Approved: March 9, 2010
Date

MINUTES OF THE HOUSE AGING AND LONG TERM CARE COMMITTEE

The meeting was called to order by Chairman Bob Bethell at 3:30 p.m. on March 4, 2010, in Room 784 of the Docking State Office Building.

All members were present except:
Representative Eber Phelps- excused
Representative Scott Schwab- excused

Committee staff present:
Doug Taylor, Office of the Revisor of Statutes
Iraida Orr, Kansas Legislative Research Department
Terri Weber, Kansas Legislative Research Department
Judith Holliday, Committee Assistant

Conferees appearing before the Committee:
Loren Snell, Deputy Attorney General, Kansas Medicaid Fraud & Abuse Division

Others attending:
See attached list.

Chairman Bethell opened the meeting with a discussion of policy issues concerning mistreatment of a dependent adult. He wanted to give the committee an update on what was being done in the area of elder abuse, neglect and exploitation.

Loren Snell, Deputy Attorney General, Kansas Medicaid Fraud and Abuse Division, testified in support of **HB 2568 - Requiring recording of durable power of attorney**. (Attachment 1) Mr. Snell explained the mission of the Kansas Medicaid Fraud and Abuse Division, which is to pursue fraud committed against the Kansas Medicaid Program, along with investigating and prosecuting physical abuse, financial exploitation, and neglect perpetrated against patients in residential care facilities operating in Kansas.

Mr. Snell related that he has reviewed case files of individuals who were unsuspecting victims of financial exploitation that occurred despite their best efforts to protect their assets. The aging population coupled with hard economic times will make financial exploitation even more of a problem.

The State becomes involved in these matters when individuals lose their assets and then must rely on the State Medicaid program for care. In adult case findings last year, 53% of the cases investigated involved financial exploitation and fiduciary abuse. Since January 2000, the Division has investigated 36 cases involving exploitation through the use of a Durable Power of Attorney (DPOA). This is a problem that is not going away.

HB 2568 proposes changes that will result in more awareness, openness, guidance and transparency in the use of a DPOA. The steps taken when executing a DPOA will result in more awareness by all parties involved of the expectations and requirements that go along with a DPOA. This will result in few opportunities for unscrupulous persons to take advantage of unsuspecting relatives or friends who simply look for someone to assist them in their day-to-day activities.

Mr. Snell addressed the conflict existing between basic assumptions of agency law and the operation of DPOAs. Agency law presumes the person executing the DPOA will retain the capacity to oversee the agent appointed to manage his or her affairs. A DPOA does the exact opposite by creating a situation where the agent appointed continues to have the power to manage and control assets even if the grantor loses the ability to oversee. Once the person granting the power of attorney becomes incapacitated, there is essentially no oversight or supervision of the person managing his or her affairs, which can lead to exploitation of the finances of the incapacitated principal for their own benefit.

Mr. Snell personally does not recommend a DPOA because it is too open to abuse, but suggested that a bond on the person given the DPOA would dissuade that person from committing a crime.

DPOAs were created and governed by state statutes, therefore the requirements to create a DPOA vary from

state to state. Generally, requirements are simple: the principal must be competent at the time the DPOA is created, the durable power of attorney must be in writing and signed by the principal, and the principal must express the intent that the power be durable. Many states require the power of attorney to be notarized or witnessed, or both. In Kansas, the statutory requirements include the following:

1. The power of attorney be described as a DPOA;
2. The power of attorney be signed by the principal;
3. Dated and acknowledged by the principal in the same manner as Notary statutes.

