higher than investigations because DSS-ASA often receives multiple protective service calls on the same vulnerable adult investigated under a single protective service care plan.

**Whenever a case is opened, one of three outcomes occurs: (1) it is followed to resolution, (2) it is closed once a more appropriate party (such as law enforcement) takes over the investigation, or (3) it is closed as unsubstantiated.

Input from Stakeholders:

The Task Force received phone calls, e-mails, and in-person comments from stakeholders as well as concerned citizens whose elder family members were impacted by abuse, neglect, and exploitation. Their input is provided below.

Concerned citizens often related that existing legal processes—including powers of attorney, court-appointed guardians/conservators, and joint accounts—had been manipulated to exploit elders. Financial exploitation was the predominant form of elder abuse cited by these sources. Some individuals also

asserted that their elder parents were being isolated and emotionally abused by a close family or friend caregiver. Certain members of the public opined that financial institutions needed to play a more active role in reporting signs of financial exploitation.

Case workers and home care providers for elders related concerns about elder capacity and the proper time to intervene, particularly in cases of neglect and self-neglect. A consensus among care providers reflected a need for closer and more effective partnerships with law enforcement, particularly in rural communities. Some cited problems of law enforcement failure to follow up on reports in rural areas and in Reservation communities; a lack of particularized training for police on the signs of adult abuse, neglect, and exploitation; and the lack of prosecutor training to handle these often technical, domestic cases. One social worker suggested joint training on elder abuse and neglect for local Adult Services & Aging staff and law enforcement. These care providers universally asserted that instances of elder abuse, neglect, and exploitation were underreported. Multiple care providers indicated that the issue of elder abuse, in terms of public perception and law enforcement response, is where domestic abuse was thirty years ago.

Elder law attorneys and law enforcement noted that, in their experience, elder financial exploitation was the most widespread concern. However, law enforcement indicated that elder abuse and neglect was substantially underreported. One law enforcement officer with expertise on elder abuse raised the concern of ambiguity in our criminal statutes regarding who is culpable for neglecting an elder. Another cited the need to create a mechanism to quickly separate an in-home abuser or neglecter from an elder or vulnerable adult, and the need for prosecution and investigative specialists for elder abuse, neglect, and exploitation cases. An attorney that specializes in this area raised a concern regarding the use of binding arbitration in long-term care service agreements that keep cases of institutional elder abuse out of the courts. Elder lawyers and law enforcement noted that the often domestic nature of elder crimes makes reporting difficult, but law enforcement offered that they would arrest if they had probable cause, even if an elder parent did not want their abusive child arrested. An elder law attorney and sheriff both cited the need for greater cooperation and reporting from financial institutions to assist with investigating elder exploitation. Law enforcement also saw a need for Department of Social Services to increase disclosure of prior substantiated reports of abuse and neglect.

In contacting tribal agencies, there was a consensus on the need for additional resources to investigate abuse and to support elder service providers on

our Reservation communities. One coordinator for a Tribe's elder protection team reported that communication with DSS was generally good, but that a few cases involving non-Indians may have "fallen through the cracks" in rural areas. Those Tribes that were contacted and employed multidisciplinary elder protection teams cited their usefulness and ability to coordinate effectively.

The Task Force also heard from members of the health care, long-term care, and financial services industries. The health care and long-term care representatives noted their advances in specialized elder and dementia care, as well as the quality and caring motivations of their personnel. All three industries reported on the training their personnel generally receive regarding the signs and the need to report elder abuse and neglect (health care, long-term care) and financial exploitation (financial). Representatives of financial institutions noted that their businesses' ability to report and fully cooperate with law enforcement was limited by federal financial privacy laws.

Summary of Recommendations



After considering national data, state demographics, and stakeholder input, the Task Force offers the South Dakota Legislature the following sixteen recommendations, all but two being unanimous. The appendices to this report contain proposed legislation, policies and more detailed commentary.

1) **Criminalize “emotional and psychological abuse” of elders and adults with a disability.**

South Dakota’s existing criminal elder abuse statutes, SDCL 22-46-1 and 22-46-2, only criminalize assaults. Thirty-eight other states criminalize both assaults and emotional and psychological abuse. The Task Force unanimously recommends that our criminal statutes be amended to define emotional and psychological abuse of elders and adults with a disability and make it a Class 1 misdemeanor. See page 14 for draft proposed legislation and further commentary.

2) **Create a civil right of action that includes protection orders for abused, neglected, and exploited elders or adults with a disability.**

Studies show that most elder abuse and neglect occurs in a home, rather than an institutional setting. The Task Force recommends adoption of a civil action with a remedy to physically protect elders and adults with a disability where they are domiciled, a remedy like that found in South Dakota’s domestic protection order statutes. The proposed civil action, borrowed from Iowa, would also authorize courts to revoke powers of appointment granted by the elder to the offender, remove the offender from the elder’s accounts, and revoke any other authority the offender was entitled to exercise over the elder by contract or law. See page 18 for draft proposed legislation.

3) **Recommend no action regarding the use of arbitration in long-term care contracts.**

The Task Force heard comments from an attorney working in Elder Law that cases of elder abuse, neglect, and exploitation occurring in assisted living centers and nursing homes were not being reported because of binding arbitration agreements. The Task Force was told that such agreements are often embedded obscurely in long-term care contracts or they are signed with the understanding that agreeing to arbitration was a precondition for receiving services. Binding

arbitration can remove cases of abuse, neglect, and exploitation from the light of state court proceedings (and the full due process protections provided therein). Initially, a majority of the Task Force recommended legislation regulating arbitration agreements and prohibiting them as preconditions for admission to a long-term care facility. The intent was to provide greater assurance that arbitration was consented to by both parties. However, the Task Force subsequently became concerned that the proposal was unconstitutional under the Federal Supremacy Clause by operation of the Federal Arbitration Act. The Task Force also learned of policies favoring arbitration and of arguments suggesting that given our mandatory reporting laws, the proposed regulations would not impact institutional accountability. See page 28 for memos informing the Task Force’s recommendation.

4) **Support DSS efforts to potentially revise the definition of “severe mental illness”—a basis for involuntary mental commitments—to exclude dementia patients, and to account for elders so committed.**

The Task Force was made aware of instances where elders with dementia, who were experiencing delirium due to medical conditions or who were disruptive and/or presented challenges to care providers, were being involuntarily committed to the Human Services Center in Yankton. The Task Force discovered that DSS also has been studying the issue. To avoid duplicative efforts, the Task Force supports DSS’s continued work to determine whether it is possible to exclude dementia as a statutory basis for involuntary commitment. The Task Force also recommends that DSS ensure data transparency and task a particular entity or officer with measuring progress on this issue, thereby certifying that any policies have their intended effect.

5) **Recommend that South Dakota not create a central registry for abuse, neglect, and exploitation of elders or adults with a disability—much like the registry that exists for child abuse and neglect.**

Majority Position: South Dakota currently has a central registry for child abuse. At least twenty-two states also have a similar registry for elder and vulnerable adult abuse, neglect, and exploitation (AK, AZ, AR, CT, HI, ID, IA, KS, KY, MN, MS, MD, NE, NH, NJ, OK, TN, TX, UT, VT, WI, WY). These registries collect reports of substantiated abuse, neglect, and exploitation, and make that information available to licensing authorities and, in some cases, prospective employers and the public. The Task Force initially explored whether a central registry was necessary to capture individuals who abused elders, but were not criminally prosecuted. The Task Force engaged in extensive consultation with

DSS, which operates the central registry for children, and the Department of Health (DOH). The Task Force learned that both agencies employ existing registries in regulating elder care institutions and licensed home care providers. Ultimately, a majority of the Task Force determined that the cost of setting up and maintaining an expanded elder registry would outweigh the limited additional protection that could be provided by such a registry. DOH reassured the Task Force that its employment “red flag list,” denoting people with a history of abuse or neglect, provided suitable protection with respect to institutions and licensed providers, and that its regulatory definition of abuse, neglect, and exploitation would encompass the Task Force’s proposed definitions if the Legislature adopts the proposals. The Task Force’s Education Committee also resolved to provide educational resources that would help consumers know the dangers that unlicensed providers may pose. See page 35 for discussion specifics.

Minority Position: The potential for abuse wherein persons found committing abuse move from position to position outside of employment in licensed and certified service programs warrants a substantiated abuse and offender central registry available to the public to ensure that abusers are not invited into positions to offend again.

6) Increase the penalty for theft by exploitation of an elder or adult with a disability.

Under current law, the punishment for elder financial exploitation is the same as theft—a misdemeanor or felony depending on the amount taken. *See* SDCL 22-46-3, 22-30A-17.1. According to UJS statistics, in the last five years, only approximately 20% of such cases involved felony exploitation. The Task Force believes that exploiting elders and adults with a disability warrants a more serious punishment: a minimum Class 6 felony, the same as elder abuse and neglect, while retaining higher punishments for aggravated theft depending on the amount taken. The Task Force believes this increase in punishment is warranted to deter individuals from preying on vulnerable populations. An increase would also make South Dakota’s exploitation statute a more viable charging option for prosecutors in aggravated cases. See page 40 for draft proposed statutory language and accompanying commentary.

7) Clarify the standards for reporting the abuse, neglect, or exploitation of an elder or adult with a disability.

South Dakota has had a mandatory reporting statute for abuse, neglect, and exploitation of elders and adults with disabilities since 2011. However, unlike

most states, South Dakota lacks a description of what information should be conveyed in that report. Further, state law does not clearly indicate that financial exploitation is reportable by the public generally (and that good faith reporters of exploitation receive immunity). Additionally, the law does not designate a single authority with responsibility to receive all reports of abuse, neglect, and exploitation of vulnerable adults. Finally, the largest potential reporter of financial exploitation—financial institutions—have concerns with reporting suspected exploitive transactions in light of federal privacy laws. The Task Force recommends statutory revisions to address these concerns. See page 42 for draft proposed legislation and commentary thereon.

8) Employ a new prosecutor and a new investigator in the Office of the Attorney General to specialize in prosecuting/investigating abuse, neglect, and exploitation of elders and adults with a disability.

The Task Force received consistent public testimony on the lack of prosecution of financial exploitation and the difficulties of prosecuting the crime. The Task Force recommends that the Legislature appropriate funds for an attorney-specialist, within the Office of the Attorney General, whose role would be to prosecute or to assist state's attorneys in prosecuting the abuse, neglect, and financial exploitation of elders or adults with disabilities. The attorney-specialist would also serve as an educational resource and liaison for local and tribal law enforcement. The Task Force also recommends that the Legislature appropriate funds for an investigator specializing in these cases to assist the attorney in bringing criminal charges and providing education on this topic.

9) Create a civil right of action for elders and adults with a disability to recover damages from exploitation.

The civil right of action proposed in Recommendation 2 focuses on physical protection elders and adults with disabilities. Financial exploitation requires additional protections. Accordingly, the Task Force believes a special civil right of action should be available to allow vulnerable adults to recoup their stolen or embezzled property, and, in addition, permit them to recover attorney's fees. The proposed civil right of action is designed to permit victimized elders and adults with a disability—who often live on a diminished, fixed income—to obtain legal counsel that would otherwise be too costly to retain. It is also designed to dissuade others by authorizing punitive damages. It further authorizes a court to divest the offender of any probate or non-probate assets to which he or she would otherwise be entitled. See page 48 for draft proposed statutory language and added commentary.

