STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

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

Testimony in Support of Senate Bill 57
Kansas Power of Attorney Act

Presented to the House Judiciary Committee
By Deputy Attorney General Loren Snell

March 11, 2015

Chairman Barker and Members of the Committee:

I would like to begin by thanking you for the opportunity to appear today on behalf of Attorney General Derek Schmidt and to testify in support of Senate Bill No. 57. 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.

During my service in the Kansas Attorney General's 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, despite their best efforts to protect their assets. This has often happened at a time in their lives when they lack the ability to fully understand or comprehend the full impact of what has taken place, and are unable to replace what has been taken from them. The typical scenario involves an individual who executes a durable power of attorney believing they are taking the necessary step to protect themselves. They authorize a relative, friend or other acquaintance to handle their financial affairs, placing their complete and total trust in that individual to act according to their best interest. Within a relatively short period of time, their entire life savings are spent, leaving them with absolutely nothing. Many times this has occurred without the victim even being aware that they are being, or have been, victimized. This can be due to a loss of capacity or just simply being too trusting of their attorney in fact. By the time that they or someone on their behalf learns of the victimization, the money is often spent and the opportunity to recover the funds is long since passed.

An inherent conflict exists between the basic assumptions of agency law and the operation of a durable power of attorney. 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 durable power of attorney is designed to do the exact opposite; it permits the appointed agent, or attorney in fact, to continue to manage and control assets even if the grantor, or principal, loses the capacity to oversee. Once the principal becomes incapacitated, there is essentially no oversight or supervision of the agent who has been left to manage his or her affairs. This can, and many times does, lead to a situation where the appointed agent exploits the incapacitated principal by

utilizing the principal's property, be it financial, personal or real, for the benefit of the agent rather than the principal.

Each year our division receives many referrals involving this very scenario. It should be noted that many more cases don't make it to our division, either because they aren't reported or they do not meet the federal grant requirements necessary for our division to become involved. Nonetheless, since January of 2004, the Medicaid Fraud and Abuse Division of the Attorney General's Office has opened approximately ninety-three (93) cases involving suspected financial exploitation, primarily through the use of a durable power of attorney. Even more unfortunate, and contrary to what some might have you believe, this is a growing problem. According to statistics provided by the Abuse, Neglect and Exploitation Unit of the Kansas Attorney General's Office, more than 58% of the substantiated reports of adult abuse in Kansas involved financial exploitation and fiduciary abuse. All studies and reports seem to indicate that as our population continues to age, 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 is not enough that our victims have lost their life savings, that they or their loved ones have worked so hard to accumulate; now they must rely upon the State for their care. Many of these victims had sufficient finances saved to pay for their accommodations and care for the remainder of their lives. Because of the actions of an unscrupulous attorney in fact, they may now be forced to rely on the State of Kansas to pay for their care. Often times the Kansas Medicaid program is looked to in order to pay for skilled nursing facilities, doctor services, prescriptions, and many other medically necessary services. These are payments that could have been used to pay for services for other Medicaid beneficiaries, beneficiaries who may never have had the financial resources available.

A durable power of attorney is created and governed according to state statutes, and therefore the requirements to create a durable power of attorney often vary from state to state. In general, the requirements to create a durable power of attorney are simple: the principal must be competent at the time the durable power of attorney 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 durable power of attorney,
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)

Senate Bill 57 proposes changes that will result in more awareness and guidance in the use of the durable power of attorney. It would require that notice provisions be included for both the principal and the attorney in fact, setting forth the expectations and requirements that go along with a durable power of attorney, while at the same time preserving the personal nature and ease of use of the instrument. The purpose is not to try to intimidate or scare someone from utilizing this very valuable estate tool, but rather to foster an awareness of exactly what is involved in this extremely important process and the responsibilities that are being given and received. This

includes providing the principal with every opportunity to understand the breadth of the power being conferred upon the attorney in fact, as well as reminding them to seek advice of an attorney if they do not understand any aspect of the durable power of attorney. While this is generally not a problem with principals that are working through an attorney to prepare and execute the durable power of attorney, for those that are resorting to online services or fill-in-the-blank forms purchased at your local office supply store, it certainly is a serious concern.

A common misperception throughout the state seems to be that exploitation committed by an attorney in fact, acting under the color of the durable power of attorney, is a civil matter that falls outside of the purview of the criminal courts. Tremendous steps were taken last legislative session to correct this misperception by amending the criminal provisions to specifically address violations of the Kansas power of attorney act. Senate Bill 57 serves to place the attorney in fact, as well as the principal, and their families, on notice that actions taken under the power of attorney that are not in the best interest of the principal will be deemed to be in violation of the Kansas power of attorney act. As violations of the Kansas power of attorney act, these actions may be subject to criminal prosecution under the statutes of the State of Kansas. An attorney in fact that is acting within the scope of their power, and according to the best interests of the principal has nothing to worry about. Those who should be concerned by this notice are those that are entering into this agreement looking at it as an opportunity to supplement their own income or assets with the assets of the principal.

Senate Bill 57 also requires an acknowledgment by the attorney in fact in the presence of a notary public prior to acting on the principal's behalf. This would be a separate section at the end of the document, placed at the bottom of the required notice. It does not require that this occur at the time the durable power of attorney is executed by the grantor. In order for the durable power of attorney to become effective, and for the attorney in fact to have any power to act accordingly, they must execute the acknowledgement identifying them as the proposed attorney in fact, and positively stating that they have read and understand the proposed notice. For the principal that desires to retain their privacy with regards to their appointments, this will respect such privacy. At the same time, it will serve as evidence that the attorney in fact was placed on notice upon agreeing to take on their trusted position to act on behalf of the principal.

Finally, Senate Bill 57 aims to complete what was begun during the 2009 legislative session. In 2009 the Legislature amended the power of attorney statutes to require that the attorney in fact had to maintain records associated with their service as attorney in fact, and prohibited the commingling of funds. That was a well-intentioned step; however, with a bit more this could be an effective measure to help prevent fraud or exploitation. For the attorney in fact that is truly performing in the best interest of the principal, keeping these records is generally not a problem. Where this has become an issue is in the cases involving the attorney in fact who tries to cover up improper dealings or who desires to avoid the "paper trail." The amendments proposed in Senate Bill 57 would impose costs, fees and expenses upon the attorney in fact for failure to maintain the necessary records. In a financial exploitation case the records are very important in uncovering the events leading up to any allegations of misdealing. In the event that the records must be reproduced, causing more time to be expended and additional expenses, the attorney in fact would be responsible for covering those expenses. Likewise, should an attorney in fact

comingle assets of the grantor, contrary to the best interest of the grantor, any costs incurred in recovering the comingled assets shall be assessed to the attorney in fact.

It is important to recognize that there is an impact to financial exploitation felt well beyond the unsuspecting victims. Nursing homes and other related facilities are left to deal with bills that go unpaid for necessary services they have provided to the grantor. There is a widespread impact on the taxpayers of the State of Kansas, as they are called upon to foot the bill for more citizens being placed upon the Medicaid rolls.

The amendments offered in Senate Bill 57 will serve to create awareness and provide guidance for those granting and those receiving powers under a durable power of attorney, without dramatically impacting the ability to utilize these very important documents. Senate Bill 57 is a very positive step in better protecting our most vulnerable citizens from future victimization. On behalf of Kansas Attorney General Derek Schmidt, I encourage you to report Senate Bill 57 out of committee favorably, as written.

###