Approved January 24, 1989
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

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

3:30 ~~a.m.~~/p.m. on January 17, 1989 in room 313-S of the Capitol.

All members were present except:

Representatives Adam and Peterson, who were 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:

Randy Hearrell, Judicial Council
Bud Grant, Kansas Chamber of Commerce and Industry
Ralph J. Rodgers, Member, Task Force, American Association of Retired Persons

BILL REQUESTS

Randy Hearrell requested, on behalf of the Judicial Council, the Judiciary Committee introduce proposed legislation on probate matters and on guardians and conservators.

Representative Jenkins moved to introduce legislation proposed by the Judicial Council as Committee bills. Representative Solbach seconded the motion. The motion passed.

Randy Hearrell also requested the Committee introduce a bill amending the Administrative Procedures Act, as proposed by the Advisory Committee of the Judicial Council..

Representative Crowell moved to introduce the proposed legislation amending the Administrative Procedures Act. The motion was seconded by Representative Jenkins. The motion passed.

Bud Grant requested the Committee introduce, as a Committee bill, legislation concerning civil liability for worthless checks. This legislation was considered and passed by the House Judiciary Committee in 1988 as Substitute for H.B. 2372, see Attachment I. He said "21-307" on line 60, page 2, should not be striken.

A motion was made by Representative Jenkins and seconded by Representative Douville to introduce as a Committee bill, legislation requested by the Kansas Chamber of Commerce and Industry regarding worthless checks. The motion passed.

The Chairman explained the legislation requested by the Attorney General's office. Legislation was recommended concerning the lemon law, attorney fees, DUI implied consent, statute of limitations, D.E.A. forensic reports and inquisition, see Attachment II.

Representative Jenkins moved and Representative Fuller seconded to introduce legislation requested by the Attorney General as Committee bills. The motion passed.

The Chairman introduced Chris Vogel, a student at the University of Kansas School of Law, who will serve as his legislative intern this session.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 313-S, Statehouse, at 3:30 a.m./p.m. on January 17, 1989.

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

Ralph J. Rodgers suggested that H.B. 2009 would be easier to understand if the provisions of Kansas law referred to in the bill were set forth in the bill. He was specifically concerned with K.S.A. 65-28,101. For his prepared testimony see Attachment III.

Representative Douville submitted an amendment to the Committee concerning the withholding or withdrawal of life sustaining procedures, see Attachment IV.

Prepared testimony of Nancy Smith Roush for the Kansas Bar Association was distributed to the Committee, see Attachment V.

The hearing on H.B. 2009 was closed.

The Committee meeting was adjourned at 4:20 p.m. The next meeting will be Wednesday, January 18, at 3:30 p.m. in room 313-S.

January 17, 1989

House Judiciary

Name	Organization	City
~~Ralph J. Rodgers~~	~~AARP~~	~~K.C., Ks.~~
Marilyn Bradt	KINH	Lawrence
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS	TOPEKA
Jessie Asay	KDOA	Topeka
Bob Buchholder	AARP	Buhler
George Goebel	AARP	Topeka
Mary Shaybaugh	SRS	Topeka
Dick Kelsey	WAEC	Wichita
Bud Grant	KCCI	TOPEKA
Randy Hearrell	Judicial Counsel	Topeka
Matt Lynch	Judicial Council	Topeka

Session of 1988

Substitute for HOUSE BILL No. 2372

By Committee on Judiciary

3-30

AN ACT concerning the civil liability for a worthless check; amending K.S.A. 1987 Supp. 60-2610 and repealing the existing section.

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

Section 1. K.S.A. 1987 Supp. 60-2610 is hereby amended to read as follows: 60-2610. (a) If a person gives a worthless check, as defined by ~~K.S.A. 21-3707 and amendments thereto~~ *subsection (g)*, the person shall be liable to the holder of the check for the amount of the check plus an amount equal to the greater of the following:

(1) Damages equal to three times the amount of the check but not exceeding the amount of the check by more than $500; or

(2) $100.

(b) The amounts specified by subsection (a) shall be recoverable in a civil action brought by or on behalf of the holder of the check only if: (1) Not less than 21 days before commencing the action, the holder of the check made written demand on the maker or drawer for payment of the amount of the check; and (2) the maker or drawer failed to tender to the holder, prior to commencement of the action, an amount not less than the amount demanded. The written demand shall be sent by restricted mail, as defined by K.S.A. 60-103 and amendments thereto, to the last known address of the maker or drawer and shall include notice that, if the money is not paid within 21 days, triple damages may be incurred by the maker or drawer of the check.