10) Create a form for establishing a durable power of attorney for financial decisions and enact legislation to better protect principals under durable powers of attorney.

The Task Force heard from members of the public on the potential for elder abuse and exploitation resulting from durable powers of attorney. The task force recommends that education should be provided to the general public and legal practitioners that would include standard, understandable language for powers of attorney used in financial matters. For example, form language could provide specific information on what powers a principal can choose to authorize, as well as those duties an agent must follow. After initially drafting proposed form language to be included in a statute, the Task Force, in consultation with the State Bar of South Dakota, recommends that the State Bar draft a durable financial power of attorney form and make it available on its website and at its office. This is to ensure that legal experts will draft the form for general application. It also provides greater flexibility to make future improvements than if the forms are in statute. See page 52 for commentary.

The Task Force also recommends that the Legislature adopt revisions to SDCL 59-7-2.1, which are found on page 51. The revisions would require that a durable power of attorney, to be valid, must include the signature of the party signing over his/her power (the principal) before two adult witnesses. Further, the Task Force recommends that the State Bar's Real Property Committee look at whether South Dakota should adopt the Uniform Power of Attorney Act.

11) Identify educational resources and suggest a public awareness campaign for elder abuse.

The Education Committee is identifying educational resources and creating a strategy for disseminating information on elder abuse awareness that will complement the Task Force's recommendations. See page 54 for an overview of these resources, the timeline for dissemination, and the Committee's goals.

12) Amend statutes to provide that the appointment of a guardian or conservator divests an agent under a power of attorney of his or her conflicting authority and prevent powers of attorney from being used to circumvent guardianships or conservatorships.

Although powers of attorney provide needed flexibility, the accountability of agents under a durable power of attorney is often elusive after a principal becomes incapacitated. Further, conflicts develop when a guardian or conservator is appointed by a court after a principal with a durable power of

attorney becomes incapacitated. South Dakota law is unclear as to which fiduciary—the agent or the guardian/conservator—should be favored when this conflict develops. The Task Force recommends legislation providing that a guardian or conservator has authority over a conflicting power of attorney, because a guardian or conservator is statutorily accountable to the court, while a power of attorney is not. Further, the proposal clarifies that a protected person for whom a guardian or conservator is appointed may not thereafter authorize a power of attorney, as that power of attorney may be used to circumvent the authority of a court-authorized and monitored guardian or conservator. See page 56 for draft proposed legislation and commentary.

13) Prepare educational resources and establish a statutory training requirement for all guardians and conservators.

South Dakota is one of only ten states that lack any official or quasi-official education on guardianships and conservatorships. The Task Force recommends the creation of education resources by the State Bar of South Dakota. Anecdotal evidence reflects that many problems with guardianships and conservatorships are the result of a lack of information (and not malicious intent). Therefore, the Task Force recommends an educational curriculum be mandated for all guardians and conservators. The Task Force further recommends that the State Bar research and prepare a training curriculum that would become a statutory training requirement. That training curricula and requirement should balance the need to keep guardianships and conservatorships economical and user-friendly while ensuring training to support fiduciaries. See page 58 for recommendations and draft proposed legislation with commentary.

Special Writing: A member of the Task Force requested that whatever training requirement is established, the cost of the training should be disclosed plainly and up front.

14) Encourage the court system to further monitor guardians and conservators using existing court electronic resources.

The Task Force heard from members and stakeholders that guardian reports and conservator accountings could be better monitored by the UJS. Because reports and accountings are a significant method of overseeing the work of guardians and conservators, the Task Force felt that additional monitoring using internal court processes was needed. These specific recommendations and commentary thereon are found on page 60.

15) Require background checks for all proposed guardians and conservators, and prohibit felons from serving as guardians or conservators unless a court finds special circumstances.

At least sixteen states (AR, AZ, CA, CT, FL, GA, ID, MN, NE, NJ, ND, OH, OK, SC, VT, WV) require criminal background checks before a person may be appointed as a guardian, conservator, or guardian ad litem for a vulnerable adult. The Task Force recommends adoption of a statute requiring a criminal background check; a check of civil judgments for adult abuse, neglect, and exploitation; and that a report of these checks be presented to the court before a guardian or conservator may be appointed. See page 61 for draft legislation.

16) Require sureties to notify the court and the protected person, minor, or estate if a guardian or conservator bond is not renewed.

The Task Force noted that surety companies supplying bonds for guardians and conservators can provide an additional level of oversight and investigation before a guardian or conservator is appointed. A surety company will not bond a potential guardian or conservator that is seen as a risk to the obligee (the vulnerable adult). However, the Task Force ultimately rejected the idea that bonding should be presumptively mandated, noting that the additional cost of bonding would be borne by the protected person, the minor, or his/her estate. Further, the Task Force noted that requiring background checks of prospective guardians and conservators (Recommendation 15) would accomplish many of the same goals as imposing a presumptive bonding requirement.

Ultimately, after taking public testimony, the only major deficiency discovered by the Task Force regarding bonding concerned the lack of notice when bonds lapse. Accordingly, the Task Force recommends amending statute to require that sureties notify the court and the protected person, minor, or estate when a court-ordered bond is not renewed. See the draft on page 64.

Endnotes



- i. “Elder Abuse: Hiding in Plain Sight,” Georgia Dep’t of Human Servs., Div. of Aging Servs., available at <http://www.gpb.org/elder-abuse> (last accessed Sept. 17, 2015).
- ii. “Fighting Back Against the Hidden Epidemic of Elder Abuse,” U. S. Dep’t of Justice (June 14, 2012), available at <http://www.justice.gov/opa/blog/fighting-back-against-hidden-epidemic-elder-abuse>.
- iii. “World Elder Abuse Awareness Day, Nebraska Toolkit,” Neb. Dep’t of Health & Human Servs., available at http://dhhs.ne.gov/children_family_services/Elder%20Abuse/Tool%20Kit.pdf (last accessed Sept. 17, 2015).
- iv. “Elder Abuse Prevalence and Incidence,” Nat’l Ctr. on Elder Abuse (2005), available at <http://www.ncea.aoa.gov/resources/publication/docs/finalstatistics050331.pdf>.
- v. *Id.*
- vi. Nat’l Ctr. on Elder Abuse, *The 2004 Survey of State Adult Protective Services: Abuse of Adults 18 Years of Age and Older 19-20*, Mar. 2007, available at http://www.ncea.aoa.gov/Resources/Publication/docs/APS_2004NCEASurvey.pdf.
- vii. Nat’l Ctr. on Elder Abuse, Statistics/Data (citing National Research Council. (2003) *Elder mistreatment: Abuse, neglect and exploitation in an aging America*. Washington, D.C.: The National Academies Press), <http://www.ncea.aoa.gov/Library/Data/index.aspx> (last access Sept. 17, 2015).
- viii. Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, New York City Department for the Aging. *Under the Radar: New York State Elder Abuse Prevalence Study. Self-reported prevalence and documented case surveys [Final Report] 2011*, available at <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf>
- ix. U.S. Dep’t of Justice, Elder Justice Initiative, <http://www.justice.gov/elderjustice/research/> (last accessed Sept. 17, 2015).
- x. Nat’l Clearinghouse on Abuse in Later Life, “An Overview of Elder Abuse: A Growing Problem” (citing Acierno et al., 2010; Beach et al., 2010; Lifespan of Greater Rochester et al. (*supra* note viii)), available at <http://www.ncall.us/sites/ncall.us/files/resources/1.%20Overview.pdf>.
- xi. Nat’l Ctr. on Elder Abuse & Westat, Inc., *The National Elder Abuse Incidence Study 1* (Sept. 1998), available at http://aoa.gov/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf.
- xii. “Elder Abuse Prevalence,” *supra* note iv. (citing John Wasik, “The Fleecing of America’s Elderly,” *Consumers Digest*, Mar./Apr. 2000, at 78-79).
- xiii. MetLife Mature Market Institute, Nat’l Cmte. for the Prevention of Elder Abuse, & Ctr. for Gerontology at Va. Polytechnic Inst., *Broken Trust: Elders, Family, and Finances: A study on Elder Financial Abuse Prevention 5*, Mar. 2009, available at <https://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf>.
- xiv. Georgia J. Anetzberger, “An Update on the Nature and Scope of Elder Abuse,” *Am. Soc’y on Aging* (Oct. 1, 2012) (citing Dong et al., 2009/2011; Baker et al., 2009; MetLife MMI 2009/2011(*supra* note xiii)), <http://www.asaging.org/blog/update-nature-and-scope-elder-abuse>
- xv. Abt Assocs., *Evaluating Long-Term Care Options for South Dakota: Update 8* (2015), available at <http://dss.sd.gov/docs/news/reports/finalreportsdltc.pdf>.
- xvi. *Id.* at 9.
- xvii. *Id.* at 10.
- xviii. *Id.* at 9, 16.

Proposed Legislation and Policy Recommendations



FOR AN ACT ENTITLED, An Act to adopt the Elder Abuse Task Force’s statutory recommendations in order to protect South Dakota seniors and adults with disabilities from abuse, neglect, and exploitation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Recommendation 1: Criminalize “emotional and psychological abuse” of elders and adults with a disability.

A. Definition of “Emotional and Psychological Abuse”

Section 1. That § 22-46-1 be amended to read as follows:

22-46-1. Terms used in this chapter mean:

- (1) ~~“Abuse,” physical harm, bodily injury, or attempt to cause physical harm or injury, or the infliction of fear of imminent physical harm or bodily injury on an elder or a disabled adult;~~

Commentary – This definition was renamed “physical abuse” (found below, (7)) to permit the inclusion of “emotional and psychological abuse” as elder abuse (also found below, (4)).

- (2) ~~“Adult with a disability,” a person eighteen years of age or older who suffers from~~
has a condition of intellectual disability, infirmities of aging as manifested by organic brain damage, advanced age, or other physical dysfunctioning to the extent that the person is unable to protect himself or herself or provide for his or her own care;

Commentary – This amendment is suggested to eliminate the requirement that an adult with a disability must prove to a court that they “suffer” from their condition.

- (2) "Caretaker," a person or entity who is in a position of trust to an elder or adult with a disability, or who is responsible for the health or welfare of an elder or adult with a disability, and who assumed the position of trust or responsibility voluntarily, by contract, by receipt of payment, or by order of the court;

Commentary – We received feedback from law enforcement who work on elder abuse and neglect cases that a person who becomes criminally liable for neglect was not currently well defined in statute. This borrows language from the theft by exploitation statute, SDCL 22-46-3, while adding that a caretaking duty can arise by volunteering. At least ten other states allow criminal neglect to be based on the voluntary assumption of the duty of care: CA, IA, MA, MO, NV, NC, OH, TN, VT, WV.

