

Approved January 18, 1989
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative Michael O'Neal at
Chairperson

3:30 ~~xxx~~ p.m. on January 12, 1989 in room 313-S of the Capitol.

All members were present except:

Representative Peterson, who was excused

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Frank Lawler, American Association of Retired Persons, Leawood
Ralph Rogers, Task Force Member, American Association of Retired Persons
Claire McCurdy, Kansas Department on Aging
Sister Mary Francine, St. Francis Hospital and Medical Center and Catholic Health Assoc. of Kansas
John Holmgren, Executive Director, Catholic Health Association of Kansas
Barbara Miller, Department of Social and Rehabilitation Services

Hearing on H. B. 2009 -- Durable Power of Attorney for health care decisions

Frank Lawler testified in support of H.B. 2009. He stated there is a need for all Kansans to have the ability to plan for their health care in accordance with their desires in the event of any disability or incapacity to make their own decisions, see Attachment I.

Ralph Rogers stated he questioned whether this act would give the durable power of attorney the authority to withhold life support systems.

Claire McCurdy testified the Kansas Department on Aging recommends passage of H.B. 2009. She said this bill incorporates the ability to make health care decisions into the Durable Power of Attorney Act. In addition, protections are given for those who act in good faith reliance on the durable power of attorney, see Attachment II.

Sister Mary Francine testified H.B. 2009 is an improvement over 1988 H.B. 2824. She stated that health care is not specifically named. She recommended placement be in a health care or treatment facility. In New Sec. 6 the bill would be clearer if subsections of K.S.A. 59-3108 were repeated. She submitted a Durable Power of Attorney form which would be a clearer statement of authority granted to an agent, see Attachment III.

John Holmgren stated the Catholic Health Association of Kansas supports H.B. 2009 and expressed interest of Advisory Board members in discussing this proposal at a future date.

Barbara Miller testified the Department of Social and Rehabilitation Services supports H.B. 2009. She submitted an amendment to Sec. 3 (a), to insert the language "conservator, guardian of the estate or other court appointed" in front of the word "fiduciary" in two places in line 43, see Attachment IV.

The Committee discussed whether "guardian of the estate" was proper language.

Staff was requested to research what effect this bill would have on the living will.

The Committee meeting was adjourned at 4:15 p.m. The next meeting will be Tuesday, January 17, 1989 at 3:30 p.m. in room 313-S.



KANSAS STATE LEGISLATIVE COMMITTEE

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T E S T I M O N Y
REGARDING HOUSE BILL NO. 2009
Uniform Durable Power of Attorney
By State Legislative Committee of AARP, Kansas
January 12, 1989

From the introduction of H. B. No. 2824 to provide for durable power of attorney for health care matters, AARP's Kansas State Legislative Committee has recognized the need for such an act and the benefits it could provide. We have reviewed proposed House Bill No. 2009 as recommended by the interim committee and we pledge it our support.

We emphasize two particular aspects of the need for a durable power of attorney statute for health care, as follows:

First, the need for persons to have the ability to plan for their health care in accordance with their desires in the event of any disability or incapacity to make their own decisions.

Secondly, we emphasize the cross-generational nature of having available such statutory authority. The need for this type act is not solely a concern of the elderly. Having such authority available would be an asset for all Kansans, regardless of age. Why? Because not one of us is immune from an instantaneous occurrence that could leave us either disabled or incapable of making our own decisions on matters related to health care. Failure to plan for such eventualities can result in trauma for an entire extended family.

We have testified on behalf of the need for the durable power of attorney concept and we have listened to others who have also testified. We will not take up your time reiterating any further opinions regarding the proposed bill. We do commend the interim committee for its work and those who contributed to the final proposal. We also thank this committee for the opportunity to restate our support.

Frank Lawler, Chairman, SLC
Ralph Rodgers, Task Force Member

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700

Louise D. Crooks *President*

Horace B. Deets *Executive Director*

*L. Judd, 1/12/89
Att I.*

HOUSE JUDICIARY COMMITTEE

January 12, 1989

Presentation by Claire McCurdy
Chief Counsel/Special Assistant
Kansas Department on Aging

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1/12/89
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I. Background

As you know, House Bill 2009 deals with powers of attorney, and incorporates the ability to make health care decisions into the Durable Power of Attorney Act. In addition, protections are given for those who act in good faith reliance on the durable power of attorney.

