

## MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on January 28, 2003 in Room 313-S of the Capitol.

All members were present except:

- Representative Jeff Jack - Excused
- Representative Dale Swenson - Excused
- Representative Jim Ward - Excused

Committee staff present:

- Jerry Ann Donaldson, Legislative Research Department
- Jill Wolters, Revisor of Statutes
- Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:

- Representative Peggy Long
- Representative Rick Rehorn
- Representative Jan Pauls
- Jerry Goodell, Kansas Judicial Council, Probate Law Advisory Committee

Representative Long requested a bill which would allow both felony charges and arson charges to be filed in cases where a felony crime occurs while the arson is being committed and allow aggravated arson charges to be filed if a firefighter is injured during a fire. Representative Long made the motion to have the request introduced as a committee bill. Representative Crow seconded the motion. The motion carried.

Representative Rehorn requested a bill which would require those using the indigent defense fund to pay a \$35 - \$50 service fee. He made the motion to have the request introduced as a committee bill. Representative Long seconded the motion. The motion carried.

Representative Pauls requested a committee bill that would amend statutes concerning the District Attorney offices and coverage under state surety bonds. Her second request amends the preliminary hearing language to allow laboratory reports in as evidence. She made the motion to have the request introduced as a committee bill. Representative Long seconded the motion. The motion carried.

Hearing on **HB 2034 - Kansas Power of Attorney Act** were opened.

Jerry Goodell, Kansas Judicial Council, Probate Law Advisory Committee, informed the committee that several states are revising their power of attorney laws and the Probate Law Advisory Committee studied each state and came up with the proposed changes. He provided the committee with a copy of the bill which listed comments beside each section (Attachment 1). He proceeded to touch on a few new changes in the act:

- It contains a definition section
- Requires that a durable power of attorney be signed, dated and acknowledged.
- General powers may be granted without including in the power of attorney an exhaustive list of all powers.
- Powers may be granted to an attorney, but must be expressly authorized in the power of attorney to be granted.
- Lists powers which may not be delegated to the attorney in fact.

Written testimony was provided by:

- Kansas Bankers Association which pointed out a few technical errors (Attachment 2)
- Kansas Bar Association which was generally supportive of the bill but is working with the Judicial Council on suggested amendments (Attachment 3)
- Life Projects requesting the committee clarify the meaning & intent of Section 5, F, paragraph 10 (Attachment 4)

CONTINUATION SHEET

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on January 28, 2003 in Room 313-S of the Capitol.

The Chairman announced he would assign a sub committee to study the bill in more detail.

**HB 2031 - Repealing the statute concerning wills containing formula marital clauses**

Representative Klein made the motion to report **HB 2031** be passed and placed on the consent calendar. Representative Owens seconded the motion. The motion carried.

The committee adjourned at 4:15 p.m. The next meeting was scheduled for January 29, 2003.

# HOUSE BILL No. 2034

By Committee on Judiciary

1-17

9 AN ACT concerning the Kansas power of attorney act; amending K.S.A.  
10 2002 Supp. 58a-602 and repealing the existing section; also repealing  
11 K.S.A. 58-601, 58-602, 58-610, 58-611, 58-612, 58-613, 58-614, 58-  
12 615, 58-616 and 58-617.

13  
14 *Be it enacted by the Legislature of the State of Kansas:*

15 New Section 1. Sections 1 through 15, and amendments thereto,  
16 shall be known and may be cited as the Kansas power of attorney act.

17 New Sec. 2. As used in the Kansas power of attorney act:

18 (a) "Attorney in fact" means an individual or corporation appointed  
19 to act as agent of a principal in a written power of attorney.

20 (b) "Court" means the district court.

21 (c) "Disabled" means a person who is wholly or partially disabled as  
22 defined in K.S.A. 77-201, and amendments thereto, or a similar law of  
23 the place having jurisdiction of the person whose capacity is in question.

24 (d) "Durable power of attorney" means a written power of attorney  
25 in which the authority of the attorney in fact does not terminate in the  
26 event the principal becomes disabled or in the event of later uncertainty  
27 as to whether the principal is dead or alive and which complies with  
28 subsection (a) of section 3, and amendments thereto, or is durable under  
29 the laws of any of the following places:

30 (1) The law of the place where executed;

31 (2) the law of the place of the residence of the principal when exe-  
32 cuted; or

33 (3) the law of a place designated in the written power of attorney if  
34 that place has a reasonable relationship to the purpose of the instrument.