- (3) "Elder," a person sixty-five years of age or older;
- (4) "Emotional and psychological abuse," a caretaker's repeated or gross infliction of:
- (a) Sexually exploitative acts involving obscene nudity that are harmful to a nonconsenting elder or adult with a disability;
 - (b) Unreasonable confinement;
 - (c) Harm or damage or destruction of the property of an elder or adult with a disability, including harm to or destruction of pets; or
 - (d) Ridiculing or demeaning conduct, derogatory remarks, verbal harassment, or threats to inflict physical or emotional and psychological abuse, directed at an elder or adult with a disability;

Commentary— This is a new provision to criminalize emotional and psychological abuse. "Unreasonable confinement" is a phrase borrowed from N.H. Rev. Stat. § 161-F:43. Nevada Rev. Stat. § 200.5092 is the basis for references to property destruction. Subpart (d) derives from Arizona and Delaware criminal statutes. Ariz. Rev. Stat. § 13-3623(F)(3), 31 Del. Code §§ 3902(1)(b). Each of these definitions of emotional and psychological abuse

involves at least one unique element not found elsewhere in South Dakota's criminal code.

- (5) "Exploitation," the wrongful taking or exercising of control over property of an elder or a ~~disabled~~ adult with a disability with intent to defraud the elder or ~~disabled~~ adult with a disability; and

Commentary—Statutory compilations try to use person-first descriptions of individuals with disabilities. While these suggested revisions do not capture all of the instances that “disabled adult” is used, it is suggested to make similar changes throughout the chapter.

- (5)(6) "Neglect," harm to ~~an elder's or a disabled adult's~~ the health or welfare of an elder or an adult with a disability, without reasonable medical justification, caused by a caretaker, within the means available for the elder or ~~disabled~~ adult with a disability, including the failure to provide adequate food, clothing, shelter, or medical care;

Commentary—These revisions incorporate the revised definition of “caretaker” above and thereby help to better define who becomes criminally responsible for neglect of an elder or an adult with a disability.

- (7) "Physical abuse," physical harm, bodily injury, attempt to cause physical harm or injury, or fear of imminent physical harm or bodily injury.

B. Abuse and Neglect Punishment Statute

Section 2. That § 22-46-2 be amended to read as follows:

22-46-2. Any person who physically abuses or neglects an elder or a ~~disabled adult~~ adult with a disability in a manner which does not constitute aggravated assault is guilty of a Class 6 felony.

Any person who emotionally or psychologically abuses an elder or adult with a disability is guilty of a Class 1 misdemeanor.

Commentary—The Task Force initially found two options to pursue on this issue and chose Option 2. Option 1 would have made the punishment for emotional and psychological abuse the same as physical abuse and neglect—a Class 6 felony. Option 2, suggested above, would authorize punishment for emotional and psychological abuse less severely (a Class 1 misdemeanor). Based on staff research, a Class 6 felony is in the middle range of punishments for emotional and psychological elder abuse nationwide. The Task Force recommends a Class 1 misdemeanor because the potential for a penitentiary sentence may be too harsh in some cases involving emotional or psychological abuse.

Recommendation 2: Create a civil right of action that includes protection orders for abused, neglected, and exploited elders or adults with a disability.

Section 3. Terms used in sections 3 to 20, inclusive, of this Act mean, unless the context otherwise requires:

- (1) "Attorney in fact," an agent under a power of attorney pursuant to chapter 59-2 or an attorney in fact under a durable power of attorney pursuant to § 59-7-2.1;
- (2) "Caretaker," a related or nonrelated person who has the responsibility for the health or welfare of a vulnerable adult as a result of assuming the responsibility voluntarily, by contract, by receipt of payment for care, or by order of the court;
- (3) "Conservator," as defined in subdivision 29A-5-102(2);
- (4) "Vulnerable adult abuse," any of the following:
 - (a) Physical abuse as defined in section 1 of this Act;
 - (b) Emotional and psychological abuse as defined in section 1 of this Act;
 - (c) Neglect as defined in section 1 of this Act and § 22-46-1.1; or
 - (d) Financial exploitation;
- (5) "Family or household member," a spouse, a person cohabiting with the vulnerable adult, a parent, or a person related to the vulnerable adult by consanguinity or affinity, but does not include children of the vulnerable adult who are less than eighteen years of age;
- (6) "Fiduciary," a person or entity with the legal responsibility to make decisions on behalf of and for the benefit of a vulnerable adult and to act in good faith and with fairness. The term, fiduciary, includes an attorney in fact, a guardian, or a

conservator;

- (7) "Financial exploitation," exploitation as defined in section 1 of this Act when committed by a person who stands in a position of trust or confidence;
- (8) "Guardian," as defined in subdivision 29A-5-102(4);
- (9) "Peace officer," as defined in subdivision 23A-45-9(13);
- (10) "Petitioner," a vulnerable adult who files a petition pursuant to sections 3 to 20, inclusive, of this Act, and includes a substitute petitioner who files a petition on behalf of a vulnerable adult pursuant to sections 3 to 20, inclusive, of this Act;
- (11) "Present danger of vulnerable adult abuse," a situation in which the respondent has recently threatened the vulnerable adult with initial or additional abuse or neglect or the potential for misappropriation, misuse, or removal of the funds, benefits, property, resources, belongings, or assets of the vulnerable adult combined with reasonable grounds to believe that abuse, neglect, or exploitation is likely to occur;
- (12) "Pro se," a person proceeding on the person's own behalf without legal representation;
- (13) "Stands in a position of trust or confidence," the person has any of the following relationships relative to the vulnerable adult:
 - (a) Is a parent, spouse, adult child, or other relative by consanguinity or affinity of the vulnerable adult;
 - (b) Is a caretaker for the vulnerable adult;
 - (c) Is a person who is in a confidential relationship with the vulnerable adult. A confidential relationship does not include a legal, fiduciary, or ordinary commercial or transactional relationship the vulnerable adult may have with

a bank incorporated pursuant to the provisions of any state or federal law; any savings and loan association or savings bank incorporated pursuant to the provisions of any state or federal law; any credit union organized pursuant to the provisions of any state or federal law; any attorney licensed to practice law in this state; or any agent, agency, or company regulated under title 58 or chapter 36-21A;

- (14) "Substitute petitioner," a family or household member, guardian, conservator, attorney in fact, or guardian ad litem for a vulnerable adult, or other interested person who files a petition pursuant to sections 3 to 20, inclusive, of this Act;
- (15) "Vulnerable adult," a person sixty-five years of age or older who is unable to protect himself or herself from abuse as a result of age or a mental or physical condition, or an adult with a disability as defined in Section 1 of this Act.

Commentary—This section is modeled after Iowa Code §235F.1. The definitions of “caretaker”, “abuse” and “neglect” correspond to the definitions proposed in the criminal elder and adult with a disability abuse and neglect chapter, SDCL 22-46. This language also deviates from Iowa Code by providing relief to adults with a disability.

Section 4. A vulnerable adult or a substitute petitioner may seek relief from vulnerable adult abuse by filing a petition and affidavit in the circuit court or in a magistrate court with a magistrate judge presiding. Venue is where either party resides. The petition and affidavit shall include all of the following:

- (1) The name of the vulnerable adult and the name and address of the vulnerable adult's attorney, if any. If the vulnerable adult is proceeding pro se, the petition shall include a mailing address for the vulnerable adult;

- (2) The name of the substitute petitioner if the petition is being filed on behalf of a vulnerable adult, and the name and address of the attorney of the substitute petitioner. If the substitute petitioner is proceeding pro se, the petition shall include a mailing address for the substitute petitioner;
- (3) The name and address, if known, of the respondent;
- (4) The relationship of the vulnerable adult to the respondent;
- (5) The nature of the alleged vulnerable adult abuse, including specific facts and circumstances of the abuse;
- (6) The name and age of any other individual whose welfare may be affected; and
- (7) The desired relief, including a request for temporary or emergency orders.

A petition for relief may be made whether or not there is a pending lawsuit, complaint, petition, or other action between the parties. However, if there is any other lawsuit, complaint, petition, or other action pending between the parties, any new petition made pursuant to this section shall be made to the judge previously assigned to the pending lawsuit, petition, or other action, unless good cause is shown for the assignment of a different judge.

If a petition for a protection order alleging the existence of vulnerable adult abuse is filed with the court pursuant to this section and, if the court, upon an initial review, determines that the allegations do not support the existence of vulnerable adult abuse, but that the allegations do support the existence of stalking or physical injury pursuant to § 22-19A-8 or domestic abuse pursuant to § 25-10-3, the court, in its discretion, may hear and act upon the petition as though the petition had been filed under § 22-19A-8 or § 25-10-3 and subject to the provisions of the respective chapters.

Section 5. If an affidavit filed with a petition under Section 4 of this Act alleges that the vulnerable adult is in present danger of vulnerable adult abuse before an adverse party or his or

her attorney can be heard in opposition, the court may grant an ex parte temporary protection order pending a full hearing and grant relief as the court deems proper, including an order:

- (1) Restraining any person from committing vulnerable adult abuse;
- (2) Excluding any person from the dwelling or the residence of the vulnerable adult..

Section 6. If a substitute petitioner files a petition pursuant to section 4 of this Act on behalf of a vulnerable adult, the vulnerable adult retains the right to all of the following:

- (1) To contact and retain counsel;
- (2) To have access to personal records;
- (3) To file objections to the protection order;
- (4) To request a hearing on the petition; and
- (5) To present evidence and cross-examine witnesses at the hearing.

Section 7. By July 1, 2016, the Unified Judicial System shall prescribe standard forms to be used by a vulnerable adult or substitute petitioner seeking a protection order by proceeding pro se in an action pursuant to sections 3 to 20, inclusive, of this Act.

The clerk of the circuit court shall furnish the required forms to any person seeking a protection order through pro se proceedings pursuant to sections 3 to 20, inclusive, of this Act.

Commentary—The South Dakota Unified Judicial System already supplies pro se verified petitions for protection orders in domestic and stalking/physical injury situations, per South Dakota law. See SDCL 25-10-3 (domestic), 22-19A-8 (stalking).

Section 8. Pursuant to § 15-6-17(c), the court may on its own motion or on the motion of a party appoint a guardian ad litem for a vulnerable adult if justice requires. The vulnerable adult's attorney may not also serve as the guardian ad litem.

Commentary—South Dakota law currently provides that “[t]he court shall

appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person and may make such appointment notwithstanding an appearance by a guardian or conservator.” SDCL 15-6-17(c).

Section 9. Upon receipt of the petition, if sufficient grounds are alleged for relief, the court shall order a hearing which shall be held not later than thirty days from the date of the order unless the court grants a continuance for good cause. Personal service of the petition, affidavit, and notice for hearing shall be made on the respondent not less than five days prior to the hearing .

Upon application of a party, the court shall issue subpoenas requiring attendance and testimony of witnesses and production of papers.

The court shall exercise its discretion in a manner that protects the vulnerable adult from traumatic confrontation with the respondent.

Hearings shall be recorded.

Upon application, notice to all parties, and hearing, the court may modify the terms of an existing protection order.

Section 10. An ex parte temporary protection order is effective for a period of thirty days except as provided in section 11 of this Act unless the court grants a continuance for good cause. No continuance may exceed thirty days. If a continuance is granted, the court by order shall extend the ex parte temporary protection order until the rescheduled hearing date. The respondent shall be personally served with a copy of the ex parte order along with a copy of the petition, affidavit, and notice of the date set for the hearing. The ex parte order shall be served without delay under the circumstances of the case including service of the ex parte order on a Sunday or holiday. The law enforcement agency serving the order shall notify the petitioner by

telephone or written correspondence when the order is served if the petitioner has provided to the law enforcement agency either a telephone number or address, or both, where the petitioner may be contacted. The law enforcement agency and any officer of the law enforcement agency is immune from civil and criminal liability if the agency or the officer makes a good faith attempt to notify the petitioner in a manner consistent with the provisions of this section.

