

Law and Aging Network

Interview with Natalie K. Thomas

Natalie K. Thomas is the recipient of the 2002 National Aging and Law Award. The award honors individuals who have made significant contributions to justice for older persons through the advancement of quality legal assistance, the promotion of access to the justice system, and achievements in legal, aging, and social policy.



Ms. Thomas is the legal services developer of Georgia. She is also the immediate past-chairperson of the National Association of Legal Services Developers and a commissioner of the ABA Commission on Law and Aging. Bifocal interviewed Ms. Thomas

to learn more about how she began her career, what drives her commitment to help others in the law and aging network, and her thoughts on the future of legal services for older people.

Bifocal: You attended South Carolina State University for your undergraduate studies, graduating *magna cum laude* in 1983. What was your major and did you have a minor?

Ms. Thomas: My major was English literature, as opposed to English for teaching. I minored in political science.

Bifocal: When did you decide that you wanted to be a lawyer?

Ms. Thomas: I knew that I wanted to be a lawyer by my senior year of high school.

Bifocal: When you entered law school, at the University of Tennessee College of Law, which areas of law did you initially think that you wanted to pursue a career in and what was it about these areas that interested you the most?

Ms. Thomas: I always knew I wanted to do something in public interest. It was a huge topic of discussion in our household. My father, who was a Baptist minister, didn't

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Legislation

Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly

By Julia C. Calvo

The durable power of attorney (DPA) has become an omnipresent tool of estate planning, popular among estate planners, elder law attorneys, and the general public because of its utility and simplicity. In the event of mental incapacity, it provides a simple way to ensure continuity in the management of a principal's estate. The costs of its preparation are modest and, if prepared properly, it should avoid the need for guardianship or other judicial involvement.¹

The DPA, however, suffers from a "Catch-22" dilemma—while the document is relatively inexpensive and easy to employ,² the simplicity of use lends itself to a potential for abuse. Unlike guardians, the actions of agents under DPAs are not monitored by judges or a court accountant. When a monetary misappropriation takes place, it is usually invisible to public eyes and typically discovered too late to recover lost or stolen monies.

The following facts from a recent case illustrate a case of financial exploitation accomplished through a power of attorney.

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Julia C. Calvo is a fourth-year law student at American University's Washington College of Law in Washington, D.C. After serving an internship with the Commission this past summer, she joined the staff in a research support position.

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approve of lawyers and he didn't want me to be one. He didn't approve of prosecutors, or judges, or anyone who defended criminals. I had a problem with the idea of defending people who I thought might be guilty, too. I also knew that I didn't want to go into law just for the money, so corporate law was out. I had a number of discussions with my father, and through a process of elimination, the only area of law that was left was in helping vulnerable people and relieving their misery. That's why I chose public interest and civil law.

Bifocal: Clearly your family, and your father especially, were important influences in your life. Was there another person in your life who served to motivate you towards the career that you ultimately chose?

Ms. Thomas: Martin Luther King Jr. and Thurgood Marshall. I have their pictures in my office right now. What I admired most about them were their mannerisms;

how they held themselves in public. When I was younger, I had a tendency to be "hot-headed." Observing their demeanors taught me a better way to do things. It taught me how to accomplish my goals. They used a different strategy—they were careful with their language, and they didn't show all their cards.

Bifocal: What was the transition in your life that led you to a career in legal services for older people. Was it a matter of job opportunity or a determination to work in a specific area?

Ms. Thomas: I had worked as a lawyer in general legal services for a number of years, and I had begun to see the same cases over and over again, and the same clients over and over again. I had reached a level of burnout.

It was at that juncture when a change was being made to the Title IIIB contract. The [AAA] director wanted to change the Title IIIB contract and the services that were being delivered. I agreed to take the contract, but under the condition of "ownership." That is, that I could turn it into what I thought it should be. So I sat down with the AAA director and we made a plan for what the job ought to be. She made a commitment to support the contract, and I just hit the ground running—working weekends, nights, and on the road.

Bifocal: What are some of the rewards of working in legal services for the older population?

Ms. Thomas: You get to partner with some of the best people to bring a little joy, in some of the strangest ways, to people who are at a point in their life when things are at their most frustrating and dismal, and there is nobody who cares or will listen to them. I get to lend a hand, and an ear. And if that's all it takes, that's a good day.

Bifocal: What are some of the challenges?

Ms. Thomas: My position as the legal services developer means I am the focal point for legal services for people 60 and older for the state. The strides and accomplishments we have made in Georgia are phenomenal, and they are due to the wonderful people and the network of support we have. I know this doesn't exist in all states. People need help; and when my counterparts in other states call me or my providers because they don't have any support, there is not a thing I can do about it.

Bifocal: Why do you have so much support in Georgia?

Ms. Thomas: It just came together—all of it. There is a commitment from the public sector, the senior hotline, the Area Agency on Aging, the long-term care ombudsman, the elder abuse prevention people, and the aging network. It really does take every one to pitch in.

It would help dramatically if there was federal funding, and, at least, state support. Part of my role as chair-

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BIFOCAL

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The Impact of Electronic Benefits Transfer Programs on Elderly Benefits Recipients

By Amy Marshall Mix

Electronic benefits transfer (EBT) is a relatively new method of delivery for food stamps, as well as some state funded and administered benefits, such as general assistance.¹ This new delivery method affects the ten percent of all food stamp recipients in the United States who are elderly, including the approximately twenty percent of food stamp households with elderly members.² EBT also affects elderly recipients of state administered cash benefits and general assistance.

In theory, the EBT format should be an improvement over the traditional paper coupon and check delivery methods. EBT should be far less costly for the state and federal governments to administer. In practice, however, some state EBT programs fail to address specific recipient concerns.

This article will provide a brief overview of EBT, including a description of how recipients access benefits through these programs. It will also focus on the potentially negative impact EBT has on elderly recipients' ability to access benefits independently and to fulfill basic shopping needs, and will illustrate possible solutions to these issues.

EBT is the federally mandated delivery method for all food stamp benefits. Many state funded and administered cash benefits are also delivered by EBT systems.

