

## **The Law and You**

### **2003 Legislative Update on Elder Law Issues**

In my August 2001 Column, I described certain amendments to our Power of Attorney statute. The 2003 Legislative Session nearly undid what was added two years ago.

Under the guise of adding trust restrictions to the Power of Attorney statute, attempts were made to substantially weaken the amendments added in 2001. On the last day of the 2003 Session we were able to mostly undo those efforts.

To be better understand what happened, let me first summarize the amendments added in 2001.

The basic purpose underlying a Power of Attorney is to allow another person, your agent, to act for you in signing documents and conducting transactions. At any time, you may revoke or amend your Power of Attorney. That is, you may at any time withdraw the power granted to your agent.

However, to monitor the actions of your agent or to revoke or amend your Power of Attorney, you must possess sufficient mental capacity to do so.

But what if you become incapacitated to the extent that you can no longer revoke your Power of Attorney or provide oversight of your agent's conduct? Who can determine whether your agent is abusing the authority granted to him or her? Essentially, there is no one to monitor the conduct of your agent when you become incapacitated.

Prior to 2001, other family members could not compel an agent to disclose any information about an estate. Far too often, the agent was unwilling to share any information, and litigation became the only recourse.

The 2001 Power of Attorney Amendments changed that. If you become incapacitated, your agent must:

(1) notify all interested persons of his or her status as agent within 30 days;

(2) provide to any interested person upon written request a copy of the Power of Attorney and a statement of the assets to which the Power of Attorney applies;

(3) provide an annual accounting of your assets; and

(4) notify all interested persons upon your death.

HB 247 nearly nullified the requirement to provide an accounting. Fortunately, we were able to weaken those efforts by substituting language that now permits you to "opt out" of the statute, rather than requiring you to "opt in." That is, if your Power of Attorney expressly states that your agent is NOT required to provide an accounting, no accounting will be required.

The original language in HB 247 required everyone to expressly state in their Power of Attorney that the statute would apply. This meant that you would have to request the protection of the statute; it would not automatically apply to you. The version that finally passed provides the full protection of the statute without asking for it.

The primary intent of HB 247 was not to enact the foregoing controversial amendment. Rather, it was intended to amend the Power of Attorney statute to restrict your agent's power to modify your trust. It also was intended to void certain transactions that may benefit your agent while being disadvantageous for you.

In particular, your agent can no longer "create, modify, or revoke" a trust created by you, unless your Power of Attorney expressly authorizes him or her to do so. This amendment was needed to prevent abuse by an agent holding a Power of Attorney, especially when the grantor of the power becomes incapacitated and can no longer monitor the agent's actions.

Unfortunately, financial exploitation

exists among family members. Greed can be a powerful tempter.

You may feel that your assets are protected because you transferred them into a trust. But the agent to whom you gave power and authority, may modify your trust for his or her own benefit.

Or, he or she may make a gift of your property from your trust. Or, your agent may grant a favorable loan from your trust to himself or herself or sell trust property to himself or his family on terms that are not fair or equitable to you.

The 2003 amendments now make these kinds of abuse much more difficult. Moreover, some of these kinds of transactions will be deemed void under the law, unless a court approves them.

When preparing a Power of Attorney or other estate documents, you should contact an experienced Elder Law Attorney. To locate an Elder Law Attorney, check with the National Academy of Elder Law Attorneys at (520) 881-4005, or your local Yellow Pages.