Section 11. If an ex parte temporary protection order is in effect and the court issues a protection order pursuant to sections 13 through 20, inclusive, of this Act, the ex parte temporary protection order remains effective until the order issued pursuant to sections 13 through 20, inclusive, of this Act is served on the respondent.

Section 12. The showing required pursuant to section 13 of this Act may be made by any of the following:

- (1) The vulnerable adult;
- (2) The guardian, conservator, attorney in fact, or guardian ad litem of the vulnerable adult;
- (3) A witness to the vulnerable adult abuse; or
- (4) An adult protective services worker who has conducted an investigation.

Section 13. Upon a finding by a preponderance of the evidence that vulnerable adult abuse has taken place, the court may order any of the following:

- (1) That the respondent be required to move from the residence of the vulnerable adult if both the vulnerable adult and the respondent are titleholders or contract holders of record of the real property, are named as tenants in the rental agreement concerning the use and occupancy of the dwelling unit, are living in the same residence, or are married to each other;

- (2) That the respondent provide suitable alternative housing for the vulnerable adult;
- (3) That a peace officer accompany the party who is leaving or has left the party's residence to remove essential personal effects of the party;
- (4) That the respondent be restrained from vulnerable adult abuse;
- (5) That the respondent be restrained from entering or attempting to enter on any premise when it appears to the court that restraint is necessary to prevent the respondent from committing vulnerable adult abuse;
- (6) That the respondent be restrained from exercising any powers on behalf of the vulnerable adult through a court-appointed guardian, conservator, or guardian ad litem, an attorney in fact, or another third party;
- (7) In addition to the relief provided in section 14 of this Act, other relief that the court considers necessary to provide for the safety and welfare of the vulnerable adult.

Any relief granted by the order for protection shall be for a fixed period and may not exceed five years.

Section 14. If the court finds that the vulnerable adult has been the victim of financial exploitation, the court may order the relief the court considers necessary to prevent or remedy the financial exploitation, including any of the following:

- (1) Directing the respondent to refrain from exercising control over the funds, benefits, property, resources, belongings, or assets of the vulnerable adult;
- (2) Requiring the respondent to return custody or control of the funds, benefits, property, resources, belongings, or assets to the vulnerable adult;
- (3) Requiring the respondent to follow the instructions of the guardian, conservator, or attorney in fact of the vulnerable adult;

- (4) Prohibiting the respondent from transferring the funds, benefits, property, resources, belongings, or assets of the vulnerable adult to any person other than the vulnerable adult.

Commentary—The equivalent provision for domestic protection orders is SDCL 25-10-5. Note that the Financial Exploitation Committee suggested a civil cause of action specific to elder and vulnerable adult financial exploitation that incorporates by reference the remedies provided in Section 14. That “exploitation” cause of action is found in Sections 28 through 33 on pages 48 to 51.

Section 15. The court may not use an order issued pursuant to sections 13 to 20, inclusive, of this Act, to do any of the following:

- (1) To allow any person other than the vulnerable adult to assume responsibility for the funds, benefits, property, resources, belongings, or assets of the vulnerable adult; or
- (2) For relief that is more appropriately obtained in a proceeding filed pursuant to chapter 29A-5 including giving control and management of the funds, benefits, property, resources, belongings, or assets of the vulnerable adult to a conservator for any purpose other than the relief granted pursuant to section 14 of this Act.

Section 16. A protection order shall be for a fixed period of time not to exceed five years. The court may amend or extend an order at any time upon a petition filed by either party and after notice and a hearing. The court may extend an order if the court, after a hearing at which the respondent has the opportunity to be heard, finds that the respondent continues to pose a threat to the safety of the vulnerable adult, a person residing with the vulnerable adult, or a member of the vulnerable adult's immediate family, or continues to present a risk of financial exploitation of the vulnerable adult. The number of extensions that the court may grant is not limited.

Section 17. The court may order that the respondent pay the attorney's fees and court costs of the vulnerable adult and substitute petitioner.

Commentary—The proposal would be unique for protection orders in South Dakota law as the court is authorized to order respondent to pay petitioner's/substitute petitioner's attorney's fees and court costs.

Section 18. An order pursuant to sections 3 to 20, inclusive, of this Act, does not affect title to real property.

Section 19. The petitioner may deliver an order within twenty-four hours to the local law enforcement agency having jurisdiction over the residence of the vulnerable adult. Each law enforcement agency shall make available to other law enforcement officers information as to the existence and status of any order for protection issued pursuant to sections 3 to 20, inclusive, of this Act.

Section 20. The petitioner's right to relief under sections 3 to 20, inclusive, of this Act, is not affected by the vulnerable adult leaving home to avoid vulnerable adult abuse.

Recommendation 3: Recommend no action regarding the use of arbitration in long-term care contracts.

Commentary—the following memoranda are part of the basis for the Task Force’s decision to decline recommending legislation regulating arbitration in long-term care agreements.

Long-Term Care Arbitration Agreement Research

TO: Justice Steven Zinter

FROM: Justin Goetz

DATE: November 6, 2015

RE: Whether the Federal Arbitration Act Preempts the Proposed Statutory Language in Draft Recommendation 3

Background Research:

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, provides, in relevant part:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The United States Supreme Court has construed this language as showing that “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 858, 79 L. Ed. 2d 1 (1984). In other words, “when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Marmet Health Care Ctr., Inc. v. Brown*, ___ U.S. ___, 132 S. Ct. 1201, 1203, 182 L. Ed. 2d

42 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1747, 179 L. Ed. 2d 742 (2011)).

Original Majority Position:

The Task Force initially explored if it was possible to prevent long-term care service providers from requiring elders sign binding arbitration clauses in order to receive services. Binding, pre-dispute arbitration generally prevents an elder from being able to bring contract and tort claims arising out of their long-term care services in a court of law. In so doing, the elder forgoes important rights, including the expansive civil procedure and discovery rights provided in our courts, a right to jury trial, and other key protections. Given the nature of these admissions agreements and the often traumatic circumstances that surround their execution, a binding arbitration clause could make an admissions agreement an unconscionable adhesion contract, or an unconscionable “standard-form contract prepared by one party, to be signed by another party in a weaker position . . . who adheres to the contract with little choice about the terms.” Black’s Law Dictionary (10th ed. 2014). Put another way, the elder could be forced to sign the arbitration agreement against his or her will in order to receive long-term care services. In a rural state like South Dakota—with potentially one long-term care provider within a hundred miles of the only home, friends, and family an elder has known—this is a real concern.

This concern is reflected in the Center for Medicare and Medicaid Services recently issuing a proposed rule that would prohibit long-term care facilities receiving Medicare and Medicaid funds from conditioning service on signing arbitration agreements. *See* 80 Fed. Reg. 42167 (proposed July 16, 2015) (to be codified at 42 C.F.R. Pts. 405, 431, 447, 482, 483, 485, and 488). It is also reflected in bills introduced in Congress, which would clarify that the FAA “was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power” and not to “consumer disputes and employment disputes” wherein “consumers and employees have little or no meaningful choice whether to submit their claims to arbitration” and “are not even aware that they have given up their rights.” *See* S. 1133, 114th Cong., 1st Sess. (2015); H.R. 2087, 114th Cong., 1st Sess. (2015).

This concern is further magnified by the U.S. Supreme Court’s own findings. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 680, 130 S. Ct. 1758, 1773, 176 L. Ed. 2d 605, the Court held that as a matter of “fundamental importance,” the FAA establishes “the basic precept that arbitration ‘is a matter of

consent, not coercion[.]” *Id.* (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). If, indeed, consent is the key, then statute may be needed to ensure that the party in a long-term care transaction with far less sophistication and bargaining power actually consented to the arbitration agreement and was not forced by an unconscionable “take-it-or-leave-it” situation.

The Task Force initially considered statutory language for this purpose. The Task Force then determined that the statute appeared to enshrine the existing practice of South Dakota long-term care providers, as indicated by the membership survey of the South Dakota Health Care Association presented to the Task Force. The survey indicated no responding members condition admission on signing an arbitration agreement. This statute would then make that practice clear to prospective admittees, with the intention of ensuring their knowing and voluntary consent.

Why the Original Majority Position is Likely Not Legally Viable:

Yet, as was brought out by Mark Deak at the 10/29/2015 Elder Abuse Task Force meeting, the United States Supreme Court has rejected the application of statute akin to what the Task Force was considering. I believe that holding presents an insurmountable obstacle, despite the initial intentions of the Majority, and it forms the basis of this recommendation.

In *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996), the Court dealt with a statute from Montana requiring a notice that a contract contained an arbitration clause to be displayed prominently on the first page of the contract or the arbitration clause would be void. *See id.* at 684, 116 S. Ct. at 1654 (citing Mont. Code § 27-5-114(4)). The Montana Supreme Court had upheld this provision on the grounds that it “did not undermine the goals and policies of the FAA” and that it in fact upheld the FAA’s fundamental precept of consent by seeking to ensure arbitration was entered into knowingly and voluntarily. *Id.* at 685, 116 S. Ct. at 1655; *see also Casarotto v. Lombardi*, 886 P.2d 931, 938-39 (Mont. 1994), *overruled by Doctor’s Assocs., supra*. The Court rejected this rationale (and, by extension, the rationale of the Majority) by expanding on the concepts outlined in the “Background Research” section above:

By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect

status, requiring instead that such provisions be placed “upon the same footing as other contracts.” Montana’s § 27-5-114(4) directly conflicts with § 2 of the FAA because the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act.

Id. at 687, 116 S. Ct. at 1656 (citation omitted). Notably, the Court chose to refute the “fundamental precept of consent” rationale given by the Montana Supreme Court in an indirect way. It began by asserting that by the plain language of § 2 of the FAA, Congress expressly prohibits States and the courts from “threshold limitations placed specifically and solely on arbitration provisions.” *See id.* at 688.

The Court reasserted that § 2 instead allows the invalidation of arbitration clauses on the same grounds as contracts generally. *See id.* (“Section 2 ‘mandates the enforcement of arbitration agreements . . . save upon such grounds as exist at law or in equity for the revocation of any contract.’” (citations omitted)). In that way, the Court appears to assert that the “fundamental precept” of consent in executing arbitration agreements can and must be determined on a case-by-case basis by courts applying traditional contract law principles (such as unconscionability) to the specific facts of the case, and that per § 2 of the FAA, arbitration clauses cannot be disfavored in a blanket fashion by statute, or for that matter, by a court. *See id.* at 687 n.3, 116 S. Ct. at 1656 n.3 (“It bears reiteration, however, that a court may not ‘rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.’” (omission in original) (quoting *Perry v. Thomas*, 482 U.S. 482, 492 n.9, 107 S. Ct. 2520, 2527 n.9, 96 L. Ed. 2d 426 (1987))).

Recommendation:

Because the United States Supreme Court’s holding in *Doctor’s Associates* rejected both the type of arbitration-targeting notice statute initially proposed in the Task Force’s Draft Recommendation 3, and the rationale employed by the Majority (initially) in support of the proposal, I recommend that “No Action Be Taken.”