Proposed amendments have been carefully considered, trying to balance the need to maintain the ease of acquiring and utilizing the DPOA with the desire to protect vulnerable citizens from exploitation. In order to foster openness and awareness, additional requirements at signing are proposed. First, the principal would be required to attest to certain facts at signing, namely that they understand the magnitude of the power they are giving to the attorney-in-fact. The attorney-in-fact will also be required to attest to their knowledge of the powers being conferred on them. Finally, the Attorney General's office recommends the amendment to the current bill, in accordance with the statutory requirements of executive a Will, two competent witnesses will attest to their having witnessed the execution of the DPOA, as well as their lack of a family relationship to the principal and their observations of the principal's competence. These requirements increase the parties' understanding of the authority being conferred by the DPOA, and will provide independent, disinterested witnesses to the execution, thereby decreasing the possibility of improper "secret" dealings at the outset.

Second, the amendment includes that failing to act in accordance with the DPOA may result in criminal prosecution, a critical component of **HB 2568**. This statement will do away with the `1misperception that exploitation done under the DPOA is a civil matter that falls outside the purview of the criminal courts, but rather will put the prosecutors across the state on notice that appropriate prosecutorial steps may be taken when warranted by law.

Next is the recording requirement which goes directly to the idea of openness and transparency. Recording the DPOA with a government agency, such as the Register of Deeds, creates the perception that someone, other than the principal, attorney-in-fact and possibly the bank, is aware of the existence of the DPOA. This is currently the law in 21 states. Furthermore, since the DPOA carries the potential to be used for transacting real property, the DPOA would be subject to recording with the Register of Deeds anyway in order to satisfy chain of title requirements. Recording with the Register of Deeds does not create an undue financial burden because the cost of recording is nominal. Mr. Snell told the Committee that the House Judiciary Committee opposed this requirement.

The amendments to the bill also require that revocation of DPOAs be recorded in the same county Register of Deeds office in which the original DPOA was recorded. For the purpose of demonstrating that a DPOA is current and effective, copies can be easily obtained from the Register of Deeds at nominal cost.

The final amendment completes what was started in the last legislative session in **SB 45**. In **SB 45**, the Legislature required the attorney-in-fact to maintain records and prohibited co-mingling of funds. While a good first step, more is required to be effective. The amendments impose potential criminal penalties for failure to maintain the records. The first potential penalty is a misdemeanor violation for failing to maintain the records, intended to deal with individuals that blatantly disregard the statutory requirements. The discretion in handling these cases and determining the cases to be filed would be left with the prosecutor having jurisdiction over the matter.

The second potential penalty is more severe, a level 9 non-person felony, for destruction or concealment of records. This amendment contemplates and handles those situations in which an intentional obstruction of justice by the attorney-in-fact occurs. Destroying records necessary to conduct a thorough and efficient investigation of alleged financial exploitation is the equivalent of lying to investigators. To better protect the most vulnerable citizens, cooperation by all involved is encouraged, and this amendment serves to do just that.

The economic impact of financial exploitation on the innocent victim also impacts every taxpayer in the State, those relying on services provided by the Kansas Medicaid program, and other programs and private industry as well.

Minutes of the House Aging and Long Term Care Committee at 3:30 p.m. on March 4, 2010, in Room 784 of the Docking State Office Building.

Mr. Snell stated that the proposed changes will serve to create an awareness, openness, and transparency, and provide guidance for those utilizing and relying upon DPOAs. While this legislation may not end all financial exploitation of the elderly in Kansas, it is a very positive step to better protect our most vulnerable citizens from future victimization. He stated this is a criminal matter, and has been a deterrent already. He expressed hope of a rewrite of probate laws in the future to protect individuals. Mr. Snell encouraged the Committee to report **HB 2568** out favorably, as written.

Regarding the grantor or principal of a DPOA fully understanding the consequences of a DPOA, Mr. Snell stated that if there is doubt as to the mental capacity of the principal, then an attorney should be consulted, possibly having a conservatorship drawn up and going through the courts. The phrase "for the benefit of the person," is defined under a provision in the statute that states if it is supposed to benefit an individual, then it must be for the benefit of that person. When asked about purchasing a gift for a relative, i.e., wedding, graduation, etc., after the principal is incapacitated, Mr. Snell stated that a provision could be made at the time the DPOA is written to include gifts to grandchildren, etc., under certain circumstances.