35 (e) "Legal representative" means a decedent's personal representa-  
36 tive, a guardian or a conservator.

37 (f) "Nondurable power of attorney" means a written power of attor-  
38 ney which does not meet the requirements of a durable power of attorney.

39 (g) "Person" means an adult individual, corporation or other legal  
40 entity.

41 (h) "Personal representative" means a legal representative of a de-  
42 cedent's estate as defined in K.S.A. 59-102, and amendments thereto.

43 (i) "Power of attorney" means a written power of attorney, either

## Comment

The Committee has generally adopted the Missouri definitions which are found at RSMo 404.703 and made changes that adapt the Missouri statute to the format and language used in Kansas. The Committee's decision to use the term "attorney in fact" exclusively is a change in Kansas terminology.

In subsection (a) the term "attorney in fact" is defined and used exclusively. This is consistent with the majority of the states of which twenty-five use the term "attorney in fact" exclusively and twenty-two use the terms "agent" and "attorney in fact" interchangeably. Three states use the term "agent" exclusively, and Louisiana uses the term "mandatory."

In subsection (b) the Kansas phrase "district court" replaces the term "circuit court."

In subsection (c) the term "disabled" is used instead of the Missouri phrase "disabled or incapacitated." Over forty states use the terms "disabled" and "incapacitated." The term "incompetence" is also used in a number of jurisdictions.

The Kansas law relating to the definition of "disabled" is as follows:

K.S.A. 77-201 (*forty-second*). "Disabled person" includes incapacitated persons and incompetent persons as defined herein.

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Attachment: /

1 able or nondurable.

2 (j) "Principal's family" means the principal's parent, grandparent, un-  
3 cle, aunt, brother, sister, son, daughter, grandson, granddaughter and  
4 their descendants, whether of the whole blood or the half blood, or by  
5 adoption, and the principal's spouse, stepparent and stepchild.

6 (k) "Third person" means any individual, corporation or legal entity  
7 that acts on a request from, contracts with, relies on or otherwise deals  
8 with an attorney in fact pursuant to authority granted by a principal in a  
9 power of attorney and includes a partnership, either general or limited,  
10 governmental agency, financial institution, issuer of securities, transfer  
11 agent, securities or commodities broker, real estate broker, title insurance  
12 company, insurance company, benefit plan, legal representative, custo-  
13 dian or trustee.

112

K.S.A. 77-201 (*thirty-first*). "Incapacitated person" means an individual whose ability to receive and evaluate relevant information, or to effectively communicate decisions, or both, even with the use of assistive technologies or other supports, is impaired to the degree that the person lacks the capacity to manage the person's estate, or to meet essential needs for the person's physical health, safety or welfare, as defined in section 2, and amendments thereto, whether or not a guardian or a conservator has been appointed for that person.

K.S.A. 77-201 (*sixth*). "Incompetent person" includes disabled persons and incapacitated persons as defined herein.

In subsection (e) the definition of "legal representative" is changed to be consistent with Kansas terms. The recently revised Kansas Guardianship and Conservatorship Act does not include general or limited guardianships or conservatorships. The term "temporary" was stricken because, while Kansas does recognize temporary guardianships and temporary conservatorships, they are included in the general term.

In subsection (f) the phrase "non durable power of attorney" is defined.

In subsection (h) reference to K.S.A. 59-102(2) is inserted. K.S.A. 59-102(2) reads as follows:

"'Personal representative' includes executors, administrators, administrators with the will annexed, administrators *de bonis non*, conservators and guardians."

2



14 New Sec. 3. (a) The authority granted by a principal to an attorney  
15 in fact in a written power of attorney is not terminated in the event the  
16 principal becomes wholly or partially disabled or in the event of later  
uncertainty as to whether the principal is dead or alive if:

19 (1) The power of attorney is denominated a "durable power of  
attorney;"

20 (2) the power of attorney includes a provision that states in substance  
21 one of the following:

22 (A) "This is a durable power of attorney and the authority of my  
23 attorney in fact shall not terminate if I become disabled or in the event  
24 of later uncertainty as to whether I am dead or alive"; or

25 (B) "This is a durable power of attorney and the authority of my  
26 attorney in fact, when effective, shall not terminate or be void or voidable  
27 if I am or become disabled or in the event of later uncertainty as to  
28 whether I am dead or alive"; and

29 (3) the power of attorney is signed by the principal, and dated and  
30 acknowledged in the manner prescribed by K.S.A. 53-501 *et seq.*, and  
31 amendments thereto.