The Welfare Reform Act required that by October 1, 2002, all food stamps were to be delivered electronically, via EBT.³ In addition to the delivery of food stamps, states are encouraged to use EBT to deliver other types of benefits, including programs that are fully funded and administered by the state.⁴ As a result, recipients in many states now receive both food stamps and cash assistance (and possibly other benefits) on a single EBT system.⁵

Amy Marshall Mix is an Equal Justice Works (formerly the National Association for Public Interest Law) Fellow in the Washington, D.C. office of the National Consumer Law Center. Amy is dedicating her fellowship to protecting low-income people in the electronic marketplace. She is the principal author of the Electronic Benefits Transfer chapter of NCLC's Consumer Banking and Payments Law Manual 2d. Amy is a graduate of the University of Texas and the University of Houston Law Center.

Each state solicits bids from companies to manage the state's EBT program,⁶ and as a result, EBT program features vary from state to state. Food stamp EBT programs are subject to the food stamp regulations issued by U.S. Department of Agriculture, Food and Nutrition Service (USDA, FNS).⁷ The broad nature of these regulations, however, allows for wide variations in the characteristics of state EBT programs.⁸ Unfortunately, the consumer protections provided by the Electronic Funds Transfer Act (EFTA) do not apply to EBT transactions.⁹

Access to Food Stamps and Cash Assistance Benefits

EBT recipients use a card similar to the debit card provided with checking accounts to access benefits. Recipients are issued an EBT card and a secret personal identification number (PIN). Recipients do not have a benefit account in the true sense of the word, but rather have limited access to an allotted benefit award amount from the state's account. In most states, EBT cards have a magnetic stripe on the back, like a regular debit card. When a recipient swipes a magnetic stripe EBT card, the automated teller machine (ATM) or point-of-sale (POS) device can verify the amount of funds available to the recipient through an online connection. The recipient's benefit balance is immediately debited the amount of the purchase or cash withdrawal, plus any associated fees.

Two states,¹⁰ Ohio and Wyoming use "smart cards," where the recipient's account information is stored directly on the card itself by means of a "smart" computer chip. The advantage of a smart card system is the elimination of the need for an ATM or POS device to be online to verify benefit availability. On the downside, the recipient must load new benefits onto the card each month at a designated location (usually the local welfare office or a designated retailer).

Recipients can use the EBT card to access their benefits in different ways, depending upon the type of benefit. The use of EBT food stamp benefits is subject to the same restrictions as the paper coupons—the benefits can only be redeemed to pay for food items at a USDA authorized access

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point. These authorized access points may include grocery stores, convenience stores, farmers' markets, route vendors, and some group living facilities.¹¹

Cash assistance benefits, on the other hand, can usually be accessed at ATMs or at POS devices.¹² At an ATM, recipients can withdraw cash, while at a POS device, recipients can either use benefit funds directly to pay for items purchased, or recipients can withdraw benefit funds in the form of cash back with a purchase. If the funds are withdrawn as cash back, the EBT recipient should be subject to the same cash back amount limits, and possibly fees, as all commercial customers in that establishment.

States Should Allow Exemptions from Mandatory EBT Cash Assistance Programs

Although EBT is the mandatory delivery method for cash assistance benefits in most states, this method may not be appropriate for all recipients. Some elderly recipients may encounter difficulties mastering this new technology and may be unable independently to access cash assistance benefits or to fulfill basic shopping needs using EBT. In many states, elderly or disabled recipients who have difficulty with EBT must assign an alternative payee or authorized representative to assist in accessing the system. The alternative payee has access to the recipient's benefits and is expected to act on behalf of the recipient.

The alternative payee system leaves the recipient dependent upon a third party and unreasonably limits the recipient's autonomy and independence. The recipient must rely upon the third party, not only to assist in accessing the benefits, but to do so in an honest and inexpensive manner. Some recipients pay a fee to a third party performing this service. In some parts of the country there is a thriving business of individuals and agencies that sell this service to persons who cannot otherwise find someone to fill this role. States which force elderly recipients to rely on an alternative payee are supporting the growth of this industry that takes money out of the pockets of some of our neediest citizens without any tangible benefits to the recipient. Additionally, this practice may open the door for potential fraud by the alternative payee and a loss of benefits for the recipient.

The best way to assist these recipients who cannot adjust to the electronic format of EBT is to provide exemptions to the mandatory EBT programs and some alternative formats for receiving benefits.

- States should allow cash assistance recipients to opt out of EBT and receive state benefits in paper checks. While

some elderly and disabled recipients have difficulty using an EBT system, many of those same recipients were independently able to access cash benefits delivered by paper check. To the extent that a recipient was able to use the paper-based benefits system independently, exemptions from mandatory EBT cash assistance delivery should be granted to permit autonomy and independence.¹³

- Upon recipient request, states should issue multiple EBT cards to cash assistance recipients, in a manner that allows maximum recipient control over third party use of these alternate cards. The state should provide alternate cards with different PINs from the recipient's primary card. These alternate cards should be managed separately from the primary card, and the recipient should have the ability to designate the benefit type (cash vs. food stamps) and dollar amount accessed by each alternate card. Furthermore, the recipient should be able to place a temporary hold or block on alternate cards to provide alternate access only when the recipient desires.

Many EBT recipients also encounter charges to access EBT cash benefits that were not incurred under the former paper check delivery of cash benefits.¹⁴ There are two distinct charges recipients may incur when accessing cash benefits with an EBT card. First, cash assistance recipients may be charged a **fee** per transaction by the company with whom the state contracts to administer the EBT program (the average contractor fee is \$.80 per transaction). In addition to these fees paid to the state's EBT contractor, there may be a separate **surcharge** imposed per transaction by the owner/operator of the ATM or POS device (the average surcharge is \$1.50 per transaction).

These charges are particularly problematic because welfare recipients, by definition, require the full amount of their benefits to maintain even a minimal standard of living. These charges effectively reduce recipients' need-based award by imposing fees to access those very benefits. In the majority of states, EBT is the mandatory delivery format for all cash assistance benefits, which means that recipients have no alternative to incurring charges for access to cash benefits.

There are several ways that states may alleviate some of this financial burden from cash assistance recipients.

- States may limit EBT contractor fees by contract terms or state law. Additionally, states may be able to limit EBT ATM or POS surcharges by state law or through informal agreements with area banks.
- States may limit recipient charges for EBT access by providing dedicated POS terminals for bill payments at

housing authorities and/or utility companies. By paying large bills directly from EBT accounts, recipients are able to avoid the charges often associated with EBT cash withdrawals and a subsequent money order purchase.