November 10, 2015

Justice Steven L. Zinter, Chair
South Dakota Elder Abuse Task Force

Re: Position Regarding Use Arbitration Agreements

Dear Justice Zinter:

I have been privileged to serve as a member of the South Dakota Elder Abuse Task Force (EATF). I appreciate the opportunity to submit this dissenting position regarding recommendation 3 of the *Final Report and Recommendations* (draft). Please consider the following points:

1. Dispute resolution by arbitration is generally quicker, more collaborative, and less expensive than going through the court system. Arbitration has been used successfully widely in healthcare, including by hospitals and physician practices, and is generally felt to protect the interests of patients, providers, and court systems alike. Arbitration provides an alternate forum for legal claims to be decided. There is no compelling reason to single out arbitration agreements used by long term care providers for unique and conditional regulation.

2. Impact on the Court System. Marginalization of arbitration agreements will have the impact of shifting burden to court systems. This is not in the best interests of residents, families, the long term care industry, or the court system. Further, the proposed 30 day “cooling off” period is not applicable to any other contracts, and it is of dubious value to create unique conditions that apply only to arbitration agreements for nursing homes or assisted living facilities.

3. Accountability. An arbitration agreement does not impact or in any way preclude the ability of the federal government or the state to cite facilities for

violation of regulatory requirements. Residents and their families are not prohibited from reporting and/or discussing any concerns that they have with the Ombudsmen, other government officials, or the public. In fact, healthcare facilities are mandatory reporters and must report abuse and neglect. The state survey process also reinforces this transparency.

I respectfully request that the Task Force reconsider its proposed recommendation regarding conditions placed on the use of arbitration agreements.

Thank you for allowing me the opportunity to share this opinion.

Sincerely,

Dr. Victoria Walker
Task Force Member

c. Task Force Members
Justin Goetz

Recommendation 4: Support DSS efforts to potentially revise the definition of “severe mental illness”—a basis for involuntary mental commitments—to exclude dementia patients, and to account for elders so committed.

Commentary—The Task Force was made aware of instances where elders with dementia, who were experiencing delirium due to medical conditions or who were disruptive and/or presented challenges to care providers, were being involuntarily committed to the Human Services Center in Yankton. The Task Force discovered that DSS also has been studying the issue. To avoid duplicative efforts, the Task Force supports DSS’s continued work to determine whether it is possible to exclude dementia as a statutory basis for involuntary commitment. The Task Force also recommends that DSS ensure data transparency and task a particular entity or officer with measuring progress on this issue, thereby certifying that any policies have their intended effect.

Recommendation 5: Recommend that South Dakota not create a central registry for abuse, neglect, and exploitation of elders or adults with a disability—much like the registry that exists for child abuse and neglect.

A. Majority Report:

Summary of DOH/DSS Position on a Central Registry Concept

S.D. Elder Abuse Task Force

Existing Monitoring and Reporting: Our current statutory and regulatory framework provides active monitoring of all licensed healthcare personnel—from physicians, nurses, and physician assistants, to physical therapists, nutritionists and certified nursing assistants. These existing functions are akin to a central registry. Individuals who provide direct care and have consistent access to elders in long-term care environments are mostly such licensed personnel. When unlicensed personnel have access to elders in long-term care situations, they are supervised by those who are licensed. All licensed health care facilities, along with both licensed and unlicensed personnel, are mandated to report elder abuse, neglect or exploitation by statute to state and federal authorities. If abuse happens, there are individuals who will see it and have a duty to report it.

Prohibited Employees: Any person who is convicted of abusing, neglecting, or exploiting another is prohibited from being employed by a licensed health care facility. Additionally, in cases of abuse, neglect, or exploitation of a person who is a resident or patient of a licensed health care facility, a conviction is not necessary to bar the perpetrator from employment. In those instances, “substantial evidence” regarding the alleged crime is sufficient grounds to prohibit employment in a licensed health care facility. Through background checks, employment history, etc., the onus is on the licensed health care facility to ensure that their employees are not prohibited. During the Department’s inspections of licensed health care facilities, inspectors review a sample of employees to ensure the facility is in compliance with the prohibited employee regulations. Such a check rarely finds offenders, as licensed facilities generally do their homework before hiring someone; failing to perform a diligent background examination may result in substantial liability if any prior offender hurts an elder in their care. *See Kirlin v. Halverson*, 2008 S.D. 107, ¶ 48, 758 N.W.2d 436, 452-53.

Wide-Scoped and Longstanding Records System: The Department of Health and Department of Social Services routinely share information on reports of suspected abuse, neglect, and exploitation of elders, partnering on a number of investigations. Further, the Department of Health's abuse rules have no time restrictions. Thus, abusive violations that occur over a decade ago will still result in individuals appearing on the red flag list.

Recommendation: The Departments of Health and Social Services ask that the Task Force consider these points in its determination of whether to advocate for a central registry of elder abuse, neglect, and exploitation. We recommend against the creation of such a central registry as a slight, additional layer of mostly redundant protection whose benefits will be outweighed by the burden on a finite state budget.

The Departments would instead suggest the Task Force recommend to the Legislature that the Department of Health's regulatory definition of elder abuse be expanded to include the expanding criminal definition advocated by the Task Force. The Departments would support that reform as an alternative to the central registry. As the status quo's infrastructure and regulatory oversight is already sufficient to protect elders in licensed health care institutions, we need to make sure that the Departments' efforts keep pace with, and compliment, the Task Force's work.

DSS's Estimate of Operating Costs of a Central Registry

Initial Placement on the Central Registry

When an individual is initially placed on the Central Registry, the process starts at the local office. Some local offices review each substantiated case in a Structured Team Response (STR) in which the supervisors of the Region come together and discuss the case to ensure adequate information to substantiate abuse/neglect. This process takes two hours - one hour of prep and one hour of discussion per supervisor.

Once the decision is made to place an individual on the Central Registry, the supervisor initiates the process and ensures all the correct documents are scanned in the electronic file system. This takes approximately 1 hour per week per supervisor.

The Regional Manager then reviews the file and sends out a certified letter to the individual notifying them of the placement on the Central Registry. The Regional Manager is responsible for tracking each of the individuals to monitor if they appeal or respond regarding placement on the Central Registry. This takes approximately 1 hour per week per Regional Manager. *598

In FY 15, Child Protection had a total of 598 substantiations

Total time: 4 hours per substantiated case, **cost of \$114**

Appeal of Initial Placement on the Central Registry

Should the individual appeal the decision of the initial placement on the Central Registry, this process adds another 8-10 hours per case for the Regional Manager. This time includes the review, prepping of witnesses, and sending certified letters. This does not include the hearing time. These cases are often reviewed by Program Specialist and/or Deputy Director. Each review is approximately 1 hour in length.

Total time: 12 hours per appealed case for a **cost of \$431**. This does not include Division of Legal Services expenses.

Initial Screening for the Central Registry

The Program Assistant is responsible for the initial screening of all Central Registry screening requests. She receives an average of 60 screenings each business day. These screenings are for purposes of adoption, foster care, kinship care, child care, employment at a child placement agency, employment at group/residential facilities, CASA volunteers, Child Protection Teams, employees of Child Protection Services, Head Start Programs, before/after school programs, caretakers through Department of Corrections, and tribal child welfare.

In order to complete the screening, she must look to see if the applicant and each of the applicant's children has history with CPS and if they do, the case has to be thoroughly reviewed. If the screenings are clear, meaning there are no substantiated findings, the Program Assistant stamps the screening form, initials it, and sends the form back to the requesting agency. This process is estimated at 5-15 minutes per screening. Depending on the number of children, the process can take up to 30-60 minutes for large families.

Total time: 15 minutes per screening, equating to **cost of \$4**

If the Program Assistant finds substantiated history, a paper file is started to be sent to the Program Specialist. The Program Specialist reviews the entire file and determines if the substantiation should be upheld and if the individual received adequate due process. A certified letter is then sent to the requesting agency. When there is substantiated history, this process is estimated to take an additional 30-60 minutes for the Program Assistant and 30-60 minutes for the Program Specialist.

Total time if screening results in substantiated findings: 2 hours, **cost of \$47**.

Waiver Requests

Individuals have the right to request a waiver to remove their name from the Central Registry after a period of 5 years. In order to do so, the individual submits a written

request. The Program Assistant researches the individual's file, as well as all of the individual's children and their files. Depending on the number of children and the amount of history, this process takes 60-90 minutes.

This file is then sent to the Program Specialist and reviewed in its entirety to make a determination if the individual is eligible for a waiver. The file is also reviewed to ensure adequate substantiations and due process. Certified letters are sent to the individual informing them of the steps required and paperwork needed to proceed with the waiver. This process takes 30-60 minutes. Consultation with the Deputy Director may also be necessary.

Total time: 3 hours, **cost of \$72.**

If the individual follows through with the request and submits the documentation required, the Program Specialist reviews the documentation to make a determination. At times, additional documentation is required and the applicant is contacted again. This process takes 30-90 minutes, for a **cost of \$46.**

If a waiver is denied and the individual requests a fair hearing to dispute the denial, an additional 2.5 hours is added, for a **cost of \$77**, not including the hearing time or consultation with the Division of Legal Services.

Total for 598 Substantiations in FY15 **\$68,172.00**

Initial Placement on the Central Registry	4 hours	\$114.00
(Supervisor 3 hours, Regional Manager 1 hour, 1 certified letter)		

Total for 22 Appeals in FY15 **\$9,482.00**

Appeal of Initial Placement on the Central Registry	12 hours	\$431.00
(Regional Manager 10 hours, Program Specialist 1 hour, Deputy Director 1 hour, 3 certified letters)		

Total for 15,000 Screenings in FY15 **\$60,000.00**

Initial Screening for the Central Registry	15 minutes	\$4.00
(Program Assistant 15 minutes)		

Total for Substantiated Findings and Waiver Requests **Variable**

Initial Screening if Substantiated Findings	2 hours	\$47.00
(Program Assistant 1 hour, Program Specialist 1 hour, 1 certified letter)		

Waiver Requests – initial request	3 hours	\$72.00
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(Program Assistant 1.5 hours, Program Specialist 1 hour, Deputy Director ½ hour, 1 certified letter)

Waiver Request – follow through 1.5 hours \$46.00

(Program Specialist 1.5 hours, 1 certified letter)

Waiver Request – appeal 2.5 hours \$77.00

(Program Specialist 2 hours, Deputy Director ½ hour, 1 certified letter)

Estimated Total for FY15 \$137,654.00+

Amounts are calculated by using salary rates of positions responsible for carrying out the specific task and does not include consultation of Legal Services which are included on the next page.

Appeal of Initial Placement on the Central Registry – Legal Expenses

When an individual appeals the decision of placement on the Central Registry, this process includes review of the case by the senior litigation supervisor and preparation and participation in the appeal hearing by the litigation supervisor or trial attorney. This time includes the review, coordinating and preparing witnesses, traveling to the hearing typically held 200-300 miles from Pierre, and participating in the hearing. Preparation and review typically takes 7 hours. Travel to and participation in the appeal hearing typically takes 8 hours. Additionally, the administrative law judge must travel to and conduct the hearing and prepare a decision. This typically takes 12 hours.