32 (b) All acts done by an attorney in fact pursuant to a durable power  
33 of attorney shall inure to the benefit of and bind the principal and the  
34 principal's successors in interest, notwithstanding any disability of the  
35 principal.

36 (c) (1) A power of attorney does not have to be recorded to be valid  
37 and binding between the principal and attorney in fact or between the  
38 principal and third persons.

39 (2) A power of attorney may be recorded in the same manner as a  
40 conveyance of land is recorded. A certified copy of a recorded power of  
41 attorney may be admitted into evidence.

42 (3) If a power of attorney is recorded any revocation of that power  
43 of attorney must be recorded in the same manner for the revocation to

1 be effective. If a power of attorney is not recorded it may be revoked by  
2 a recorded revocation or in any other appropriate manner.

3 (4) If a power of attorney requires notice of revocation be given to  
4 named persons, those persons may continue to rely on the authority set  
5 forth in the power of attorney until such notice is received.

6 (d) A person who is appointed an attorney in fact under a durable  
7 power of attorney has no duty to exercise the authority conferred in the  
8 power of attorney, unless the attorney in fact has agreed expressly in  
9 writing to act for the principal in such circumstances. An agreement to  
10 act on behalf of the principal is enforceable against the attorney in fact  
11 as a fiduciary without regard to whether there is any consideration to  
12 support a contractual obligation to do so. Acting for the principal in one  
13 or more transactions does not obligate an attorney in fact to act for the  
14 principal in subsequent transactions.

Comment

The Committee has generally adopted the Missouri statute which is found at RSMo 404.705 and follows the Uniform Act approach to the creation of durability by requiring express language to do so. This approach is currently followed by forty-three states (the other seven states have created a statutory presumption of durability unless the instrument states otherwise).

The Missouri act requires that a durable power of attorney be signed by the principal, dated and acknowledged. Current Kansas statutes do not make these requirements. The Committee draft follows the Missouri act.

Subsection (c) has been amended by adding subsections (2), (3) and (4). These subsections relate to recordation and revocation as did K.S.A. 58-601 and 58-602, which are repealed by this act.

Subsection (e), which provides for a springing power of attorney, is nearly identical to sections A and B of 11-9.4 of the Code of Virginia.

(e) The grant of power or authority conferred by a power of attorney in which any principal shall vest any power or authority in an attorney in fact, if such writing expressly so provides, shall be effective only upon:  
17 (1) A specified future date; (2) the occurrence of a specified future event;  
18 (3) the existence of a specified condition which may occur in the future.  
19 In the absence of actual knowledge to the contrary, any person to whom  
20 such writing is presented shall be entitled to rely on an affidavit, executed  
21 by the attorney in fact, setting for that such event has occurred or con-  
22 dition exists.  
23

24 New Sec. 4. (a) A principal may appoint more than one attorney in  
25 fact in one or more powers of attorney and may provide that the authority  
26 conferred on two or more attorneys in fact shall or may be exercised either  
27 jointly or severally or in a manner, with such priority and with respect to  
28 such subjects as is provided in the power of attorney. In the absence of  
29 specification in a power of attorney, the attorneys in fact must act jointly.  
30 (b) The designation of a person not qualified to act as an attorney in  
31 fact for a principal under a power of attorney subjects the person to  
32 removal as attorney in fact but does not affect the immunities of third  
33 persons nor relieve the unqualified person of any duties or responsibilities  
34 to the principal or the principal's successors.

Comment

The Committee has followed subsections 1 and 3 of the Missouri statute which is RSMo 404.707. Subsection 2 was stricken. Missouri is one of twelve jurisdictions which addresses the issue of multiple attorneys in fact.

The Committee has amended the Missouri statute by providing that in the absence of specification to the contrary, the multiple attorneys in fact must act jointly. This is the majority position among jurisdictions that address this issue.

