TESTIMONY OF JOHN J. McGEE, ESQ.
BEFORE THE JUDICIARY COMMITTEE OF
THE HOUSE OF REPRESENTATIVES OF
THE COMMONWEALTH OF PENNSYLVANIA
JULY 31, 1996

By way of background, I am an attorney licensed to practice in the Commonwealth of Pennsylvania with offices in Scranton and Stroudsburg. My field of concentration is estate planning, in which I address a number of elder law issues, including the preparation of power of attorney documents for elderly clients.

Upon being made aware of the fact that the House Judiciary Committee was considering legislation to reform the guardianship laws, I recommended various changes in the laws dealing with powers-of-attorney in a letter to Representative Gaynor Cawley who forwarded my correspondence to the House Judiciary Committee for consideration. Upon a review of my recommendations, I was contacted by Brian J. Preski, Chief Counsel to the House Judiciary Committee and I was asked to appear before you today to express to you personally my recommendations for legislative changes in the power of attorney statutes.

First of all, I wish to make a distinction between powers of attorney that are in effect when a person is mentally incapacitated as opposed to those that are in effect when a person still retains the mental capacity to make decisions effectively.

If a person has granted a power of attorney to another person but still retains the mental capacity to make decisions, that person does not need protection or intervention on his/her behalf since he/she still has the power to revoke the power of attorney which has been granted.

My concern, today, however, is addressing the need for protection of the assets of an individual who has granted power of attorney to another individual, has then subsequently become mentally incapacitated, and is therefore unable to take further steps to safeguard his/her assets. This situation can arise in principally two circumstances: first in the context of guardianship proceedings which have been instituted but where the court concludes that, despite the mental incapacity of the individual, a guardian is not necessary since a durable power of attorney document had previously been executed; and secondly, the circumstance can arise when an individual has executed a power-of-attorney document stating that the power shall become effective at some future time if and when a doctor or doctors by written certification state that the person has become mentally incapacitated. In both of these circumstances, a person designated in the power of attorney document as the attorney-in-fact has control of the assets of the mentally incapacitated individual without the court supervision which is accorded to those individuals who are subject to the guardianship statutes. It is in light of these situations that I offer the following

recommendations:

1. Upon the commencement of the period in which the attorney-in-fact assumes control of the assets of the mentally incapacitated individual, the attorney-in-fact should be required to file a petition with the appropriate county court requesting the court to establish the rate of compensation to which the attorney-in-fact shall be entitled for the rendering of his services. This requirement could be waived if the mentally incapacitated individual had stipulated the compensation terms in the power-of-attorney document. The compensation is infrequently set forth in the power of attorney document since the nature and extent of the assets and the services to be rendered in the future are unknown at the time of the execution of the document.

2. Upon the commencement of the period in which the attorney-in-fact assumes control of the assets of the mentally incapacitated individual, the attorney-in-fact should be required to post with the appropriate county court an administrative bond in an amount equal to the assets. This requirement could be waived if the mentally incapacitated individual had so designated in the power-of-attorney document. This mandate would be similar to the laws concerning the administration of decedents' estates which require the posting of an administrative bond by the estate's executor unless the deceased individual has waived that requirement in his or her last will.

3. On an annual basis, the attorney-in-fact should be required to file with the appropriate county court, and also with the insurance underwriter which has provided the administrative bond, financial reports detailing the receipts and expenditures made by the attorney-in-fact. This requirement could be waived if the mentally incapacitated individual had so designated in the power-of-attorney document.

I believe that these recommendations if implemented could significantly decrease the opportunity for abuse of assets of a mentally incapacitated individual.

Respectfully submitted,

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