With specific regard to health care decisions, this bill allows a principal to confer upon an agent, by means of a durable power of attorney, the authority to do acts that a guardian would be capable of under Kansas law. This includes the power to make health care decisions without first obtaining a court order to take such actions except as set forth in subsections (g) (3), (4), (5), (6), (7) and (8) of K.S.A. 59-3018. As a point of information, that statute sets forth the powers of a guardian under Kansas law, and includes the power to make certain health care decisions. These subparagraphs deal with such things as sterilization, experimental medical procedures and preventing divorce.

This bill also protects any person who acts in good faith in reliance upon the validity of the power of attorney from civil or criminal liability.

II. Kansas Department on Aging recommends passage of this legislation.

Enactment of this bill recognizes that individuals have a fundamental right to control decisions relating to their health care. The enactment of House Bill 2009 would be of great comfort to older Kansans in that it allows them to choose a trusted friend or relative to act as his or her informed health care decision-maker in his or her place should the need arise.

Existence of a durable power of attorney which includes the power to make health care decisions will also alleviate many of the problems that arise when there is disagreement among family members or between family members and physicians concerning the principal's course of treatment.

Furthermore, House Bill 2009 will minimize the reluctance upon the part of institutions to accept durable powers of attorneys, in that it legally authorizes the agent to make health care decisions, and protects any party acting in good faith in reliance upon the durable power of attorney from any type of civil or criminal liability.

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TESTIMONY ON HOUSE BILL 2009

TO: Special Committee on Judiciary
January 12, 1989

BY: Sister Mary Francine
St. Francis Hospital and Medical Center, Topeka
Also representing
Catholic Health Association of Kansas

House Bill 2009 is an improvement over last year's proposed House Bill 2824. However I agree with yesterday's speakers that it is overly simplified.

1. Health care is not specifically named; this could continue the current uncertainty of its application to health care.
2. It allows placement "in any facility or institution, including any treatment facility" --the vagueness is frightening. I would prefer to see placement "in a health care or treatment facility."
3. In section 6, I am not familiar with the reference to subsections of K.S.A. 59-3018. The Bill could be understood better if these items were repeated.
4. A clearer statement of the authority granted to an agent needs to be made since we are talking about decision-making power over life itself. An example of such a statement is in the attached Durable Power of Attorney form which we based on the Kansas statute.

Section 2: General Statement of Authority Granted

- Specifies the authority that is given or withheld. In my experience the decision to refuse consent or withdraw consent seems to carry a lot of emotional baggage and should therefore be stated explicitly in order to avoid a challenge to the authority.
- Organ donation, autopsy and disposition of the body are intentionally included since some might consider that these are not "health care" and therefore are not part of the agent's authority. The previous reference to K.S.A. 50-3018 and discussion yesterday considered the guardians authority for removal of organs. I consider removal of organs and donation of organs to be very different and this may be another authority that needs clarification.

You may be aware that an addition to the Kansas Anatomical Gift Act and also a Federal statute became effective in 1986. Since that time health care providers are required to inform the decedents family about the option of organ donation. An agent who is thus informed needs a clear authority to carry out the decedents wishes.

H. Jurd
1/12/89
Att III

DURABLE POWER OF ATTORNEY

1. CREATION OF DURABLE POWER OF ATTORNEY

Pursuant to the Kansas Uniform Durable Power of Attorney Act, I hereby create a durable power of attorney by appointing the person designated below to make health care decisions for me. This power shall become effective at the time I become incapable of giving informed consent for health care decisions. This power of attorney shall not be affected by my subsequent disability or incapacity.

2. GENERAL STATEMENT OF AUTHORITY GRANTED

If I become incapable of giving informed consent for health care decisions and protective proceedings have not commenced regarding the guardianship of my person, I hereby grant to my attorney-in-fact full power and authority to make health care decisions for me including the right to consent, refuse consent, or withdraw consent to any care, treatment, service, or procedure to maintain, diagnose or treat a physical or mental condition, and to authorize release of medical information. Unless crossed out and initialized by me this includes authority to make decisions about organ donation, autopsy, and disposition of my body. This authority is subject to the special provisions and limitations set out as follows:

The attorney-in-fact shall be prohibited from authorizing consent for the items marked below, otherwise authority is not limited:

3. DESIGNATION OF ATTORNEY-IN-FACT

I, _____ do hereby designate and appoint
 _____, residing at _____

as my attorney-in-fact to make health care decisions for me as authorized in this document.

If protective proceedings are commenced pursuant to my incapability, I hereby nominate to the Court, pursuant to K.S.A. 58-612(b) as amended, or applicable statute, the above named attorney-in-fact (or alternate) as the conservator or guardian of my person.