35 New Sec. 5. (a) A principal may delegate to an attorney in fact in  
36 a power of attorney general powers to act in a fiduciary capacity on the  
37 principal's behalf with respect to all lawful subjects and purposes or with  
respect to one or more express subjects or purposes. A power of attorney  
with general powers may be durable or nondurable.

40 (b) If the power of attorney states that general powers are granted to  
41 the attorney in fact and further states in substance that it grants power  
42 to the attorney in fact to act with respect to all lawful subjects and pur-  
43 poses or that it grants general powers for general purposes or does not  
1 by its terms limit the power to the specific subject or purposes set out in  
2 the instrument, then the authority of the attorney in fact acting under  
3 the power of attorney shall extend to and include each and every action  
4 or power which an adult who is nondisabled may carry out through an  
5 agent specifically authorized in the premises, with respect to any and all  
6 matters whatsoever, except as provided in subsection (f) and (g). When  
7 a power of attorney grants general powers to an attorney in fact to act  
8 with respect to all lawful subjects and purposes, the enumeration of one  
9 or more specific subjects or purposes does not limit the general authority  
10 granted by that power of attorney, unless otherwise provided in the power  
11 of attorney.

12 (c) If the power of attorney states that general powers are granted to  
13 an attorney in fact with respect to one or more express subjects or pur-  
14 poses for which general powers are conferred, then the authority of the  
15 attorney in fact acting under the power of attorney shall extend to and  
16 include each and every action or power, but only with respect to the  
17 specific subjects or purposes expressed in the power of attorney that an  
18 adult who is nondisabled may carry out through an agent specifically au-  
19 thorized in the premises, with respect to any and all matters whatsoever,  
20 except as provided in subsection (f) and (g).

21 (d) Except as provided in subsections (f) and (g), an attorney in fact  
22 with general powers has, with respect to the subjects or purposes for  
23 which the powers are conferred, all rights, power and authority to act for  
24 the principal that the principal would have with respect to the principal's  
25 own person or property, including property owned jointly or by the en-  
26 tireties with another or others, as a nondisabled adult. Without limiting  
27 the foregoing an attorney in fact with general powers has, with respect to  
28 the subject or purposes of the power, complete discretion to make a  
29 decision for the principal, to act or not act, to consent or not consent to,  
30 or withdraw consent for, any act, and to execute and deliver or accept  
31 any deed, bill of sale, bill of lading, assignment, contract, note, security  
32 instrument, consent, receipt, release, proof of claim, petition or other  
33 pleading, tax document, notice, application, acknowledgment or other  
34 document necessary or convenient to implement or confirm any act,  
35 transaction or decision. An attorney in fact with general powers, whether  
power to act with respect to all lawful subjects and purposes, or only with  
respect to one or more express subjects or purposes, shall have the power,

Comment

This section is nearly identical to RSMo 404.710 with the exception of  
subsection (f)(12). Subsection (f)(3) addresses the authority to make gifts.  
Currently eighteen jurisdictions specifically address the authority of the  
attorney in fact to make gifts and all but two provide for statutory default  
limitations on the authority. Missouri is one of the two states that does not  
provide for statutory default limitations on the authority.

Subsection (f)(10) addresses the subject of health care decisions. Twelve  
jurisdictions incorporate authority for health care decisions into their general  
durable power of attorney statutes and also refer to other statutes dealing with  
authority for health care decision making. Three jurisdictions incorporate the  
authority into the general durable power of attorney and do not cross-  
reference other statutes. One does not incorporate such authority but cross-  
references another statute, and five specifically state that the general durable  
power of attorney does not include authority for health care decisions.

Subsection (f)(12) was added by the Committee to require that an  
attorney in fact under a power of attorney may not delegate any or all of his  
or her powers unless expressly authorized in the power of attorney. This is  
a change from Missouri law which allows such delegation.

Subsection (g)(2) is amended to make specific reference to applicable  
Kansas statutes in the natural death act and the statutes relating to do not  
resuscitate orders and directives.