- States may limit access charges by offering EBT recipients a direct deposit option for the receipt of cash assistance benefits, permitting recipients to have cash benefits deposited directly into personal bank accounts. Direct deposit is clearly a better alternative for many recipients and allows a degree of fee-free access to benefits greater than that offered by EBT delivery. Direct deposit recipients, unlike EBT recipients, have an account relationship with at least one bank where ATM withdrawals will be surcharge free. Also, by opting out of the EBT system, the recipient incurs no fees by the state's contractor. Additionally, direct deposit programs provide recipients with a greater degree of privacy as well as Electronic Funds Transfer Act (EFTA)¹⁵ protections that are inapplicable to EBT transactions.

Opportunity for EBT Advocacy

Although there are problematic aspects of many state EBT programs, the move to EBT can have some very positive consequences, both for federal and state governments, as well as for recipients. Federal and state governments' program administrative costs should be decreased because the printing and processing of billions of food stamp coupons and cash assistance checks is eliminated by EBT. This new delivery format should also reduce benefit fraud and instances of food stamp coupon trafficking—the buying or selling of food stamp coupons for cash, firearms, or controlled substances.¹⁶

Recipients, too, can benefit from the transition to EBT. Recipients should experience faster access to benefits, less theft, greater security, and more privacy from EBT. The stigma associated with using food stamps to buy food is removed because the EBT system uses cards and personal identification numbers (PINs) that look like regular debit cards. Furthermore, the use of an EBT system may act as a stepping stone for welfare recipients into the mainstream banking world—a world with which many recipients have had little or no previous contact—by providing training and experience with electronic banking mechanisms.

As states procure and renegotiate EBT contracts, local advocates are in a unique position to provide the state with valuable information regarding proposed EBT practices and to suggest improvements to a new or existing EBT design plan. Despite the particular insight of local advocates, few states draw upon this resource when planning an EBT program, and there are virtually no federal requirements that state agencies involve advocates in the planning process.¹⁷

Over half the states' EBT contracts will expire by the end of 2003.¹⁸ States should draw upon the resources of local advocates when negotiating these contracts to ensure the greatest degree of recipient rights and protections. Likewise, local advocates should try to become involved in the contract procurement and renegotiation processes. The earlier the advocates are able to enter the process, the more influence they are likely to have.

For more information on EBT and a detailed analysis of state practices—both good and bad—as well as state agency contact information, see the National Consumer Law Center Consumer Banking and Payments Law Manual 2d, part of the Consumer Credit and Sales Legal Practice Series. Also, advocates wishing to learn more about EBT may join the National Consumer Law Center EBT listserv by contacting Chi Chi Wu at cwu@nclc.org or Amy Mix at amy@nclcdc.org. Copies of Congressional testimony and comments, as well as findings from a recipient survey and information regarding individual state practices can be found on the National Consumer Law Center Electronic Benefits Initiative Web page at <http://www.consumerlaw.org>.

Notes

1. State administered benefits may also include Temporary Assistance to Needy Families (TANF) (the block grant program that replaced AFDC) and the Women, Infants and Children nutrition and health program (WIC).
2. United States Department of Agriculture, Food and Nutrition Service, "Characteristics of Food Stamp Households: Fiscal Year 2001 (Advance Report)" (July 2002).
3. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 stat. 2105 (1996). Food stamp provisions of this Act are codified at 7 U.S.C. §2016.
4. States might also include the delivery of general assistance, TANF, WIC, child care benefits, Medicaid, and unemployment benefits in an EBT program.
5. See "Selected Characteristics of State EBT Systems" (<http://www.consumerlaw.org>, Electronic Benefits Initiative) for a complete listing, by state, of programs administered through EBT.
6. For a detailed listing of state EBT implementation status and contractor information, see http://www.fns.usda.gov/fsp/MENU/ADMIN/EBT/Status/EBT_Status_Report.htm.
7. 7 C.F.R. §274.12.
8. The implementing regulations are found at 7 C.F.R. §274.12. These regulations must define "the required level of recipient protection regarding privacy, ease of use, and access to and service in retail food stores." 7 U.S.C. §2016(i)(2)(B).
9. The EFTA and its implementing Regulation E set out numerous consumer protection requirements for electronic transfers generally, but a provision of the Welfare Reform Act specifically exempts from the EFTA all needs-tested EBT programs established or administered under state or local law. "Needs-tested" EBT programs are those which take the recipient's income or other

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- resources into account to determine the recipient's benefit level (e.g., TANF, food stamps, general assistance, and WIC). *See* Welfare Reform Act, amending 15 U.S.C. §1693b(d)(2). *See also* Reg. E, 12 C.F.R. §205.15(a) & (b). The EFTA is made inapplicable to the Food Stamp Program in 7 U.S.C. §2016(i)(10).
10. Additional states are considering the use of smart cards or "hybrid" cards, which have features of both the magnetic stripe and the smart chip technology—certain benefits are accessible using each of the technologies. *See* USDA "EBT Status Report" at http://www.fns.usda.gov/fsp/MENU/ADMIN/EBT/Status/EBT_Status_Report.htm.
 11. 7 C.F.R. §278.2(a).
 12. At least one state, Texas, does not permit cash assistance access at ATMs.
 13. It should be noted, however, that these opt-out programs can apply only to state benefits and *cannot* apply to food stamp benefits. EBT is the federally mandated delivery method for all food stamp benefits regardless of the method chosen for providing state funds.
 14. In most states, the EBT contract authorizes a fixed number of fee-free transactions, per recipient, per month. The agreements generally provide for up to four fee-free ATM or POS cash benefit withdrawals each month, although the recipient may still incur a surcharge for the use of the ATM or POS. Most recipients did not incur fees to cash assistance checks before EBT because many banks and local stores provided check cashing services free of charge. Although recipients in some states do incur fees to access cash assistance benefits, no recipient can incur fees to access food stamp benefits. 7 C.F.R. §274.12(f)(1).
 15. 12 C.F.R. §205.15(a) and (b).
 16. "Trafficking" is defined as "the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food; or the exchange of firearms, ammunition, explosives, or other controlled substances, as defined in section 802 of title 21, United States Code, for coupons." (7 C.F.R. §271.2).
 17. Current food stamp regulations require states to submit, to USDA, "evidence of contacts with recipient organizations" prior to approval for the EBT program. (7 C.F.R. §27.12(c)(1)(ii)). A proposed amendment to the food stamp regulations would require only that state agencies include "a brief letter of intent, planning budget, cost allocation plan, and schedule of activities and deliverables." Food Stamp Program, Regulatory Review: Standards for Approval and Operation of Food Stamp Electronic Benefits Transfer (EBT) Systems, 66 Fed. Reg. 36,495, 36,499 (2001) (to be codified at 7 C.F.R. pt. 274)(proposed July 12, 2001).
 18. For contract expiration dates, by state, *see* http://www.fns.usda.gov/fsp/MENU/ADMIN/EBT/Status/EBT_contract_expiration_calendar.htm.

