

**SENATE BILL NO. 2442**

Introduced by

Senators O'Connell, Lyson

Representatives Boehm, D. Johnson, Nelson

1 A BILL for an Act to create and enact a new section to chapter 30.1-30 of the North Dakota  
2 Century Code, relating to the durable powers of attorney; and to provide a penalty.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. Powers of attorney - Best interest - Penalty.**

5 1. As used in this section:

6 a. "Best interest" means the agent acts solely for the principal's benefit.

7 b. "Capacity" means that at the time the power of attorney was executed the  
8 principal was capable of understanding in a reasonable manner the nature  
9 and effect of the act of executing and granting the power of attorney.

10 c. "Deception" means that a person deceives an incapacitated or vulnerable  
11 adult by knowingly doing any of the following:

12 (1) Creating or confirming a false impression in an incapacitated or  
13 vulnerable adult's mind;

14 (2) Failing to correct a false impression that the person is responsible for  
15 creating or confirming in an incapacitated or vulnerable adult's mind;

16 (3) Making a promise to an incapacitated or vulnerable adult that the  
17 person does not intend to perform or that the person knows will not or  
18 cannot be performed. A person's failure to perform a promise is not by  
19 itself sufficient proof that the person did not intend to perform the  
20 promise;

21 (4) Misrepresenting or concealing a material fact that relates to the terms of  
22 a contract or an agreement that the person enters into with the  
23 incapacitated or vulnerable adult or that relates to the existing or

- 1 preexisting condition of any of the property involved in a contract or an  
2 agreement; or
- 3 (5) Using any material misrepresentation, false pretense or false promise  
4 to induce, encourage, or solicit an incapacitated or vulnerable adult to  
5 enter into a contract or an agreement.
- 6 d. "Intimidation" includes threatening to deprive an incapacitated or vulnerable  
7 adult of food, nutrition, shelter, or necessary medication or medical treatment.
- 8 e. "Vulnerable adult" means an individual who is eighteen years of age or older  
9 who is unable to protect the individual from abuse, neglect, or exploitation by  
10 others because of a physical or mental impairment.
- 11 2. Except as provided in subsection 3, an agent may use the principal's money,  
12 property, or other assets only in the principal's best interest and the agent may not  
13 use the principal's money, property, or other assets for the agent's benefit. An  
14 agent who violates this subsection is subject to prosecution under chapter 12.1-23  
15 and is subject to damages in a civil action that equal up to three times the amount  
16 of the monetary damages.
- 17 3. Any authority, the use of which is not in the principal's best interest or is for the  
18 agent's benefit, including a contract for commissions, fees, or other compensation,  
19 must be specifically identified by the instrument and must be separately initialed by  
20 the principal and the witness at the time of execution.
- 21 4. If the agent acted with intimidation or deception in procuring the power of attorney  
22 or any authority provided in the power of attorney, the agent is subject to  
23 prosecution under chapter 12.1-23 and is subject to damages in a civil action that  
24 equal up to three times the amount of the monetary damages.
- 25 5. A power of attorney executed by an adult who does not have capacity is invalid. In  
26 a criminal proceeding, the agent has the burden of proving by clear and convincing  
27 evidence that the principal had capacity. In a civil proceeding, if the party  
28 challenging the validity of a power of attorney on the grounds of lack of capacity  
29 proves by a preponderance of the evidence that, at the time the power of attorney  
30 was executed the principal was a vulnerable adult, the agent has the burden of  
31 proving by clear and convincing evidence that the principal had capacity. In a civil

- 1 proceeding, if the party challenging the validity of a power of attorney on the basis  
2 of lack of capacity does not prove by a preponderance of evidence that, at the time  
3 the power of attorney was executed, the principal was a vulnerable adult, the agent  
4 has the burden of proving by a preponderance of the evidence that the principal  
5 had capacity.
- 6 6. A person who in good faith either assists or deals with an agent is protected as if  
7 the agent properly exercised the agent's power regardless of whether the authority  
8 of that person as the agent has been terminated.