The next meeting is scheduled for March 9, 2010.

The meeting was adjourned at 4:15 p.m.

HOUSE AGING & LONG TERM CARE COMMITTEE

DATE: 3/4/2010

NAME	REPRESENTING
Loren Snell	KSAG
Yvonne Etzel	KDoA
TED Herbel	CAPITOL STRATEGIES
Mitzi McKitrick	KAPE

Please use black ink

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

STEPHEN N. SIX
ATTORNEY GENERAL

120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.KSAG.ORG

House Aging and Long Term Care Committee
House Bill 2568
Deputy Attorney General Loren Snell
March 2, 2010

Dear Chairman Bethel and Members of the Committee:

I would like to begin by thanking you for the opportunity to appear today on behalf of Attorney General Steve Six and to testify in support of House Bill No 2568. My name is Loren Snell, and I am a Deputy Attorney General and the Director of the Medicaid Fraud and Abuse Division of the Kansas Attorney General's Office.

While the primary mission of the Kansas Medicaid Fraud and Abuse Division is the pursuit of fraud committed against the Kansas Medicaid Program, our Division is also charged with investigating and prosecuting physical abuse, financial exploitation and neglect perpetrated against patients in residential care facilities operating in the State of Kansas. This is why our office felt compelled to draft the amendments proposed in HB 2568, and why I am testifying before you today.

During my service in the Kansas Medicaid Fraud and Abuse Division I have had many opportunities, too many, to review case files of individuals who were the unsuspecting victims of financial exploitation, exploitation that has occurred despite their best efforts to protect their assets. Exploitation that has most often occurred at a time in their lives when they lack the ability to fully understand or comprehend the full impact of what has taken place. One example of this is "Rita". "Rita" and her now deceased spouse had spent their lifetimes working to provide for themselves. In fact, at the time of her husband's passing, "Rita" had sufficient assets, including the home that they had shared their lives in, to take care of her for the remaining days of her life. Having reached her eighties, and having begun to develop some physical limitations, "Rita" acknowledged that the time had arrived for her to seek assistance with the important day-to-day responsibilities of life, primarily her finances. "Rita" contacted her nearest living relative who offered to serve as her attorney-in-fact. A Durable Power of Attorney (DPOA) was prepared naming this relative as her attorney-in-fact, with the power to handle her financial obligations. Unsuspecting, "Rita" executed the DPOA authorizing her relative to handle her financial affairs. Within approximately four (4) years, the relative moved "Rita" into a retirement facility, sold her home, and spent all of "Rita's" assets. "Rita" was not even made aware that this had happened until she was visited by administrators from the

retirement facility advising that her bills were not being paid. Upon contacting the bank where her funds had been deposited she was told that not only was all of her money gone, but one of her accounts was overdrawn. By the time all was said and done, more than $390,000 was stolen from "Rita" and spent by the relative for their own benefit, not "Rita's". When a situation like "Rita's" occurs, the State and the taxpayers become collateral victims as well because the State's already strained healthcare resources must now foot the tab for caring for the "Ritas."

This is only one example from the many cases that are referred to our office on a regular basis. Unfortunately, there are many people that are forced to swallow the same bitter pill "Rita" had to swallow a few years ago. Even more unfortunate is the fact that this is a growing problem. All studies and reports seem to indicate that as our population continues to age, coupled with the stringent economic times, the problem of financial exploitation of our elderly adults will become more pervasive.

Looking at the problem economically, from the State's vantage point, it is a reason for serious concern. As if it were not enough that "Rita" lost all of the money that she and her husband had worked so hard to accumulate; now she must rely upon the State for her care. At one point "Rita" had sufficient finances saved to pay for her accommodations and care for the remainder of her days. Because of the actions of one unscrupulous relative she is now forced to rely on the State of Kansas to pay for her care. Now she has to rely on the Kansas Medicaid program to pay for her skilled nursing facility, doctor services, prescriptions, and any other medical services she might receive. Payments are being made by the State, on "Rita's" behalf, that could be used to pay for services for someone else, someone who is truly in need and does not have the financial resources available that "Rita" once had. "Rita", is just one of many unsuspecting victims of financial exploitation being taken advantage of under a DPOA.