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person of the National Association of Legal Services Developers was to convince states' internal networks, as well as State Units' directors, Area Agencies on Aging, and others that we need it and we are justified in having it. It's authorized in the Older Americans Act, but there are no appropriations for it. We're working on that. We're taking tiny, little steps, but they are in the right direction.

Bifocal: Across the spectrum of society, there are multiple demographics that can be classified as "vulnerable"—why do you choose to focus your efforts on older people?

Ms. Thomas: I have always had an interest in this population. Even when I was younger, when I was in the 4-H club, I did a project on gerontology, which won an award. I did an exposé on the iron, too, which also won an award.

Bifocal: What did the experience of providing direct legal representation, first as a general legal services lawyer and then as a Title IIIB lawyer, teach you?

Ms. Thomas: The first thing that comes to mind is "patience." That is something I always pass along to my providers. For those who have not had experience working with elderly clients, it's crucial to impress upon them the concept of "patience."

The tendency with lawyers who are not experienced with older clients, is to complain that they feel like they are expected to be social workers when they are lawyers. In this job, you are a lawyer and you are part social worker, too.

There are a number of issues in a client's life, and you have to listen to know which issues belong to you and which ones belong to someone else. "Issue spotting" is a requirement for legal services developers, so you have to know something about everything and everyone's programs. That's what makes Title IIIB part of the aging network.

This is not to say that you will listen for three hours as someone begins their story in 1918. You have to help them, and steer them through. You listen for the legal issues, and refer them to other agencies and services for the other issues. If you are listening to a story about why a bill hasn't been paid, just getting that bill paid doesn't completely resolve the problem. You have to identify the issues behind why that bill wasn't paid.

Bifocal: In your professional experience, what are the three accomplishments that you are most proud of, and why?

Ms. Thomas: You mean besides the exposé on the iron? I'll have to pass on that one.

Bifocal: You have authored a number of publications, most recently the one about funeral homes, crematories, and

cemeteries. Was this in response to the incident earlier this year that drew the national spotlight to a Georgia crematorium?

Ms. Thomas: Pretty much. Let's just say that as a result [of that incident], there was a renewed public interest in the subject.

Bifocal: Can you tell me how you choose the subjects for your publications?

Ms. Thomas: There are a couple of ways we choose a subject. If there is a matter that I feel the public needs information on and that we don't already have information on, we'll develop it. If there is an issue that is generating calls, not only in our own state, but in other states, or on the hotline, we'll generate a document about it.

Bifocal: Is there a publication that you are particularly proud of?

Ms. Thomas: What seems to have been the most helpful to people so far has been a planning document called "Details of My Final Arrangements." It's the most requested document from our office.

“ In this job, you are a lawyer and you are part social worker, too.”

Bifocal: In May of this year, you and Richard Ingham, the legal services developer of Oklahoma, were awarded a grant from the Borchard Foundation Center on Law and Aging to study state legal assistant development programs across the country. Can you elaborate on this project and what it is you hope to achieve?

Ms. Thomas: We were awarded a grant of \$15K to take a look at the states to determine what the barriers were to a successful legal services development program. What we hope to achieve is to produce a set of recommendations to present to the Administration on Aging and the National Association of State Units on Aging that will serve as a catalyst to jump-start the progression of legal services development programs across the country.

We will be looking at the different ways states run their programs and trying to determine why some things that work in one place don't work in another. For instance, we'll compare the set-ups in Oklahoma, Georgia, and the other states where there seems to be progress, with the set-ups in states where there is no progress at all. We'll also be looking at issues such as funding streams, and job descriptions and duties. We'll present the results of the study next May.

Bifocal: How many states will you be looking at?

Ms. Thomas: We have already conducted a mini-survey and gathered responses from 34 states. Of those, some states will receive more in-depth study based on certain structural criteria.

Bifocal: As a state legal services developer, you have made your own state a model for others across the country. As a result, numerous states have asked for your help in providing their developers with job orientation and prioritizing of responsibilities in order to do their job better. Who helps you do your job better?

Ms. Thomas: Everybody. Everybody helps me do my job better. From the folks in our office to the national support folks. If I have a question, I'll ask whoever I think is going to give me the answer. I learn from everybody.

I can tell you an interesting story that happened when I was a legal services lawyer. I got into trouble with another lawyer because I had a question. I took my question not to the lawyer, but to the paralegal. I was fairly new, and the paralegal had 20 years of experience in administrative law. The paralegal had more experience than the lawyer, and knew the answer. So I went to the person who knew the answer. I don't care who has the answer, I'll go

to that person if I know they have it.

Bifocal: How do you keep up on the issues?

Ms. Thomas: I don't think I will ever be up-to-date. Thank goodness for listserves and email.

Bifocal: Can you tell me some of the issues that you expect to follow or be directly involved with in the coming year?

Ms. Thomas: The Borchard project is one. Funding is always an issue. There is the consolidation of offices of Legal Services Corporation programs; hotlines; nursing home arbitration clauses in admissions contracts, which is a whole new training area for providers; and the new Elder Justice Act—and our absence from it. The issues keep piling up.

Bifocal: Do you have any projects or short-term goals that you plan to undertake or are working towards?

Ms. Thomas: I have big dreams. I would like to host a summit to bring together the developers, the national support folks, the Administration on Aging, hotlines, legal service corporation folks, and hash out the legal services developer program status. I'm taking small steps in that direction, in the dream world and otherwise. But you have to dream it before it becomes a reality.