38 unless specifically denied by the terms of the power of attorney, to make,  
39 execute and deliver to or for the benefit of or at the request of a third  
person, who is requested to rely upon an action of the attorney in fact,  
41 an agreement indemnifying and holding harmless any third person or  
42 persons from any liability, claims or expenses, including legal expenses,  
43 incurred by any such third person by reason of acting or refraining from

1 acting pursuant to the request of the attorney in fact. Such indemnity  
2 agreement shall be binding upon the principal who has executed such  
3 power of attorney and upon the principal's successor or successors in  
4 interest. No such indemnity agreement shall protect any third person  
5 from any liability, claims or expenses incurred by reason of the fact that,  
6 and to the extent that, the third person has honored the power of attorney  
7 for actions outside the scope of authority granted by the power of attor-  
8 ney. In addition, the attorney in fact has complete discretion to employ  
9 and compensate real estate agents, brokers, attorneys, accountants and  
10 subagents of all types to represent and act for the principal in any and all  
11 matters, including tax matters involving the United States government or  
12 any other government or taxing entity, including, but not limited to, the  
13 execution of supplemental or additional powers of attorney in the name  
14 of the principal in form that may be required or preferred by any such  
15 taxing entity or other third person, and to deal with any or all third persons  
16 in the name of the principal without limitation. No such supplemental or  
17 additional power of attorney shall broaden the scope of authority granted  
18 to the attorney in fact in the original power of attorney executed by the  
19 principal.

20 (e) An attorney in fact, who is granted general powers for all subjects  
21 and purposes or with respect to any express subjects or purposes, shall  
22 exercise the powers conferred according to the principal's instructions, in  
23 the principal's best interest, in good faith, prudently and in accordance  
24 with sections 6 and 7, and amendments thereto.

25 (f) Any power of attorney, whether or not it grants general powers  
26 for all subjects and purposes or with respect to express subjects or pur-  
27 poses, shall be construed to grant power or authority to an attorney in  
28 fact to carry out any of the actions described in this subsection only if the  
29 actions are expressly enumerated and authorized in the power of attorney.  
30 Any power of attorney may grant power or authority to an attorney in fact  
31 to carry out any of the following actions if the actions are expressly au-  
32 thorized in the power of attorney:

- 33 (1) To execute, amend or revoke any trust agreement;
- 34 (2) to fund with the principal's assets any trust not created by the  
35 principal;
- 36 (3) to make or revoke a gift of the principal's property in trust or  
otherwise;

38 (4) to disclaim a gift or devise of property to or for the benefit of the  
 39 principal;  
 40 (5) to create or change survivorship interests in the principal's prop-  
 erty or in property in which the principal may have an interest. The in-  
 43 clusion of the authority set out in this paragraph shall not be necessary  
 in order to grant to an attorney in fact acting under a power of attorney

1 granting general powers with respect to all lawful subjects and purposes  
 2 the authority to withdraw funds or other property from any account, con-  
 3 tract or other similar arrangement held in the names of the principal and  
 4 one or more other persons with any financial institution, brokerage com-  
 5 pany or other depository to the same extent that the principal would be  
 6 authorized to do if the principal were present, not disabled and seeking  
 7 to act in the principal's own behalf;

8 (6) to designate or change the designation of beneficiaries to receive  
 9 any property, benefit or contract right on the principal's death;

10 (7) to give or withhold consent to an autopsy or postmortem  
 11 examination;

12 (8) to make a gift of, or decline to make a gift of, the principal's body  
 13 parts under the uniform anatomical gift act, K.S.A. 65-3209 through 65-  
 14 3217, and amendments thereto;

15 (9) to nominate a guardian or conservator for the principal; and if so  
 16 stated in the power of attorney, the attorney in fact may nominate such  
 17 attorney in fact's self as such;

18 (10) to give consent to or prohibit any type of health care, medical  
 19 care, treatment or procedure to the extent authorized by K.S.A. 58-625  
 20 *et seq.*, and amendments thereto;

21 (11) to designate one or more substitute or successor or additional  
 22 attorneys in fact; or

23 (12) to delegate any or all powers granted in a power of attorney  
 24 pursuant to subsection (a) of section 11, and amendments thereto.

25 (g) No power of attorney, whether or not it delegates general powers,  
 26 may delegate or grant power or authority to an attorney in fact to do or  
 27 carry out any of the following actions for the principal:

28 (1) To make, publish, declare, amend or revoke a will for the  
 29 principal;

30 (2) to make, execute, modify or revoke a declaration under K.S.A. 65-  
 31 28,101 *et seq.*, and amendments thereto, for the principal or to make,  
 32 execute, modify or revoke a do not resuscitate directive under K.S.A. 65-  
 33 4941, and amendments thereto, for the principal;

34 (3) to require the principal, against the principal's will, to take any  
 35 action or to refrain from taking any action; or

36 (4) to carry out any actions specifically forbidden by the principal  
 37 while not under any disability or incapacity.