Since January of 2000, the Medicaid Fraud and Abuse Division has opened active investigations in thirty-six (36) cases involving suspected financial exploitation through the use of a DPOA. All but four (4) of these cases were opened since 2005, with twenty (20) of those cases being reported in the past two (2) years alone. This is just a scratch on the surface as many suspected cases are outside of the jurisdiction of our office or simply go unreported. According to statistics provided by the Abuse, Neglect and Exploitation Unit of the Kansas Attorney General's Office, more than fifty-three percent (53%) of the adult case findings from last year, or more than 230 cases, involved financial exploitation and fiduciary abuse. While those may or may not have all involved exploitation through the use of a DPOA, the telling figure is that this constitutes an increase of almost six percent (6%) over the previous year. This is a problem that is not going to go away.

House Bill 2568 does not propose to solve all exploitation problems. In fact, I am not sure there is any way that we could possibly do away with all exploitation. What it does do is propose changes that will result in more awareness, openness, guidance and transparency in the use of the DPOA. It requires steps to be taken that will result in more awareness by all involved of the expectations and requirements that go along with executing a DPOA. These

steps will create more openness and transparency in handling these matters. All which will result in fewer opportunities for unscrupulous actors to take advantage of unsuspecting relatives or friends who are simply looking for someone to assist them in their day-to-day activities.

An inherent conflict exists between the basic assumptions of agency law and the operation of DPOAs. Agency law presumes that the person executing a power of attorney will retain the capacity to oversee the agent appointed to manage his or her affairs. A DPOA is designed to do the exact opposite; it creates a situation where the agent appointed continues to have the power to manage and control assets even if the grantor loses the ability to oversee. Once the person granting the power of attorney becomes incapacitated, there is essentially no oversight or supervision of the person managing his or her affairs. This can lead to a situation where the appointed agent exploits the finances of the incapacitated principal for their own benefit.

DPOAs are created and governed by state statutes, and therefore the requirements to create a DPOA vary from state to state. In general, the requirements to create a DPOA are simple: the principal must be competent at the time the DPOA is created, the durable power of attorney must be in writing and signed by the principal, and the principal must express the intention that the power be durable. A number of states today also require the power of attorney to be notarized or witnessed, and some require both. In Kansas, the current statutes require only that:

1. The power of attorney be described as a DPOA,
2. The power of attorney be signed by the principal,
3. Dated and acknowledged by the principal in the same manner as K.S.A. 53-501 et.seq. (Notary statutes)

The proposed amendments have been carefully considered, trying to balance the need to maintain the ease of acquiring and utilizing the DPOA, with the increasing desire to protect our vulnerable citizens from exploitation. In order to foster openness and awareness, we have proposed additional requirements at signing. First, the principal would be required to attest to certain facts at signing. Namely that they understand the magnitude of the power they are giving to the attorney-in-fact. The attorney-in-fact will also be required to attest to their knowledge of the powers being conferred upon them. Finally, and this is an amendment we are recommending to the Bill as it currently reads, in accordance with the statutory requirements for executing a Will, two competent witnesses will attest to their having witnessed the execution of the DPOA, as well as their lack of a family relationship to the principal and their observations of the principal's competence. These requirements will increase the parties' understanding of the authority being conferred by the DPOA, and will provide independent, disinterested witnesses to the execution, thereby decreasing the possibility of improper "secret" dealings at the outset.