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Bifocal: What do you plan to do when you retire, if you ever decide to retire?

Ms. Thomas: I'm not going to retire.

Bifocal: O.K., what would you do if you weren't a lawyer?

Ms. Thomas: If I wasn't a lawyer? Do you mean if I did not pass the bar? Was I disbarred? You have to be more specific.

Bifocal: How about if you had not gone to law school?

Ms. Thomas: I don't know, but it would probably be in a position of helping people.

Bifocal: Final question. There have been two big winners in Georgia recently—former President Jimmy Carter won the Nobel Peace Prize and Natalie K. Thomas was awarded the National Law and Aging Award. Serendipity? Or do you think the fates have engaged to say something about those who dedicate their lives to serving others, especially those most vulnerable?

Ms. Thomas: Not that I would even begin to compare myself. But there is no question about it. If you don't lend yourself to helping others, it does you no good to be here—you're wasting yourself and living a selfish existence.

Inside the Commission

Commission Welcomes Two Distinguished Liaisons

The **Hon. Howard H. Dana Jr.** is the Commission's new liaison from the ABA Board of Governors. Judge Dana has been an associate justice of the Maine Supreme Judicial Court since 1993. He has been a member of the ABA since 1967, and has served on the Commission on Interest on Lawyers Trust Accounts, the Standing Committee on Legal Aid and Indigent Defendants, and the Standing Committee on Pro Bono and Public Service. Prior to the bench, he was appointed by Presidents Reagan and Bush to serve on the board of directors of the Legal Services Corporation.

Robert L. Roth is the new liaison from the ABA Section of Health Law. Mr. Roth is a partner in the Washington, D.C. office of Crowell & Moring LLP. He is a former HCFA lawyer with expertise in Medicare issues. He is also the immediate past chair of the Health Law Section and has served as a member and liaison for the past few years to the ABA Standing Committee on Continuing Legal Education.

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ney (POA). Attorney-in-fact (AIF) Violet Columbus possessed a broad POA for Elroy Jones, a nursing home resident.³ The document authorized Ms. Columbus to pay for Mr. Jones' nursing home expenses. She managed to pay for Mr. Jones' expenses, albeit late. She also managed to transfer \$45,000 of Mr. Jones' money to herself and spend it all.⁴ When Mr. Jones finally revoked the POA, it was discovered that he was in excess of \$7,000 in arrears to the nursing home, with no money left to pay his debt. This scenario is characteristic of how an unscrupulous agent can abuse a POA's broad power and drain the principal's finances.

Fortunately in this case, Mr. Jones' successor AIF reported Ms. Columbus to the sheriff's department and she was later convicted of theft and financial exploitation of a vulnerable adult.⁵ Ms. Columbus appealed both convictions based on insufficient evidence. The appeals court affirmed the financial exploitation conviction but dismissed the theft conviction. The appeals court reasoned that because the power of attorney authorized the AIF to transfer property to herself, then a "claim of right" was conferred.⁶ The state statute noted that a theft is committed when someone "intentionally and without a claim of right" uses or retains the property of another.⁷ In this case, Ms. Columbus was given the right to transfer money from Mr. Jones' account and, therefore, not guilty of theft.

The National Center on Elder Abuse estimates that over one million elders were victims of various types of domestic abuse in 1996, and that 12.3 percent of these cases involved financial abuse or material exploitation. However, statistics on the proportion of these cases involving the use of DPAs is not known. Some studies suggest a significant rate of occurrence of financial abuse of the elderly through the use of DPAs. In a 1993 study conducted by New York's Albany Law School's Government Law Center, 94 percent of the survey sample (410 lawyers, social service providers, area aging administrators, district court lawyers, and surrogate court justices) felt that DPAs were subject to abuse on occasion.⁸ A 1994 survey of the ABA Section of Real Property, Probate and Trust Law members produced 854 responses, of which 40 percent were aware of one or more DPAs that had been misused. However, 62 percent estimated that misuse occurred in 1 percent or less of cases, and 91 percent reported that it occurred in 5 percent or less. Nevertheless, when misuse does occur, the survey indicated that the consequences are often quite serious. Respondents cited the transfer of the principal's assets as the major area of abuse in 91 percent of cases, with the magnitude of such transfers averaging 50 percent of the principal's estate.⁹

| Types of Power of Attorney | Special Agent is authorized to handle <u>limited</u> transactions or limited property | General Agent is authorized to handle all financial matters and property of the principal |
|---|--|--|
| Non-Durable Power is effective upon signing, but ends at time principal loses capacity | Useful for single transactions or specific property or business | Useful for management of a principal's property or business while principal is away on travel |
| Durable Power is effective upon signing and continues even during incapacity of principal | Useful for managing specific property or business on a continuing basis even when principal loses capacity | Useful for overall management of the principal's affairs, especially in the event of incapacity |
| Springing Power is not effective until the principal loses capacity | Useful for managing specific property or business beginning at the time the principal loses capacity | Useful for overall management of the principal's affairs, where the principal wants the agent's authority to commence only at the time of incapacity |

Types of Power of Attorney and How They Are Used

This article examines state legislative responses to the growing concern about financial exploitation involving the use of DPAs. The author conducted a nationwide review of state legislative activity during the last two years—the 2000 to 2002 state legislative sessions. The examination revealed that 27 states have had legislative activity relating to the use or abuse of DPAs, either under their DPA statutes or adult protective services statutes.¹⁰ This legislative activity was reflected in six DPA provisions in the areas of: execution; disclosure; accounting requirements; agent's duties and gift-giving authority; and the need for an affidavit from a physician. Activity from the Adult Protective Services and Penal front included the introduction of "abuse" or "exploitation" definitions; required mandated reporters; and investigatory requirements.

Witnessing Requirements

A strong execution requirement, such as requiring notarization or witnessing, can serve as a threshold line of defense against an unscrupulous agent intent on taking advantage of an incapacitated principal. However, more than half of the states analyzed have no such execution requirement.¹¹ Those that do typically require notarization. Statutes that do not require a principal's signature to be witnessed or even notarized may allow for DPAs that are easier to forge and more prone to fraudulent behavior. Three states—Missouri, Texas, and Utah—responded to this concern with proposed legislation, although only the Utah bill became law.