Total time: 27 hours per appealed case, mailing and administrative fees, and travel expenses for a **cost of \$1095.**

(Senior Litigation Supervisor 1 hour, Litigation Supervisor 14 hours, Administrative Law Judge 12 hours, mailing and administrative fees, travel costs)

In FY 15, Legal Services had a total of 22 appeals

Total for 22 Hearings in FY15 \$24,090.00

Appeal of Initial Placement on the Central Registry 27 hours \$1095.00

Grand Total for FY15 \$161,744.00+

B. Minority Report: The potential for abuse wherein persons found committing abuse move from position to position outside of employment in licensed and certified service programs warrants a substantiated abuse and offender central registry available to the public to ensure that abusers are not invited into positions to offend again.

Recommendation 6: Increase the penalty for theft by exploitation of an elder or adult with a disability.

Section 21. That § 22-46-3 be amended to read as follows:

22-46-3. Any person who, having assumed the duty voluntarily, by written contract, by receipt of payment for care, or by order of a court to provide for the support of an elder or a disabled adult, and having been entrusted with the property of that elder or disabled adult, with intent to defraud, appropriates such property to a use or purpose not in the due and lawful execution of that person's trust, is guilty of theft by exploitation. Theft by exploitation is a Class 6 felony if the appropriated property is less than or equal to one thousand dollars in value. If the appropriated property exceeds one thousand dollars in value, theft by exploitation is punishable as theft pursuant to chapter 22-30A.

Commentary—Criminal exploitation (theft by exploitation) differs from the general definition of exploitation in SDCL 22-46-1, as the former requires that the perpetrator have a caretaker-like duty and be entrusted with the property at the time of the wrongful appropriation. Like the proposed language defining caretakers as voluntary for purposes of criminal neglect or emotional and psychological abuse in Section 1, the Task Force proposes this change so that the duty can be voluntary.

The Task Force proposals would likely increase penalties for most occurrences of theft by exploitation based on conviction statistics for theft in South Dakota—despite the near lack of charging SDCL 22-46-3 offenses, and only seven convictions over the last five years. The Task Force determined general theft was the closest offense to theft by exploitation that resulted in regular convictions. Those conviction statistics indicated that over 90% of theft convictions were non-felony convictions. Therefore, the Task Force determined that most thefts by exploitation, if reported and charged, would similarly be misdemeanors. Indeed, according to court records on the limited number of convictions for violations of SDCL 22-46-3, 80% of those convictions since 1990 have been misdemeanors.

Additionally, the Task Force did not want to dilute existing punishments for theft by exploitation amounting to grand or aggravated grand theft. Such

penalties are based on amount, and can go as high as a Class 2 felony for aggravated grand theft (over \$500,000). See SDCL 22-46-3, 22-30A-17.1. The more serious types of theft by exploitation should be subject to the same type of more serious punishments authorized for theft violations in general.

Recommendation 7: Clarify the standards for reporting the abuse, neglect, or exploitation of an elder or adult with a disability.

A. Mandatory Reporter Statute

Section 22. That § 22-46-9 be amended to read as follows:

22-46-9. Any ~~person who is a~~:

- (1) Physician, dentist, doctor of osteopathy, chiropractor, optometrist, podiatrist, religious healing practitioner, hospital intern or resident, nurse, paramedic, emergency medical technician, social worker, or any health care professional;
- (2) Long-term care ombudsman;
- (3) Psychologist, licensed mental health professional, or counselor engaged in professional counseling; or
- (4) State, county, or municipal criminal justice employee or law enforcement officer;

who knows, or has reasonable cause to suspect, that an elder or ~~disabled~~ adult with a disability has been or is being abused ~~or~~, neglected, or exploited, shall, within twenty-four hours, report such knowledge or suspicion orally or in writing to the state's attorney of the county in which the elder or ~~disabled~~ adult with a disability resides or is present, to the Department of Social Services, or to a law enforcement officer. Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.

A person described in this section is not required to report the abuse, neglect, or exploitation of an elder or adult with a disability if the person knows that another person has already reported to a proper agency the same abuse, neglect, or exploitation that would have been the basis of the person's own report.

Commentary—The language above is modified to include person-first language, as well as to clarify—as some had interpreted—that exploitation is a form of abuse that must also be reported by mandatory reporters.

Admittedly, the individuals listed above are not necessarily financial experts, but “reasonable cause” is a high threshold. Reasonable cause does not hinge on technical knowledge, but instead bears on whether a reasonable and prudent person, operating in everyday life, should act given the circumstances. See State v. Smith, 2014 S.D. 50, ¶ 19, 851 N.W.2d 718, 725 (quoting State v. Hirning, 1999 S.D. 53, ¶ 13, 592 N.W.2d 600, 604). Such abuse, neglect, or exploitation—evident to the average person without any technical knowledge—can and should be reported.

At the August 18 Task Force meeting, the Elder Financial Exploitation Committee relayed its support for mandatory reporting of financial exploitation to include financial institutions. However, the Board of Directors of the South Dakota Bankers Association unanimously rejected mandatory reporting as well as the Class 1 misdemeanor for financial institutions’ employees’ failure to report. It suggested instead that the Task Force adopt a permissive reporting process for financial institutions that also outlines when and how law enforcement can obtain additional nonpublic personal information from financial institutions in any follow-up investigation. Without these measures, financial institutions are concerned their reporting and cooperation will violate federal privacy regulations. Ultimately, the Task Force did not recommend that financial institutions be included as mandatory reporters

The new sentence at the end of the proposal above comes from Colorado statute. It is designed to accommodate large institutions that have an internal, specialized process for reporting that may not rely entirely on the mandatory reporter who witnessed the suspicious activity

Section 23. That chapter 22-46 be amended by adding thereto a NEW SECTION to read as follows:

The person making a report as required by § 22-46-9 and as permitted by § 22-46-11 shall provide, or a proper agency receiving the report shall acquire, to the extent possible, the following information:

- (1) The name, age, physical address, and contact information of the elder or adult with a disability;

- (2) The name, age, physical address, and contact information of the person making the report;
- (3) The name, age, physical address, and contact information of the caretaker of the elder or adult with a disability;
- (4) The name of the alleged perpetrator;
- (5) The nature and extent of the elder or adult with a disability's injury, whether physical or financial, if any;
- (6) The nature and extent of the condition that required the report to be made; and
- (7) Any other pertinent information.

Commentary—South Dakota's vulnerable adult abuse reporter law, unlike most other states' provisions, does not specify the information that should be included in a report. The Task Force recommends such information be specified. This proposal is taken from Colo. Rev. Stat § 18-6.5-108(2)(a).

B. Statute Clarifying Law Enforcement Responsibility

Section 24. That § 22-46-5 be amended to read as follows:

22-46-5. The person or agency that receives, pursuant to § 22-46-7, a report of abuse, neglect, or exploitation of an elder or adult with a disability shall also forward the report to the Office of the Attorney General, if the person or agency determines that reasonable suspicion exists to support further investigation. In investigating violations of this chapter, law enforcement agencies shall cooperate with and assist the Department of Social Services. A law enforcement agency shall complete a criminal investigation when appropriate.

Commentary—The Task Force initially felt that there needed to be some record of an elder financial exploitation report being made given the limitations of the federal online portal for submitting suspicious financial activity reports (FinCEN). The Task Force then expanded this concern to include elder abuse and neglect reporting as well. The Task Force believes

that the Attorney General's Office, and particularly the specialists advocated for in Recommendation 8, would be an appropriate repository.

Office of the Attorney General Commentary—The South Dakota Office of Attorney General (SDAG) supports Recommendation 8, which would provide two additional FTE and additional resources to SDAG. SDAG would need the two FTE and additional resources if it is the intent to have the SDAG increase or broaden its involvement in the investigation and prosecution of cases involving alleged abuse, neglect, and financial exploitation.

SDAG also supports the proposed amendment of SDCL 22-46-5, assuming that Recommendation 8 is fully implemented. However, if Recommendation 8 is not fully implemented, SDAG does not have sufficient FTE or resources to fully implement the Task Force's intent behind the proposed amendment of SDCL 22-46-5.

C. Statute Expanding Voluntary Reporting to Exploitation for the General Public

Section 25. That § 22-46-11 be amended to read as follows:

22-46-11. Any person who knows or has reason to suspect that an ~~elderly or disabled elder~~ or adult with a disability has been abused ~~or~~, neglected, or exploited as defined in ~~§ 22-46-2 or 22-46-3~~ §§ 22-46-1 to 22-46-3, inclusive, may report that information, regardless of whether that person is one of the mandatory reporters listed in §§ 22-46-9 and 22-46-10.

Commentary—The Task Force recommends that the voluntary reporting statute more clearly authorize voluntary reporting of all abuse, neglect, and financial exploitation of an elder or adult with a disability. This revision is also intended to lessen the concern of some financial institutions that voluntary reporting may violate federal privacy laws.

D. Adopt a Permissive Reporting System for Financial Institutions and a Form to Request Financial Information from Financial Institutions

Section 26. That chapter 37-24 be amended by adding thereto a NEW SECTION to read as follows:

A financial institution, as defined in 31 U.S.C. § 5312(a)(2), who voluntarily or mandatorily reports via a suspicious activity report, pursuant to 31 U.S.C. § 5318(g), any possible violation of law or regulation constituting exploitation, as defined in subdivision 22-46-1(5), may also report the information contained in the suspicious activity report to state or local law enforcement. A financial institution is immune from any civil or criminal liability that might otherwise result from complying with this section.

Section 27. That chapter 37-24 be amended by adding thereto a NEW SECTION to read as follows:

A financial institution shall cooperate with any lead investigative agency, law enforcement, or prosecuting authority that is investigating the abuse, neglect, or exploitation of an elder or adult with a disability and comply with reasonable requests for the production of financial records. A financial institution is immune from any civil or criminal liability that might otherwise result from complying with this section.

Commentary—After eschewing mandatory reporting, financial institutions asked the Task Force to provide them with maximum reporting flexibility, coupled with immunity for reporting. This suggested language provides immunity at the initial reporting stage (by the first proposed section) and at the subsequent investigatory and prosecutorial stages (by the second proposed section).

Recommendation 8: Employ a new prosecutor and a new investigator in the Office of the Attorney General to specialize in prosecuting and investigating abuse, neglect, and exploitation of elders and adults with a disability.

Commentary—The Task Force received consistent public testimony on the lack of prosecution of financial exploitation and the difficulties of prosecuting the crime. The Task Force recommends that the Legislature appropriate funds for an attorney-specialist, within the Office of the Attorney General, whose role would be to prosecute or to assist state’s attorneys in prosecuting the abuse, neglect, and financial exploitation of elders or adults with disabilities. The attorney-specialist would also serve as an educational resource and liaison for local and tribal law enforcement. The Task Force also recommends that the Legislature appropriate funds for an investigator specializing in these cases to assist the attorney in bringing criminal charges and providing education on this topic.

Recommendation 9: Create a civil right of action for elders and adults with a disability to recover damages from exploitation.

Section 28. That chapter 22-46 be amended by adding thereto a NEW SECTION to read as follows:

A court may find that an elder or adult with a disability has been exploited as defined in § 22-46-1 or § 22-46-3. If a court finds exploitation occurred, the elder or adult with a disability has a cause of action against any perpetrator and may recover actual and punitive damages for the exploitation. The action may be brought by the elder or adult with a disability, or that person's guardian, conservator, by a person or organization acting on behalf of the elder or adult with a disability with the consent of that person or that person's guardian or conservator, or by the personal representative of the estate of a deceased elder or adult with a disability without regard to whether the cause of death resulted from the exploitation. The action may be brought in any court of competent jurisdiction to enforce the action. A party who prevails in the action may recover reasonable attorney's fees, costs of the action, compensatory damages, and punitive damages.