4. DESIGNATION OF ALTERNATE ATTORNEY-IN-FACT

If the person designated in Paragraph 3 as my attorney-in-fact is not available and willing to make a health care decision for me, then I designate the following persons to serve as my attorney-in-fact to make health care decisions for me as authorized in this document, such person to serve in the order listed below:

A. First Alternate Attorney-In-Fact

Name: _____

Address: _____

Telephone Number: _____

B. Second Alternate Attorney-In-Fact

Name: _____

Address: _____

Telephone Number: _____

5. DURATION

I understand that this power of attorney will exist from the date I execute this document until I revoke this power by an instrument in writing and executed by the same formalities as required by the Kansas Uniform Durable Power of Attorney Act.

6. PRIOR DESIGNATIONS REVOKED

I revoke any prior durable power of attorney for health care.

7. I sign my name to this Durable Power of Attorney on

_____ at _____
Month Day Year

Principal

Witness

Witness

Address

Address

STATE OF _____)

SS.

COUNTY OF _____)

BE IT REMEMBERED, that on this _____ day of _____, 19 _____, before me the undersigned, a Notary Public in and for said County and State, came

_____ who is personally known to me to be the same person who executed the foregoing instrument of writing for the purposes stated therein and duly acknowledged the execution of the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in said County and State the day and year last above written.

Notary Public

My Commission Expires:

Copies:

This document is not considered to be legal advise. Before using consult with Attorney and particular state law.



STATE OF KANSAS

MIKE HAYDEN, Governor

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Docking State Office Building, Topeka, Kansas 66612-1570

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January 12, 1988

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Commissioner

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Services
GABE FAIMON
Commissioner

Youth Services
ROBERT BARNUM
Commissioner

Rep. Michael O'Neal, Chairman
House Judiciary Committee
Statehouse
Topeka, KS 66612

RE: House Bill No. 2009

Dear Chairman O'Neal:

My staff and I support Proposal Number 20 to HB 2009. We have reviewed the bill, and would suggest a language modification to Section 3(a). This provision is somewhat confusing in the use of the term "fiduciary." Suggested substitute language is attached.

A member of my staff will be available at the committee meeting this afternoon to answer any questions you might have. Thank you for your consideration.

Sincerely,

Winston Barton
Secretary

WB:TCO:BJM:BC:bt

Housefiled
1/20/89
Att IV

HOUSE P'LL No. 2009

By Special Committee on Judiciary

Re Proposal No. 20

12-22

16 AN ACT concerning power of attorney; relating to the uniform du-
17 rable power of attorney act; health care decisions; amending K.S.A.
18 58-610, 58-611, 58-612, 58-613, 58-614 and 58-615 and repealing
19 the existing sections.

20 *Be it enacted by the Legislature of the State of Kansas:*

21 Section 1. K.S.A. 58-610 is hereby amended to read as follows:
22 58-610. A durable power of attorney is a power of attorney by which
23 a principal designates another as the principal's ~~attorney in fact-agent~~
24 in writing and the writing contains the words "this power of attorney
25 shall not be affected by subsequent disability or incapacity of the
26 principal" or "this power of attorney shall become effective upon
27 the disability or incapacity of the principal," or similar words showing
28 the intent of the principal that the authority conferred shall be
29 exercisable notwithstanding the principal's subsequent disability or
30 incapacity.

31 Sec. 2. K.S.A. 58-611 is hereby amended to read as follows: 58-
32 611. All acts done by an ~~attorney in fact-agent~~ pursuant to a durable
33 power of attorney during any period of disability or incapacity of
34 the principal have the same effect and inure to the benefit of and
35 bind the principal and the principal's successors in interest as if the
36 principal were competent and not disabled.

37 Sec. 3. K.S.A. 58-612 is hereby amended to read as follows: 58-
38 612. (a) If, following execution of a durable power of attorney, a
39 court of the principal's domicile appoints a conservator, guardian of
40 the estate or other fiduciary charged with the management of all of
41 the principal's property or all of the principal's property except spec-
42 ified exclusions, ~~the attorney in fact-agent~~ is accountable to the ~~the~~ conservator, guardian of the estate
43 fiduciary as well as to the principal. The ~~fiduciary~~ has the same or other court-appointed
44 power to revoke or amend the durable power of attorney that the conservator, guardian of the estate
45 principal would have had if the principal were not disabled or or other court-appointed
46 incapacitated.

47 (b) A principal may nominate, by a durable power of attorney,
48 a conservator, guardian of the principal's estate or guardian of the
49 principal's person for consideration by the court if protective pro-
50 ceedings for the principal's person or estate are thereafter com-
51 menced. The court shall make its appointment in accordance with
52 the principal's most recent nomination in a durable power of attorney
53 except for good cause or disqualification.