Missouri proposed a bill that would require the written consent of the principal's immediate family for his choice for agent, before the agent would be authorized under the DPA.¹² However, this bill failed, perhaps because it is gen-

erally accepted that a principal should be free to choose whomever he would like to act on his behalf when he can no longer handle his affairs. Giving the principal's family veto power over his choice of agent, is, in essence, stifling the principal's autonomy.

In 2001, the Texas legislature considered a bill that would have required the principal, upon execution of the DPA, to give notice of his choice of agent, via certified mail, to each known address of all persons related to the principal within the second degree by consanguinity or affinity.¹³

Similarly, a Utah bill, which became effective in 2001, requires the AIF to notify all interested parties of his status as AIF within 30 days of the principal's incapacitation.¹⁴

Arizona, which did not have recent legislative activity, includes an interesting element in its execution provision. Arizona requires one witness and the notarization of the principal's signing. Moreover, the witness cannot be the agent, the agent's spouse, the agent's children, or the notary public.¹⁵ The exclusion of the agent's family is intended to thwart a dishonest agent's attempt to collude with his own family to defraud the principal.

Disclosure Requirement

A disclosure statement notifies the principal of his or her rights, obligations, and risks incurred by signing a DPA. These statements are generally mandated in connection with a statutory short form or preprinted DPAs. Some states also include a statement directed to agents that warn them of their fiduciary duty to the principal and that breach of that duty could result in prosecution and penalties.

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Durable Power Attorney

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Currently, 16 states plus the District of Columbia have statutory DPA short forms.¹⁶ These short forms generally incorporate disclosure statements and make them a mandatory component. Short form DPAs are more efficient and generally cost less than hiring an lawyer to draft one, although without legal guidance, statutory short forms may fail to accomplish the individual's objectives fully. Accordingly, many people like to use the short form in conjunction with legal advice. To that end, the short form generally supplements the advice and counsel a lawyer would provide to the principal. Preprinted DPA forms also can be purchased from stationery or office supply stores, but many do not provide a disclosure or acknowledgment statement. The caveat is that the less legal advice there is to rely on, the more important a disclosure statement becomes.

Of the 27 states with any legislative activity concerning DPAs,¹⁷ only Maryland proposed legislation related to disclosures—specifically, to make the disclosures mandatory on all preprinted DPA forms sold or distributed in the state. The bill was not enacted.¹⁸

Existing law in other states offers some useful examples of disclosure strategies. Pennsylvania requires a signed disclosure statement from the principal.¹⁹ The statement must inform the principal of the POA's purpose and the agent's duties. Furthermore, under Pennsylvania law an agent has no authority to act unless an executed acknowledgment is affixed to the POA²⁰ stating that the agent will exercise the powers for the benefit of the principal, will not commingle funds, will keep an account of transactions, and will exercise reasonable caution and prudence.

Although New Hampshire does not require a disclosure statement to be signed by the principal when executing a DPA,²¹ it does provide the following suggested model language that is both typical and fairly clear and concise:

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT YOU SHOULD KNOW THESE IMPORTANT FACTS:
Notice to the Principal: As the "Principal" you are using this Durable Power of Attorney to grant power to another person (called the "Agent" or "Attorney in Fact") to make decisions, including, but not limited to, decisions concerning your money, property, or both, and to use your money, property, or both on your behalf. If this written Durable Power of Attorney does not limit the powers that you give to your Agent, your Agent will have broad and sweeping powers to sell or otherwise dispose of your property, and to spend your money without advance

notice to you or approval by you. Under this document, your Agent will continue to have these powers after you become incapacitated, and unless otherwise indicated your Agent will have these powers before you become incapacitated. You have the right to retain this Power and not to release this Power until you instruct your attorney or any other person who may hold this Power of Attorney to so release it to your Agent pursuant to written instructions. You have the right to revoke or take back this Durable Power of Attorney at any time, so long as you are sound of mind. If there is anything about this Durable Power of Attorney that you do not understand, you should seek professional advice.²²

New Hampshire also provides an acknowledgment statement that the agent may sign and attach to the DPA. By signing, the agent acknowledges that he has read and understands the DPA and that when he acts as an agent he has the power to make decisions concerning the principal's money, property, or both; that he is acting on the principal's behalf; and that while acting as agent he is under a fiduciary duty to the principal.²³ It further defines a fiduciary relationship to be one where the agent must act prudently and that the use of his powers should be that which "is reasonable in view of the interests of the [p]rincipal and in view of the way in which a person of ordinary judgment would act in carrying out that person's own affairs."²⁴

New Hampshire's and Pennsylvania's disclosure statements are an effective way to guarantee that both the principal and the agent are aware of the consequences and responsibilities of executing a DPA. However, the statements are only effective if the parties take the time to read and understand them, or to seek counsel if they do not understand.

Defined Agent Duties

This kind of provision is very similar to disclosure mandates provided in statutory short forms but focuses on articulating the agent's duties and applies regardless of the existence of a statutory form. Agents under DPAs are typically family members or friends who may not have a great deal of understanding of their role. Thus, the aim of these provisions is to provide clear, detailed duties for an agent to follow. The guidance also provides law enforcement officials with a means to cite the exact duty that was breached in the case of financial abuse or exploitation.

Indiana was the only state to propose legislative reform concerning an agent's duties under a DPA. The two Indiana bills, which were both signed into law, focused on the agent's powers, such as who they are allowed to employ to help manage the principal's estate.²⁵ Other states have already

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Durable Power Attorney

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enacted provisions addressing an agent's duties. For instance, Florida provides a comprehensive list of duties that an agent may not perform, such as: the agent may not attest to the personal knowledge of the principal, vote on behalf of the principal, or execute or revoke any will for the principal.²⁶ Tennessee provides a list of duties that an agent may perform, such as: provide for the support and protection of the principal, the principal's spouse, or the principal's child; act as a representative payee; make advance arrangements for principal's funeral and burial; and even execute other POA forms on the principal's behalf.²⁷

Gift-Giving Authority

A number of states require a principal who wishes to allow an agent to make gifts of the principal's property, to include in the power of attorney specific language authorizing such gift giving. Other states allow the agent a broad gift-giving authority as the default rule, making the principal responsible for specifically limiting the agent's gift-giving power.²⁸ A small minority of states lack any gift-giving default rule at all.²⁹

A New Hampshire bill,³⁰ effective January 2002, is representative of one of the two states that had any legislative activity in the last two years on gift-giving. The New Hampshire provision follows the "not authorized unless" approach, providing that the agent is not authorized under the DPA to make gifts unless the DPA expressly authorizes such gifts. Future legislative trends from the other states may very well be geared toward the "not authorized" default provision because it is the most protective of the principal's assets.