Commentary—This section is taken from Florida statute. To provide the protection needed, the Task Force proposes language that provides (1) attorney's fees and court costs, (2) punitive (or additional) damages, and (3) a mechanism by which other interested parties may bring suit on behalf of the elder or adult with a disability. The remaining sections, found below, are taken from Arizona statute.

Section 29. That chapter 22-46 be amended by adding thereto a NEW SECTION to read as follows:

In addition to the damages prescribed in section 28 of this Act, the court may impose the following penalties:

- (1) Order the perpetrator to forfeit all or a portion of the person's:

- (a) Interest in any governing instrument executed by the elder or adult with a disability; and
 - (b) Benefits under chapter 29A-2, with respect to the estate of the elder or adult with a disability, including an intestate share, an elective share, an omitted spouse's share, an omitted child's share, a homestead allowance, any exempt property and a family allowance. If the elder or adult with a disability died intestate, the elder or adult with a disability's intestate estate passes as if the perpetrator disclaimed that person's intestate share to the extent the court orders that person to forfeit all or a portion of the person's benefits under chapter 29A-2;
- (2) Revoke, in whole or in part, any revocable:
- (a) Disposition or appointment of property that is made in a governing instrument by the elder or adult with a disability to the perpetrator;
 - (b) Provision by the elder or adult with a disability that is contained in a governing instrument that confers a general or nongeneral power of appointment on the perpetrator; and
 - (c) Nomination or appointment by the elder or adult with a disability that is contained in a governing instrument that nominates or appoints the perpetrator to serve in any fiduciary or representative capacity, including serving as a personal representative, executor, guardian, conservator, trustee, attorney in fact, or agent;
- (3) Sever the interests of the elder or adult with a disability and the perpetrator in any property that is held by them at the time of the violation as joint tenants with the right

of survivorship and transform the interests of the elder or adult with a disability and the perpetrator into tenancies in common. To the extent that the perpetrator did not provide adequate consideration for the jointly held interest, the court may cause the person's interest in the subject property to be forfeited in whole or in part.

Section 30. That chapter 22-46 be amended by adding thereto a NEW SECTION to read as follows:

A severance pursuant to subdivision (3) of section 29 of this Act does not affect any third party interest in property that was acquired for value and in good faith reliance on apparent title by survivorship in the perpetrator unless a writing declaring the severance has been noted, registered, filed, or recorded in records that are appropriate to the kind and location of the property and that are relied on as evidence of ownership in the ordinary course of transactions involving that property.

Section 31. That chapter 22-46 be amended by adding thereto a NEW SECTION to read as follows:

If the court imposes a revocation pursuant to subdivision (2) of section 29 of this Act, provisions of the governing instrument shall be given effect as if the perpetrator disclaimed all provisions revoked by the court or, in the case of a revocation of a nomination in a fiduciary or representative capacity, the perpetrator predeceased the decedent.

Commentary—Sections 29 through 31 provide a “Slayer statute”-equivalent for exploiters, sharing the same provisions as South Dakota’s existing “Slayer” statute that divests a murderer of any inheritance or benefit from the person he or she killed. See SDCL 29A-2-803. These remedies are somewhat similar to the civil right of action proposed for elder abusers and neglecters (Sections 14 and 15, on pages 25-26), but instead of simply divesting the offender of control of the elder or disabled adult’s finances, these provisions also empower a court to divest the offender benefits, including probate and non-probate interests and other joint accounts. Note also that convictions under the theft by deception statute, SDCL 22-46-3, will, by this proposal, authorize

a court sitting in civil jurisdiction to utilize these remedies against the defendant.

Section 32. That chapter 22-46 be amended by adding thereto a NEW SECTION to read as follows:

The court may utilize the remedies provided in section 14 of this Act for violations under section 28 of this Act or § 22-46-3.

Commentary— This section, taken from Arizona, cross-references the remedies available in the elder abuse and neglect civil right of action. The civil right of action is found in Sections 3 through 20. By cross-referencing the civil right of action remedies, a court would be permitted to also order an exploiter to not exercise control, to return custody or control, to follow a fiduciary's instructions, and to prohibit transfers regarding an elder's assets.

Section 33. That chapter 22-46 be amended by adding thereto a NEW SECTION to read as follows:

The remedies provided in section 28 through section 32, inclusive, of this Act are in addition to and cumulative with other legal and administrative remedies available to an elder or adult with a disability.

Recommendation 10: Create a form for establishing a durable power of attorney for financial decisions and enact legislation to better protect principals under durable powers of attorney.

A. State Bar Drafting Form Language for Durable Financial Powers of Attorney

Commentary—The Task Force recommends that the State Bar of South Dakota create a committee of practitioners and other legal experts that specialize in powers of attorney. Noting the State Bar's successful efforts to create a durable health care power of attorney and its placement of the form on its website for public access, the Task Force recommends a similar form be prepared and adopted by the State Bar for financial powers of attorney, and that it be made available on the State Bar's website. The Task Force requests that this form be completed by the State Bar and uploaded to its website no later than January 1, 2017.

B. Amending Existing Durable Power of Attorney Statutes to Provide Formal Protections for Vulnerable Adults

Section 34. That § 59-7-2.1 be amended to read as follows:

59-7-2.1. Notwithstanding § 59-7-2, if a principal designates another as the principal's attorney in fact or agent by a written power of attorney which contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred is exercisable notwithstanding the principal's disability, the authority of the attorney in fact or agent is exercisable by the attorney in fact or agent as provided in the power on behalf of the principal notwithstanding any later disability or incapacity of the principal or later uncertainty as to whether or not the principal is dead or alive.

The durable power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. The signature must be witnessed by two other adult individuals. A power

of attorney granted pursuant to this section may authorize the attorney-in-fact to consent to, to reject, or to withdraw consent for health care, including any care, service, or procedure to maintain, diagnose, or treat a person's physical or mental condition.

Commentary—By statutory definition, a durable power of attorney is effective when the principal (the person who created the durable power of attorney to allow another to make decisions on the principal's behalf regarding the principal's person or property) lacks soundness of mind or decisional capacity. In other words, individuals rely on these documents when they are at their most vulnerable, regarding their most cherished concerns. The Task Force, at an early stage, became aware of the lack of formalities required for a durable power of attorney, making these important legal documents susceptible to abuse. The proposed statutory language is meant to prohibit the most egregious potential for abuse by requiring the principal's signature be affixed to the power of attorney and witnessed by two other adults.

The Task Force also recommends that the State Bar's Real Property Committee look at whether the Uniform Power of Attorney Act should be adopted in South Dakota.

Recommendation 11: Identify educational resources and suggest a public awareness campaign for elder abuse.

Elder Abuse Task Force Education Committee Report to the Legislature

The members of the Elder Abuse Task Force (EATF) Education Committee, Sarah Jennings (AARP SD/Committee Chair), Jennifer Murray (SD Department of Social Services), Kristina Schaefer (Fishback Financial Corporation), Jody Swanson (SD Attorney General Office), and Senator David Novstrup (State Senator), have agreed to continue their work into 2016 to complete the larger outreach efforts for the Elder Abuse Task Force. Though communication has begun, many key messages cannot be shared with the target audiences until the Legislature has taken action during the 2016 session on Task Force recommendations.

Timeline: The timeline to implement the full EATF outreach and communications plan will begin on January 13, 2016 with an awareness campaign regarding the work of the Elder Abuse Task Force. It will continue throughout the session with legislative and partner outreach surrounding specific Task Force supported proposals. Outreach to general audiences will begin with messaging that has been developed based on priority message for the specific audience (see chart below) and action taken during session. The peak of the outreach and awareness campaign will be focused around Elder Abuse Awareness Month in June 2016. Education Committee members also offer to do a report in mid or late 2016 to the Chief Justice and/or legislative representatives if desired.

Committee Goals:

- Ensure Task Force goals are met through our educational initiatives including generating legislative support, getting media outreach highlighting Task Force work, increasing awareness, and improving training.
- By the end of 2016, the education and outreach effort will recruit at least 10 Stakeholders/Champions to help with outreach and reach 5,000 seniors, 200 family caregivers, financial service professionals across the state, and 30,000 mandatory reporters through education and communication efforts.

2016 Outreach Overview:

Target Audience	Primary Messaging	Does Collateral exist to deliver?
Health Professionals	<ul style="list-style-type: none"> • Mandatory reporting requirements, responsibilities and protections • Signs of abuse 	Yes. DSS brochure (\$.10 each). Committee looking into e-version, short video to accompany.
Law Enforcement	<ul style="list-style-type: none"> • General awareness on the issue and signs of abuse • Understanding the means by which elder abuse is facilitated, both in criminal and civil contexts. • Suggestions for investigating elder abuse, knowing the various charging options, and understanding who may be a partner in investigating and preventing elder abuse. 	Yes. ABA pocket guide & Desk Guide. Committee considering if anything else needed to accompany the existing collateral.

Financial Institutions - Staff	<ul style="list-style-type: none"> • General awareness on the issue and signs of abuse • What to do if suspect abuse? Protections of whistleblowers 	In Development. American Bankers Association is developing new materials to be launched in early 2016.
Financial Institutions - Consumers	<ul style="list-style-type: none"> • How to protect your assets and avoid fraud or exploitation • Power of Attorney Guidance (Highlighting the Power to Make Gift issue) 	In Development. American Bankers Association is developing new materials to be launched in early 2016.
Tribal	<ul style="list-style-type: none"> • General Awareness/signs of abuse • What to do if suspect abuse? (Guidance will be different than that to General Public) 	In Development. Trying to identify a Lead Agency. AARP staff is reaching out to other organizations to find existing resources.
Family Caregivers	<ul style="list-style-type: none"> • General awareness and signs of abuse • What to do if you suspect abuse • What to look for in a home health aid • Power of Attorney Guidance (Highlighting the Power to Make Gift issue) 	No. AARP taking lead on development.
Individuals/Victims	<ul style="list-style-type: none"> • Understanding your rights and how to protect yourself from abuse • What to do if you feel you are being abused or financially exploited • Power of Attorney Guidance (Highlighting the Power to Make Gift issue) 	Yes. SD Attorney General Consumer Protection Manual. Committee discussing companion piece to highlight certain issues. DSS has info also.
General Public	<ul style="list-style-type: none"> • Elder abuse does happen in SD – share information, signs of abuse and resources. • Share the work of the Task Force to protect our seniors from abuse starting on January 13 and continuing through session as legislative initiatives are considered. 	Yes. All info exists but likely need to package it in a more consumer friendly format.

Recommendation 12: Amend statutes to provide that the appointment of a guardian or conservator divests an agent under a power of attorney of his or her conflicting authority and prevent powers of attorney from being used to circumvent guardianships or conservatorships.

Section 35. That chapter 59-7 be amended by adding thereto a NEW SECTION to read as follows:

If a conservator of the principal is appointed after the occurrence of the disability or incapacity referred to in § 59-7-2.1, any power of attorney authorizing an agent to act on the principal's finances or estate is terminated at the time of the appointment and the person acting under the power of attorney shall account to the conservator rather than to the principal.