(c) Subsequent to the commencement of an action under this section but prior to the hearing, the defendant may tender to the plaintiff as satisfaction of the claim, an amount of money equal to

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the sum of the amount of the check, the incurred court and service costs and the costs of collection, including but not limited to reasonable attorney fees.

(d) If the court or jury determines that the failure of the defendant to satisfy the dishonored check was due to economic hardship, the court or jury may waive all or part of the damages provided for by this section, but the court shall render judgment against defendant for not less than the amount of the dishonored check, the incurred court and service costs and the costs of collection, including but not limited to reasonable attorney fees.

(e) Any amount previously paid as restitution or reparations to the holder of the check by its maker or drawer shall be credited against the amount for which the maker or drawer is liable under subsection (a).

(f) Conviction of giving a worthless check ~~or habitually~~ giving a worthless check, as defined by K.S.A. ~~21-3707 and~~ 21-3708 *and subsection (g)*, and amendments ~~thereto,~~ shall not be a prerequisite or bar to recovery pursuant to this section.

(g) As used in this section, "giving a worthless check" means the making, drawing, issuing or delivering or causing or directing the making, drawing, issuing or delivering of any check, order or draft on any bank, credit union, savings and loan association or depository for the payment of money or its equivalent:

(1) With intent to defraud or in payment for a preexisting debt created by a consumer credit sale or consumer loan as defined in K.S.A. 16a-1-301, and amendments thereto; and

(2) knowing, at the time of the making, drawing, issuing or delivering of such check, order or draft, that the maker or drawer has no deposit in or credits with the drawee or has not sufficient funds in, or credits with, the drawee for the payment of such check, order or draft in full upon its presentation.

Sec. 2. K.S.A. 1987 Supp. 60-2610 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

The following are recommendations I would like for you to consider introducing in the House Judiciary Committee. Thank you for you assistance.

1. Lemon Law - Get enforcement power for the Attorney General. This bill was proposed last year in Senate Bill 527.

2. Attorney Fees - Provide attorney fees when actions are brought by the attorney general. This bill was proposed last year in Senate Bill 335.

3. DUI Implied Consent - Include in K.S.A. 8-1001 that any person who operates or attempts to operate a motor vehicle within the state has deemed to have given consent to submit to one or more tests to determine the presence of alcohol or drugs, irrespective of where that test may be administered, either within or without the state of Kansas.

4. Statute of Limitations - Change K.S.A. 21-3106 on the statute of limitations for all crimes expanding it from two years to five years.

5. D.E.A. Forensic Reports - Amend K.S.A. 22-2902 (a) by adding the Drug Enforcement Administration to the list of authorized forensic labs which could be utilized in Kansas cases. (Also add United States Army, Navy and Air Force.)

6. Inquisition - Expand the inquisition statute, K.S.A. 22-3101, to allow nonjudicial inquisition subpoenas in all criminal investigations. Now it is permitted in violations of gambling, intoxicating liquors, criminal syndicalism, racketeering, bribery, tampering with a sports contest, narcotic or dangerous drugs or any violation of any law where the accused is a fugitive from justice.

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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 The House of Representatives
~~12~~ 17 January 1989

At a Session of the Special Committee on the Judiciary on Thursday, 12 January 1989, an Act concerning power of attorney, relating to the Uniform Durable Power of Attorney act, health care decisions, and amending certain other K.S.A. provisions relative thereto, was duly brought on to be heard, Honorable Mike O'Neal, Chairman, Presiding. The American Association of Retired Persons (AARP), by Frank Lawler, Chairman, Kansas SLC, assisted by Ralph J. Rodgers, Task Force Member, appeared, and Testified as follows:

That the official position of AARP was declared to be in favor and continuing support of said Bill at this time;

That although notwithstanding such continuing support, We do suggest, however, that since said Bill does appear to be affected by other provisions of Kansas Law as set forth in Kansas Statutes Annotated (KSA) not specifically included herein, greater clarity and simplicity may be achieved by including pertinent provisions in the actual body of House Bill NO. 2009.