Along with New Hampshire, New Jersey introduced legislation, S.B. 2082, to clarify the fact that a POA should not be construed as an authorization for the attorney-in-fact to gratuitously transfer the principal's property to the attorney-in-fact or to the others, unless there is express authorization to do so.

Affidavit from Physician

Some DPAs incorporate a "springing" provision, where in the DPA "springs" to life and the agent is authorized to act on behalf of the principal when and only when the principal becomes incapacitated. Rather than relying on an agent's word that the principal is incapacitated, existing law in some states requires an affidavit from at least one licensed physician regarding the incapacitation of the principal. Presumably, this provides some protection against over-reaching agents.

Only one state, Florida, proposed legislation of this type. The bill, enacted in 2001, requires the agent to execute an affidavit stating that the principal is incapacitated. In addition, the agent also must obtain a physician's affidavit attesting to the principal's incapacity to manage his or her own financial affairs.³¹ The new law requires that the physician must be the principal's primary physician. Until these extra steps are met, the agent is not authorized to act under the DPA.

Existing legislation in other states offers some useful comparisons. Illinois does not require a physician's affidavit, only a physician's written statement that the principal lacks decision-making capacity.³² The statement must be signed within three months of the examination and delivered to the agent, who may rely on it as proof of the principal's incapacity.³³

Kentucky allows the principal to designate the person who will be responsible for determining the principal's incapacity. However, if the principal does not designate a person, two licensed physicians are required to make the determination.

Accounting Requirement

An accounting provision requires that the agent keep all relevant receipts, records, and any other business items that pertain to the financial dealings of the principals' estate. The provision also ensures that the principal or another interested party may request an accounting of all the agents' transactions pertaining to the principal's estate.

Indiana, Texas, and Washington proposed and enacted language that requires the agent to keep the principal informed by keeping records and providing accounting on request.³⁴ Washington's new law goes a step further and specifies how an interested party can petition the court to force an accounting if the agent has failed to provide an accounting within two months of a written request.³⁵

Adult Protective Services and Penal Statutes

States are not only reexamining their DPA laws as a means of preventing financial abuse, they are also attempting to combat the problem through reform of Adult Protective Services and Penal laws.

Definition of Abuse/Exploitation

Without clear definitions of financial abuse or financial exploitation, states are hampered in imposing strong penalties against agents who do not act according to their fiduciary responsibilities.³⁶ Hawaii, Illinois, Massachusetts, and Pennsylvania recognized this need and proposed legislation on the subject.³⁷ Illinois proposes that:

A person commits the offense of financial exploitation of an elderly person . . . when he/she stands in a position of trust or confidence with the elderly person . . . and he/she knowingly and by deception or intimidation obtains control over the property of the elderly person . . . with the intent to permanently deprive the elderly person . . . of the use, benefit, or possession of his/her property.”³⁸

The majority of states already have variations of this definition.³⁹ By defining the actual crime of financial abuse or exploitation, it is much easier to recognize when a crime has been committed. Moreover, prosecutors are more inclined to pursue a conviction when there is a clear case of a violation.

Mandated Reporters

Mandated reporters are individuals or financial institutions required by law to report any suspected elder abuse, including financial abuse and exploitation. They serve as watchdogs who can quickly bring suspected abuse to the attention of the appropriate authorities. Mandatory reporters can include clergy members, doctors and other health care providers, and adult protective service workers.

Many states have begun to expand their list of mandated reporters to include other professionals, such as bank tellers who may be aware of an elderly person’s financial transactions. California, Illinois, Massachusetts, Missouri, New York, and Tennessee have all proposed legislation adding to their list of mandated reporters. For instance, Illinois proposed to add bankers and lawyers. California enacted legislation adding all clergy members to the list of mandated reporters.⁴⁰ Maine also enacted legislation, Pub. L. No. 345, requiring a caregiver that has full, intermittent, or occasional responsibility to report suspected abuse, neglect, or exploitation.

Investigation

Prompt, effective investigation is crucial after an alleged financial abuse has been reported. A Connecticut public act that became effective last year requires the Department of Social Services’ Commissioner to “investigate,” not just evaluate, allegations of elder abuse (which includes financial abuse).⁴¹ Other states, such as Michigan, Missouri, Pennsylvania, and Washington implemented a time constraint into their investigation requirement.

Penalties

Many states have recognized that criminalizing financial abuse of the elderly can serve as a strong deterrent for agents contemplating an abuse of their authority.

New York classified the financial exploitation of the elderly or disabled within the definition of the crime of larceny.⁴²

New York also categorized the crime of financial exploitation of a vulnerable elderly person in the first through fourth degrees and precluded the defense that the defendant lacked knowledge of facts or conditions that made the victim a vulnerable person.⁴³

Texas amended its state Penal Code by providing that an agent under a DPA who knowingly, intentionally, or recklessly misapplies property held as a fiduciary, and that involves substantial risk of loss to the owner, will have committed the offense of misapplication.

Policy Considerations

Criminalizing an agent’s actions under a DPA may have some deterrent effect, but it may also deter the proper use of DPAs as an instrument of estate planning. DPAs may lose their appeal if they become overburdened by heavy regulation and strict criminal sanctions. It is crucial for a state to balance appropriately the principal’s right to privacy and autonomy in handling his financial affairs with that of protecting an unaware or incompetent principal’s assets from an unscrupulous agent.

Apart from the states’ important role as regulator and enforcer, lawyers bear an even larger responsibility to their clients to ensure effective steps are taken to help combat the problem of financial abuse. Lawyers can ensure that their clients thoroughly understand the authority they are transferring to their agent and highlight the fact that the DPA can be revoked at any time. Lawyers can also take steps to ensure that appointed agents know and understand their responsibilities.⁴⁴ Drafting safeguards, such as requiring a second signature on checks higher than a pre-specified amount, can also help to keep track of large monetary transactions.