Second, including the amendment that failure to act in accordance with the DPOA may result in criminal prosecution, although simple, is a critical component to this Bill. The common

misperception throughout the state seems to be that exploitation committed by an attorney-in-fact, acting under the color of the DPOA is a civil matter that falls outside of the purview of the criminal courts. While I would openly disagree with this perception, and have successfully prosecuted or supervised prosecution of a number of these cases, I acknowledge that this perception exists nonetheless. This simple statement puts the world on notice, along with prosecutors throughout the state, that these matters are not simply civil matters, and that appropriate prosecutorial steps may be taken when warranted by the law.

Next is the recording requirement. Again, this goes directly to the idea of openness and transparency. Recording the DPOA with a government agency creates, at the very least, the perception that "someone" is aware of the existence of this DPOA. It removes the mystique and secrecy from the instrument making it at least a little more likely that someone may find out not only that the DPOA exists, but what powers are conferred in the DPOA. While under current law the only ones fully aware of what is covered under a DPOA are the principal, assuming they still have capacity, the attorney-in-fact, and possibly the bank, these changes would make this document more open, without revealing protected information of the principal. It puts the world on notice, while at the same time putting the attorney-in-fact on notice that the world is aware. This is not a new or novel concept as it is currently the law in twenty-one (21) states that DPOAs must be recorded. Recording with the Register of Deeds simply is a logical choice as the Register of Deeds is equipped to handle these types of recording requirements. Furthermore, since the DPOA carries the potential to be used for transacting real property, the DPOA would be subject to recording with the Register of Deeds anyway in order to satisfy chain of title requirements. When compared to alternative recording locations, the Register of Deeds was the most logical for this instrument. Additionally, it is worth noting that recording with the Register of Deeds does not create any undue burden because the cost of recording is nominal.

It is worth noting that the amendments would also require that revocations of DPOAs be recorded in the same county Register of Deeds office in which the original DPOA was recorded. Furthermore, for purpose of demonstrating that a DPOA is current and effective, copies can be easily obtained from the Register of Deeds, again, at a nominal cost.

The final major amendment set forth in this legislation, is aimed at completing what was started last legislative session. In SB 45, the Legislature required the attorney-in-fact to maintain records of all transactions, and prohibited the commingling of funds. That was a well intentioned first step, but requires more in order to be effective. The amendments impose potential criminal penalties for failure to maintain adequate records. The first potential penalty is a misdemeanor violation for failing to maintain the records. While I understand that there may be accidents, in which records are lost or not obtained, this is intended to deal with those individuals that blatantly disregard the statutory requirements. The discretion in handling these cases, and determining which ones should be filed would be left with the prosecutor having jurisdiction over the matter. The second potential penalty is more severe, a level 9 non-person felony, for destruction or concealment of records. This amendment contemplates and handles those situations in which there is an intentional obstruction of justice by the attorney-

in-fact. Destroying records that may be necessary to conduct a thorough and efficient investigation of alleged financial exploitation is the equivalent to lying to investigators. In furtherance of the efforts being made to better protect our most vulnerable citizens, it is important that we encourage cooperation by those involved. This can serve to do just that.

It is important to recognize that beyond the economic impact financial exploitation has on the innocent victims, there is also an impact on every citizen of the State of Kansas, especially those that rely on the services paid for and provided under the Kansas Medicaid Program. That is not to say that it does not affect other programs or private industry as well, but these are impacts that all tax payers are feeling during these economic times.

Careful consideration was given to the changes being proposed when drafting this legislation. Again, the changes being proposed will serve to create an awareness, openness, transparency and provide guidance, for those utilizing and relying upon DPOAs. While we do not profess to have created legislation that will end all financial exploitation of the elderly in Kansas, we do believe it is a very positive step in the right direction and will help to better protect our most vulnerable citizens from future victimization. I encourage you to report HB 2568 out of committee favorably, as written.

Respectfully,

OFFICE OF THE ATTORNEY GENERAL
STEVE SIX

Loren F. Snell Jr.,
Deputy Attorney General, Director
Kansas Medicaid Fraud and Abuse Division