Again, we commend the Committee and others who have contributed thereto, for its very diligent effort in preparing said Bill. We, also, extend our thanks for the opportunity to again appear and to restate our support.

Frank Lawler, Chairman, SLC
Ralph J. Rodgers, Esq., Task Force Member.

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law; and if necess .y, to make all necessary a angements, contracts or otherwise, for me at any hospital, hospice, nursing home, convalescent home, health care facility, or similar institution, or in my own residence should I desire, and ensure that all my essential needs are provided for at such facility or in my residence, as the case may be; to employ and discharge medical personnel, including physicians, psychiatrists, dentists, nurses and therapists as my agent shall deem necessary, for my physical, mental and emotional well being and to pay them or cause them to be paid reasonable compensation; to request, receive and review any information, verbal or written, regarding my personal affairs or my physical or mental health including medical and hospital records and to execute any releases of other documents that may be required in order to obtain such information; giving and granting to my said Attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises. This power to contract and make decisions effecting my health shall not be construed to authorize the withholding or withdrawal of life sustaining procedures unless I shall have executed a declaration in accordance with law as set forth in K.S.A. 65-28, 101-65, 28, 109 and provided further that I have not revoked the declaration as authorized by K.S.A. 65-28, 106; The powers of agent herein shall be limited however, to the extent set out in writing in the Power of Attorney. No guardian powers shall be effective until the occurrence of the principal's disability or incapacity, unless the Power of Attorney specifically provides otherwise. Nothing herein shall effect the validity of any Power of Attorney which conveys by its language the powers a guardian would have under Kansas law, even though the language referred to above is not used.

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LAW OFFICES
SHOOK, HARDY & BACON

MO TELECOPIER (816) 421-5547
KS TELECOPIER (913) 451-6579
W.U.T. TELEX 426291 SHB KSCA
A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS

40 CORPORATE WOODS, 6TH FLOOR
9401 INDIAN CREEK PARKWAY
P.O. BOX 25126
OVERLAND PARK, KANSAS 66225
(913) 451-6060

MISSOURI OFFICE
ONE KANSAS CITY PLACE
1200 MAIN STREET
KANSAS CITY, MISSOURI 64105
(816) 474-6550

January 16, 1989

House Judicial Committee
c/o Ron Smith
Kansas Bar Association
1200 Harrison
P. O. Box 1037
Topeka, KS 66601

Re: House Bill No. 2009
Durable Power of Attorney Act

I am writing to you in connection with the proposed House Bill No. 2009, and my comments regarding certain proposed changes and also responses to some concerns raised by the Committee. These are as follows:

1. Concern was raised by some Committee members regarding Section 3. This section is not being changed, rather it is my understanding that some Committee members just expressed concern that the law allows a conservator or guardian to "supersede" the agent under the Durable Power of Attorney. I think this is a good provision. You should note in Section 3 (b) that a principal may nominate by Durable Power of Attorney a guardian and conservator. Therefore, if the principal is concerned that some other family members may try to come in and appoint themselves as guardian and conservator and thus supersede the agent under the Power of Attorney, they can simply include in the Power of Attorney a nomination of the same person serving as agent to also serve as guardian and conservator if one is ever needed. In addition, the advantage of the procedure is that it allows other concerned family members to make the agent accountable to the court through a guardian and conservatorship procedure, which I think is a nice safeguard if the agent appears to be operating inappropriately.

2. New Section 6 includes language referring to guardianship powers. The bill originally proposed by the KBA Committee included reference to conservatorship powers as well. Apparently the references to conservatorship were deleted because believed unnecessary. However, I did want to explain to you our reasoning for including conservatorship as well as guardianship. We have a continuing problem convincing institutions to accept the acts of an agent under a power of attorney. However, there is never any problem with having an institution accept a conservator

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that has been appointed by the court. We believed by "piggy-backing" what an agent under a Power of Attorney can do on to the conservatorship statutes and case law, it would provide significant substantive support in dealing with third party institutions regarding what an agent can or cannot do under state law. Some states have resolved this problem by containing in the statute a laundry list of various powers. We feel that approach has some problems as well, because if any particular power or act is not included, then it gives an institution a reason to say that the agent cannot have that power or do that act under a general power of attorney. Consequently, we felt the "piggy-back" approach was preferable. For this reason, we would strongly recommend that references to conservatorship be added back into new Section 6.