38 (h) A third person may freely rely on, contract and deal with an at-  
39 torney in fact delegated general powers with respect to the subjects and  
40 purposes encompassed or expressed in the power of attorney without  
regard to whether the power of attorney expressly identifies the specific  
41 property, account, security, storage facility or matter as being within the  
scope of a subject or purpose contained in the power of attorney, and

1 without regard to whether the power of attorney expressly authorizes the  
2 specific act, transaction or decision by the attorney in fact.

3 (i) It is the policy of this state that an attorney in fact acting pursuant  
4 to the provisions of a power of attorney granting general powers shall be  
5 accorded the same rights and privileges with respect to the personal wel-  
6 fare, property and business interests of the principal, and if the power of  
7 attorney enumerate some express subjects or purposes, with respect to  
8 those subjects or purposes, as if the principal was personally present and  
9 acting or seeking to act; and any provision of law and any purported  
10 waiver, consent or agreement executed or granted by the principal to the  
11 contrary shall be void and unenforceable.

12 (j) Sections 1 through 15, and amendments thereto, shall not be con-  
13 strued to preclude any person or business enterprise from providing in a  
14 contract with the principal as to the procedure that thereafter must be  
15 followed by the principal or the principal's attorney in fact in order to  
16 give a valid notice to the person or business enterprise of any modification  
17 or termination of the appointment of an attorney in fact by the principal.  
18 Any such contractual provision for notice shall be valid and binding on  
19 the principal and the principal's successors so long as such provision is  
20 reasonably capable of being carried out.

21 New Sec. 6. (a) An attorney in fact acting for the principal under  
22 a power of attorney shall clearly indicate the attorney in fact's capacity  
and shall keep the principal's property and accounts separate and distinct  
25 from all other property and accounts in a manner to identify the property  
and accounts clearly as belonging to the principal.

26 (b) An attorney in fact holding property for a principal complies with  
27 subsection (a) if the property is held in the name of the principal, in the  
28 name of the attorney in fact as attorney in fact for the principal or in the  
29 name of the attorney in fact as personal custodian for the principal under  
30 the uniform custodial trust law or similar law of any state.

Comment

This section is nearly identical to RSMo 404.712.

31 New Sec. 7. An attorney in fact who elects to act under a power of  
32 attorney is under a duty to act in the interest of the principal and to avoid  
33 conflicts of interest that impair the ability of the attorney in fact so to act.  
34 A person who is appointed an attorney in fact under a power of attorney  
35 who undertakes to exercise the authority conferred in the power of at-  
36 torney, has a fiduciary obligation to exercise the powers conferred in the  
37 best interests of the principal, and to avoid self-dealing and conflicts of  
38 interest, as in the case of a trustee with respect to the trustee's beneficiary  
39 or beneficiaries. In the absence of explicit authorization, the attorney in  
40 fact shall exercise a high degree of care in maintaining, without modifi-  
41 cation, any estate plan which the principal may have in place, including,  
42 but not limited to, arrangements made by the principal for disposition of  
43 assets at death through beneficiary designations, ownership by joint ten-

1 ancy or tenancy by the entirety, trust arrangements or by will or codicil.  
2 Unless otherwise provided in the power of attorney or in a separate agree-  
3 ment between the principal and attorney in fact, an attorney in fact who  
4 elects to act shall exercise the authority granted in a power of attorney  
5 with that degree of care that would be observed by a prudent person  
6 dealing with the property and conducting the affairs of another, except  
7 that all investments made on or after July 1, 2003, shall be in accordance  
8 with the provisions of the Kansas uniform prudent investor act, K.S.A.  
9 58-24a01 *et seq.*, and amendments thereto. If the attorney in fact has  
10 special skills or was appointed attorney in fact on the basis of represen-  
11 tations of special skills or expertise, the attorney in fact has a duty to use  
12 those skills in the principal's behalf.