States have begun to recognize and address the problem of financial exploitation of their elderly citizens. Bringing more accountability into the monitoring system will help to lessen the devastating effects of financial exploitation of the elderly through DPAs. However, in the end, it will take the combined efforts of state legislatures, state adult protective services, practicing lawyers, and even principals who must become more educated and responsible users of DPAs.

For more information and to view a complete list of all state legislation passed in the last two years, see the Commission on Law and Aging’s Web site at <http://www.abanet.org/aging> under “Legislative Updates.”

Notes

1. Dessin, Carolyn L., “Acting As Agent Under a Financial Durable Power of Attorney: An Unscripted Role,” *75 Neb. L. Rev.* 574, 584 (1996).
2. Boxx, Karen E., “The Durable Power of Attorney’s Place in the Family of Fiduciary Relationships,” *Ga. L. Rev.* 12 (2001).

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3. *Minnesota v. Violet Mae Columbus*, 2001 WL 950097 (Minn. App. Aug. 21, 2001) (unpublished opinion).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* (quoting Minn. Stat. §609.52, sub. 2).
8. Lapping, Hans, "A License to Steal: Implied Gift-Giving Authority and Powers of Attorney," 4 *Elder L.J.* 143, 167 (1996).
9. English, David & Kimberly K. Wolff, "Survey Results: Use of Durable Powers," 10 *Probate & Property* 33 (Jan./Feb. 1996).
10. California, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and West Virginia. See State Chart on Legislative Activity, available at Commission on Law and Aging's Web site.
11. Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, North Dakota, Oregon, Rhode Island, Tennessee, Utah, West Virginia, and Washington. *Id.*
12. Missouri 2001 H.B. 633.
13. Texas 2001 H.B. 330.
14. Utah 2001 H.B. 349 and 2001 S.B. 1006.
15. Ariz. Rev. Stat. Ann. §14-5501.
16. Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Illinois, Minnesota, Montana, Nebraska, New Mexico, New York, North Carolina, Oklahoma, Texas, Wisconsin, and the District of Columbia.
17. See *supra* note 10.
18. Maryland 2001 S.B. 105.
19. Pa. Stat. Ann. §5601(b).
20. *Id.*
21. N.H. Rev. Stat. Ann. tit. LII, § 506:6 V.
22. *Id.* at IV.
23. *Id.* at VII.
24. *Id.*
25. Indiana 2002 S.B. 252 and 2001 S.B. 190.
26. Fla. Stat. ch. 709.08(7)(b) (2001).
27. Tenn. Code Ann. §34-6-109.
28. Memorandum from Advisory Committee on DPAs, to The Joint Editorial Board for Uniform Trusts and Estates Acts (Feb. 12, 2002).
29. States that follow the "not authorized" default approach are: California, Kentucky, Maine, Missouri, New Hampshire, North Dakota, Pennsylvania, Tennessee, Vermont, and Washington.
30. New Hampshire 2001 H.B. 703.
31. Florida 2001 S.B. 886.
32. 755 ILCS 45/2-7.5
33. *Id.*
34. Indiana 2001 H.B. 1385, Texas 2001 H.B. 1883, and Washington 2001 H.B. 1135.
35. Washington 2001 H.B. 1135.
36. Boxx, *supra* note 2, at 56.
37. See State Chart on Legislative Activity, available at Commission on Law and Aging's Web site.
38. Illinois 2002 H.B. 4829
39. Florida and Oregon did not have any definitions.
40. Illinois 2001 H.B. 0596. California 2001 A.B. 255.
41. Conn. Pub. Acts 01-209 (2001).
42. New York 2001 A.B. 3174.
43. New York 2001 A.B. 3614.
44. Vincent, Richard B., "Financial Exploitation Involving Agents Under POAs," 3 *Victimization of the Elderly & Disabled* 3-4 (May-June 2000).

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Report on Dying in America Finds End-of-life Care Lacking

Dying patients and their families are suffering more than they should due to the lack of availability and poor use of important services in end-of-life care. This finding is the result of a state-by-state study of end-of-life care conducted by Last Acts, a Robert Wood Johnson Foundation-funded campaign and coalition of more than 1,000 organizational partners. The study was published in a report entitled “Means to a Better End: A Report on Dying in America Today.”

To produce the report, Last Acts brought together national experts in palliative care, spirituality, pain management, and the U.S. healthcare system to establish a method for measuring the status of end-of-life care in every state. **Charles P. Sabatino**, assistant director of the ABA Commission on Law and Aging, served as an expert advisor on advance directives and convened Last Acts’ Standards and Guidelines Committee.

The report grades the 50 states and the District of Columbia on eight key elements of end-of-life care: state advance directive policies; location of death; hospice use; hospital end-of-life care services; care in ICUs at the end of life; pain among nursing home residents; state pain policies; and palliative care-certified physicians and nurses. Most states earned Cs and Ds, and worse, in the majority of criteria.

The report cited a number of barriers to providing adequate end-of-life care, including:

- Confusing language and bureaucratic hurdles in state advance directive policies;

- Underuse of hospice, as well as shrinking lengths of stays for hospice patients;
- Not enough hospitals that provide end-of-life care options, pain management programs, or hospice services;
- Persistent pain in nearly half of all nursing home residents;
- State controlled substances laws that stand as barriers to good pain management; and
- Not enough physicians and nurses trained in palliative care.

The report recommends that the following improvements be made in order to improve the quality of end-of-life care, including:

- Reforming Medicare to meet the needs of the seriously ill and dying;
- Changing state policies that affect doctors’ abilities to prescribe needed medications;
- Increasing training in palliative care for physicians, nurses, and other health care professionals; and
- Informing ourselves, and our families, about end-of-life care choices.

The full report, as well as the results of a national survey commissioned by Last Acts on Americans’ views on end-of-life care, can be viewed on the Last Acts Web site at <http://www.lastacts.org>.

American Bar Association

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See new chart detailing states’ Durable Power of Attorney legislative activity in 2000-2002 on the Commission’s Web site at <http://www.abanet.org/aging> under “Legislative Updates.”