3. The Kansas Hospital Association and Kansas Medical Society testimony presented by Marla Luckert, addressed the issue of the living will and withholding of life support systems issue in the context of the Durable Power of Attorney. She wants to allow the agent under the Power of Attorney to do the acts set out in Section 59-3018 (g) (3) and (4).

(a) In connection with the acts under (3) those involve consenting to "psychosurgery, removal of a bodily organ, or amputation of a limb, unless those are necessary in an emergency situation to preserve the life or prevent serious impairment of the physical health of the ward." Since the authority under a Power of Attorney terminates when the principal dies, I do not see how the medical institution can rely on the Power of Attorney to consent to organ donation anyway. (Perhaps what would be appropriate in that regard is a specific provision allowing the agent under a Power of Attorney to make certain post-death health care decisions, such as consent to use of the organs in an organ transplant, authorizing an autopsy, authorizing burial arrangements, etc. However, the whole question of organ transplants seems to me to be better handled separately in connection with the whole issue of who has the power to give consent. I wonder why this problem is not handled by the Uniform Anatomical Gift Act.) In connection with psychosurgery and amputation of a limb, to me those actions are so irreversible, that I have a concern about letting an agent make those decisions without court approval. If there is an emergency situation, then clearly the hospital can go ahead and act with consent of the agent. If it is not an emergency, it seems to me not to be a tremendous problem to get the court involved when you weigh that against the detriment to the individual if the operation is perhaps ill-advised. You can always argue that when an attorney drafts a Power of Attorney, they should discuss this point with the client and make sure that power is specifically excluded, but I think that prevents a drafting trap and is a solution I am uncomfortable with.

(b) Subsection (4) involves consent on behalf of the ward to withholding of life-saving medical procedures, except to the extent that the principal has signed a living will authorizing such. I think our Living Will Statute is probably inadequate. But assuming for a minute that it is adequate and thus when a person signs one they can be assured that life support systems will be withheld if they are only artificially prolonging life, then the policy question is: (i) whether we should require the principal to sign a living will as the only means of accomplishing that without court order, or (ii) whether we should let a person give an agent under a power of attorney the power to make a decision whether or not to withhold life support systems. Obviously the latter option is more flexible and allows for the agent at the time and in review of all of the circumstances to make a decision whether withholding life support systems is appropriate. For that reason I believe it is advantageous. (In addition, if we go with the latter option, the attorney drafting the Power of Attorney could always specifically limit the agent's power in that regard, although this presents the same "drafting trap" as mentioned above.) I do not see a significant problem with the first option, however, because presumably if a client goes to the trouble to have a Durable Power of Attorney prepared, the attorney would discuss the living will and the interplay of the two documents, and give the principal a chance to sign the living will if they felt that was appropriate. It is my understanding and experience that the decision to withhold life support systems is often made informally between the doctor and the family anyway regardless of whether there is a Durable Power of Attorney or living will. Because of the seriousness of the decision, and the fact that a doctor is involved making the medical decisions, I think that there is probably a very small chance of this power being misused. The Committee did not feel strongly one way or another on this issue, and I think it basically comes down to a policy decision.

4. Finally, it is my understanding there were some questions on the interplay between a Durable Power of Attorney and a Living Will Statute. Because the agent under a Power of Attorney is a fiduciary and must act in the best interest of the principal, some people have suggested that an agent has no authority to consent to the withholding of life support systems as opposed to consenting to medical procedures which are designed to benefit the principal. Therefore, if the principal has not signed a living will, absent specific statutory authorization, there would be significant question about whether an agent under a Durable Power of Attorney could give that consent. If a principal has signed a living will, then it is possible the agent would have the power to countermand

the direction to withhold life support systems contained in the living will. Presumably intelligent drafting of the Power of Attorney would address this conflict and make it clear that the living will superseded the agent under the Power of Attorney, if that was the intent. If the policy question is decided in favor of letting an agent deal with the living will issue, then I suggest we set out an appropriate statutory authority for this. My recommendation would be to provide that any living will signed by a principal could not be revoked by an agent. However, if the principal had not signed a living will, the agent would have the power to sign one for the principal.

I would be more than happy to discuss these points further with the Committee.

Sincerely,

Nancy Roush

Nancy Schmidt Roush

NSR/rmk

cc: The Honorable Sam K. Bruner
Michael Dwyer
Eugene Hackler