

The Law and You Possible New Laws for 2006

The New Year is here. Resolutions have been made. Debts incurred for gifts must be paid. And, Utah's Legislature is about to begin its 2006 Session. That means new laws!

In the past, I have written some amendments to our laws. In 1997, I worked on an amendment to allow you to nominate your own guardian or conservator should you ever need one appointed for you.

In 2001, I wrote an amendment to overcome a judge's ruling that a conservator is not necessary if there is a power of attorney. The new law prohibits that notion.

Also in 2001, I wrote a provision to require an agent holding a power of attorney to account to the beneficiaries of the estate over which the agent has authority.

In 2003, other amendments to our power of attorney statutes were enacted to provide additional protections to those who become incapacitated and can no longer oversee the actions of their agent.

In 2006, there are several opportunities to protect seniors: (1) reduce the need for probating certain estates; (2) give exploited seniors more power to seek restitution against their exploiters; and (3) provide a more reasonable means to have a guardian or conservator appointed to protect those who can no longer protect themselves. Let me highlight these potential new laws.

First, to eliminate the need for probate of certain estates there are two key ideas. The maximum dollar amount for "small estates" can be increased. Currently, Utah's limit is \$25,000, which is substantially lower than neighboring states. For example, the limits in Colorado and Arizona are \$50,000; Idaho is \$75,000; Oregon is \$140,000; and Wyoming recently increased its limit to \$150,000. If Utah raises its limit to a reasonable amount, say \$75,000, then small estates, those less than \$75,000, would not have to be probated. The

estates would simply be handled through easily and inexpensively prepared affidavits.

The other but very significant idea to avoid probate is a transfer on death ("TOD") provision for real property. Several nearby states have enacted statutes to allow real property to be transferred upon death without going through probate.

These statutes permit a new type of deed that expressly names the person who should receive the real property upon the death of the owner. To achieve this now, many surviving spouses often add the name of a child to the deed. Doing so, however, actually transfers an ownership interest in the property to the child.

If a child is a part owner, then he or she must give consent to sell or mortgage the property. That is, the owner must always obtain the child's permission.

In contrast, a TOD Deed grants no ownership interest to the child until the owner dies. The owner can sell or mortgage the property freely without consulting with or informing the child. Also, any creditor's claims against the child cannot attach or become a lien against the property.

The second legislative measure is to provide a statutory right to collect attorney fees against a person who financially exploits or abuses a senior. Under current law, a senior who prevails in court against an exploiter or abuser cannot recover any attorney fees for the litigation. That is a huge deterrent against a senior trying to go after an exploiter. A simple provision in the Abuse, Neglect, or Exploitation statute would cure this problem.

The third area for legislative action is to amend the guardianship and conservatorship statute. Such amendment would allow a petitioner who is seeking protection for an incapacitated to have the legal fees incurred in the proceeding paid from the estate of the protected person. This makes sense only if the

court agrees that such person needs protection. That is, the fees would only be paid if the proceeding is in the best interest of the protected person. Otherwise, they would not be paid.

Without this provision, children or relatives or close friends may not be willing to incur the necessary legal expenses to protect those who are most vulnerable.

It is somewhat analogous to a person who has a trust. Most all trusts provide that the trust pay the legal fees incurred by the trustee.

But for those who don't have a trust, which is most of the population, there is no provision for payment of the legal fees from the estate of the protected or incapacitated person.

Those are just some ideas for our Legislators to consider in the 2006 Session. There may be other legislative ideas you may have. If so, don't hesitate to send them to me by e-mail or by regular, snail-mail. Or, feel free to express your thoughts on the ideas presented above.