Section 36. That chapter 59-7 be amended by adding thereto a NEW SECTION to read as follows:

If, after a principal executes a power of attorney for health care pursuant to § 59-7-2.1, a court appoints a guardian of the principal's person, the power of attorney is terminated at the time of the appointment, but the guardian shall follow any provisions contained in the power of attorney for health care delineating the principal's wishes for medical and end-of-life care.

Commentary—The Task Force sought a bright-line determination that powers of attorney cease to be effective where they conflict with a court appointment of a guardian or conservator. Section 35 is taken from a Connecticut statute providing that when a conservator is appointed, the agent/attorney-in-fact under a conflicting financial power of attorney ceases to have authority under the POA and must account to the conservator. Section 36, taken from Nevada, is an equivalent provision for guardians and health care powers of attorney. However, unlike financial instructions, the instructions in a health care power of attorney are less technical and are related to the most fundamental decisions a person can make, hence its more deferential treatment by the guardian.

The Task Force believes that a guardianship or conservatorship should trump a power of attorney when they conflict because a guardian or conservator must report their actions to a court, while an agent under a power of attorney has a duty only to report to the principal, who by the time of a guardian or conservator appointment is often unable to hold an agent to account. Accordingly, the guardian or conservator is more answerable for their actions.

Section 37. That § 29A-5-118 be amended to read as follows:

29A-5-118. The appointment of a guardian or conservator of a protected person does not constitute a general finding of legal incompetence unless the court so orders, and the protected person shall otherwise retain all rights which have not been granted to the guardian or conservator, with the exception of the ability to create an agency and confer authority on another person to do any act that the protected person might do, pursuant to § 59-2-1. Unless prior authorization of the court is first obtained, a guardian or conservator may not change the residence of the minor or protected person to another state, terminate or consent to a termination of the minor's or protected person's parental rights, initiate a change in the minor's or protected person's marital status, or revoke or amend a durable power of attorney of which the protected person is the principal, except as provided in sections 35 and 36 of this Act.

Commentary—Under current statute, a protected party retains the ability to enter into future powers of attorney, even after appointment of a guardian or conservator, unless a court specifically finds the protected person legally incompetent. The changes above are in keeping with the suggested revision to SDCL 59-7-2.1, which are intended to establish that the appointment of guardians or conservators automatically terminates conflicting powers of attorney and prevents a power of attorney from being set up later to attempt to circumvent the guardian or conservator.

Recommendation 13: Prepare educational resources and establish a statutory training requirement for all guardians and conservators.

A. Guardianship Handbooks:

Commentary—The Task Force received anecdotal information that many problems arising out of guardianships or conservatorships are not the result of malice. Instead, most are from a lack of knowledge regarding a guardian or conservator’s duties. Forty states have an official or semi-official handbook or pamphlet on guardian and/or conservator duties and best practices. South Dakota is not one of them. The Task Force recommends the State Bar of South Dakota develop a handbook to educate guardians and conservators on their duties and provide best practices.

B. Training Statutory Requirements:

Section 38. That chapter 29A-5 be amended by adding thereto a NEW SECTION to read as follows:

The State Bar of South Dakota shall prepare and approve training curricula for persons appointed as guardians and conservators. The training curricula shall include:

- (1) The rights of minors and protected persons under chapter 29A-5 and under the laws of the United States generally;
- (2) The duties and responsibilities of guardians and conservators;
- (3) Reporting requirements;
- (4) Least restrictive options in the areas of housing, medical care, and psychiatric care;
and
- (5) Resources to assist guardians and conservators in fulfilling their duties.

Each person appointed by the court to be a guardian or conservator must complete the training curricula within four months after the appointment as a guardian or conservator.

Commentary—The Task Force recommends that the State Bar prepare curricula that balance cost and accessibility with comprehensiveness and

rigor. The statutory training language above ensures the training is “required,” but it should not be immediately effective, in order to give the Bar time to work.

Special Writing—A member of the Task Force requested that whatever training requirement is established, the cost of the training should be disclosed plainly and up front.

Recommendation 14: Encourage the court system to further monitor guardians and conservators using existing court electronic resources.

- Create an automated letter that goes out to all active guardians and conservators (as well as their principals, either protected persons or minors), that have not had their annual accounting requirement waived. Each year, that letter will issue two months prior to April 15, the deadline set for annual reporting and accounting. *See* SDCL 29A-5-403 (reports), 29A-5-408 (accountings).
- Create a search report for clerk’s offices that runs on April 16 (or the first business day thereafter) to notify the court as to which guardians and conservators failed to file their annual report or accounting.
- Redouble efforts to ensure courts use the right events in its case management system to permit this process to automate effectively, specifically for these events:
 - Terminating a guardianship or conservatorship.
 - Waiving (or otherwise modifying) the accounting requirement.
 - Accepting a guardian’s report or a conservator’s accounting.

Commentary—The UJS’s Odyssey Electronic Records System appears to be configurable to assist the courts in alerting guardians and conservators to their reporting requirements and monitor to see that the reports and accountings were actually filed. The Task Force was informed that the UJS does have the ability to make these modifications.

Recommendation 15: Require background checks for all proposed guardians and conservators, and prohibit felons from serving as guardians or conservators unless a court finds special circumstances.

Section 39. That § 29A-5-110 be amended to read as follows:

29A-5-110. Any adult individual may be appointed as a guardian, a conservator, or both, if capable of providing an active and suitable program of guardianship or conservatorship for the minor or protected person, and if not employed by any public or private agency, entity, or facility that is providing substantial services or financial assistance to the minor or protected person.

Commentary—The Task Force could think of no reason why only public agencies were excluded from acting as guardians while simultaneously providing substantial services or financial assistance. Private agencies provide similar services, and their employees would have a similar conflict of interest if they were to be appointed as a fiduciary—perhaps an even greater conflict considering their profit motive.

Any public agency or nonprofit corporation may be appointed as a guardian, a conservator, or both, if it is capable of providing an active and suitable program of guardianship or conservatorship for the minor or protected person, and if it is not providing substantial services or financial assistance to the minor or protected person.

Any bank or trust company authorized to exercise trust powers or to engage in trust business in this state may be appointed as a conservator if it is capable of providing a suitable program of conservatorship for the minor or protected person.

The Department of Human Services or the Department of Social Services may be appointed as a guardian, a conservator, or both, for individuals under its care or to whom it is providing services or financial assistance, but such appointment may only be made if there is no

individual, nonprofit corporation, bank or trust company, or other public agency that is qualified and willing to serve.

No individual or entity, other than a bank or trust company, whose only interest is that of a creditor, is eligible for appointment as either a guardian or conservator.

No individual who has been convicted of a felony is eligible for appointment as a guardian or conservator unless the court finds appointment of the person convicted of a felony to be in the best interests of the person for whom the guardianship or conservatorship is sought. As part of the best interest determination, the court shall consider the nature of the offense, the date of offense, and the evidence of the proposed guardian's or proposed conservator's rehabilitation. No person may be appointed who has been convicted of a felony involving harm or threat to a minor or an elder or an adult with a disability, including a felony sexual offense.

Commentary—The Task Force recommends that convicted felons should generally be excluded from serving in fiduciary capacities, but a circuit judge should be given discretion to find it is in a principal's best interest to have a felon (such as a family member with a very attenuated felony conviction) serve in that capacity. It is often difficult for a court to find someone who is willing or able to serve in such important roles.

A person, except for a financial institution or its officers, directors, employees, or agents, or a trust company, who has been nominated for appointment as a guardian or conservator, shall obtain an Interstate Identification Index criminal history record check and a record check of South Dakota state court civil judgments for abuse, neglect, or exploitation of an elder or adult with a disability. The nominee shall file the results of these record checks with the court at least ten days prior to the appointment hearing date, unless waived or modified by the court for good cause shown by affidavit filed simultaneously with the petition for appointment.

Commentary—The Task Force determined that the III Background Check was the most comprehensive yet cost-effective criminal background check available. Further, the Task Force is aware that certain civil judgments may not rise to the level of culpability of criminal convictions but nevertheless indicate a history of abusing vulnerable adults, and thus would be very relevant to a court’s appointment decision.

The judge may not sign an order appointing a guardian or conservator until the record check results have been filed with the court and reviewed by the judge. The record check results, or the lack thereof, shall be certified by affidavit. The court may not require a record check upon the application of a petitioner for a temporary guardianship or temporary conservatorship. The court may waive the requirements of this section for good cause shown.

Commentary—The Task Force wanted to ensure that an exception to a time-intensive background check existed for “emergency” guardianship or conservatorship situations. The Task Force also wanted to ensure that a “good cause” safety valve existed for other exceptional situations in which the need for guardianships and conservatorships manifests.

Recommendation 16: Require sureties to notify the court and the protected person, minor, or estate if a guardian or conservator bond is not renewed.

Section 40. That § 29A-5-111 be amended to read as follows:

29A-5-111. The appointment of a guardian or conservator does not become effective nor may letters of guardianship or conservatorship issue until the guardian or conservator has filed an acceptance of office and any required bond.

The court may not require the filing of a bond by a guardian except for good cause shown.

The court shall determine whether the filing of a bond by a conservator is necessary. In determining the necessity for or amount of a conservator's bond, the court shall consider:

- (1) The value of the personal estate and annual gross income and other receipts within the conservator's control;
- (2) The extent to which the estate has been deposited under an arrangement requiring an order of court for its removal;
- (3) Whether an order has been entered waiving the requirement that accountings be filed and presented or permitting accountings to be filed less frequently than annually;
- (4) The extent to which the income and receipts are payable directly to a facility responsible for or which has assumed responsibility for the care or custody of the minor or protected person;
- (5) Whether a guardian has been appointed, and if so, whether the guardian has presented reports as required;
- (6) Whether the conservator was appointed pursuant to a nomination which requested that bond be waived; and
- (7) Any other factors which the court deems appropriate.

Any required bond shall be with such surety and in such amount and form as the court may order. The court may order additional bond or reduce bond whenever it considers such modification to be in the best interests of the minor, the protected person, or the estate.

The surety or sureties of the bond must immediately serve notice to the court and to the minor, the protected person, or the estate if the bond is not renewed by the guardian or conservator.

Commentary— Current law does not require mandatory bonding for guardians and conservators. The Task Force initially supported a regime in which bonding was mandated in all cases, but the court retained discretion to waive the bonding requirement. The Task Force’s initial position proceeded from the idea that bonding companies will perform additional due diligence to ensure they do not take on a high risk obligee, thus subjecting themselves to potential liability. In that way, the bonding company acts like a gatekeeper, excluding high-risk potential guardians and conservators.

The Task Force discovered, however, that the most salient reason why statute currently disfavors bonding is that substantial bonding costs are passed on to the same protected person, minor, or estate the requirement is meant to protect, for little services ultimately provided by the surety. The Task Force found this burden too great relative to the minor additional protections afforded by a mandatory bonding requirement—protections made less necessary by the background check requirement proposed in Recommendation 15 on page 59.

In taking public testimony, the Task Force was made aware of instances where bonds were required by courts for conservatorships, and the conservators violated their fiduciary duties, only for the protected persons to find that the conservators’ bonds had been expired for months, even years. Accordingly, the Task Force only recommends that sureties (who are ultimately paid by the protected persons, minors, and estates) serve the protected persons, minors, estates, and the court notice when the guardian- or conservator- fails to renew the bond during the guardianship or conservatorship.