13 (b) On matters undertaken or to be undertaken in the principal's  
14 behalf and to the extent reasonably possible under the circumstances, an  
15 attorney in fact has a duty to keep in regular contact with the principal,  
16 to communicate with the principal and to obtain and follow the instruc-  
17 tions of the principal.

18 (c) If, following execution of a durable power of attorney, a court of  
19 the principal's domicile appoints a conservator, guardian of the estate or  
20 other fiduciary charged with the management of all of the principal's  
21 property or all of the principal's property except specified exclusions, the  
22 attorney in fact is accountable to the fiduciary as well as to the principal.  
23 The fiduciary has the same power to revoke or amend the durable power  
24 of attorney that the principal would have had if the principal were not an  
25 adult with an impairment in need of a guardian or conservator or both as  
26 defined by subsection (a) of K.S.A. 59-3051, and amendments thereto.

27 (d) A principal may nominate by a power of attorney, a conservator,  
28 guardian of the principal's estate or guardian of the principal's person for  
29 consideration by the court if protective proceedings for the principal's  
30 person or estate are thereafter commenced. The court shall make its  
31 appointment in accordance with the principal's most recent nomination  
in a power of attorney except for good cause or disqualification.

111  
Comment

This section follows generally section 404.714 of RSMo. Sections 3, 4, 5 and 6 of the Missouri statute are stricken and subsections (c) and (d) are similar to K.S.A. 58-612(a) and (b). Former Missouri subsection 404.714(6) is moved to Section 8(b)(4) of this act.

The Missouri statute is unique in that it contains a list of specified duties of an attorney in fact, including the duty to keep the principal's property segregated, the duty to avoid self-dealing and conflicts of interest and to maintain the principal's estate plan. The Missouri act also requires the attorney in fact to keep in contact with the principal and communicate with the principal with respect to the principal's wishes, as much as possible. This language is included in the proposed draft.

Twenty-three states follow the Uniform Act approach which provides that once there is a court-appointed guardian or fiduciary, the attorney in fact is then accountable to both the fiduciary and the principal. In seventeen states the attorney in fact is accountable to the fiduciary only. Five states terminate the attorney in fact's authority upon the court appointment of a fiduciary and four states specify that the attorney in fact's authority actually supersedes that of a later appointed fiduciary. Regarding a fiduciary's authority to revoke a durable power of attorney, thirty-five jurisdictions follow the Uniform Act approach that the fiduciary has the same power the principal would have had to revoke the agent's authority and five require that the court must grant specific authority to the fiduciary in order to revoke an attorney in fact's authority.

Subsection (c), taken from K.S.A. 58-612(a), follows the Uniform Act approach that once there is a fiduciary appointed, the attorney in fact is accountable to both the fiduciary and principal.

11

33 (e) An attorney in fact shall exercise authority granted by the principal  
34 in accordance with the instrument setting forth the power of attorney,  
35 any modification made therein by the principal or the principal's legal  
36 representative or a court, and the oral and written instructions of the  
? principal, or the written instructions of the principal's legal representative  
3 or a court.

39 (f) An attorney in fact may be instructed in a power of attorney that  
40 the authority granted shall not be exercised until, or shall terminate on,  
41 the happening of a future event, condition or contingency, as determined  
42 in a manner prescribed in the instrument.

43 (g) On the death of the principal, the attorney in fact shall follow the  
1 instructions of the court, if any, having jurisdiction over the estate of the  
2 principal, or any part thereof, and shall communicate with and be ac-  
3 countable to the principal's personal representative, or if none, the prin-  
4 cipal's successors. The attorney in fact shall promptly deliver to and put  
5 in the possession and control of the principal's personal representative or  
6 successors, any property of the principal and copies of any records of the  
7 attorney in fact relating to transactions undertaken in the principal's be-  
8 half that are deemed by the personal representative or the court to be  
9 necessary or helpful in the administration of the decedent's estate.

10 (h) If an attorney in fact has a property or contract interest in the  
11 subject of the power of attorney or the authority of the attorney in fact  
12 is otherwise coupled with an interest in a person other than the principal,  
13 this section does not impose any duties on the attorney in fact that would  
14 conflict or be inconsistent with that interest.

Subsection (d) is similar to K.S.A. 58-612(b) which provides that a principal may nominate a guardian or conservator by a durable power of attorney. The requirement that the power of attorney be durable is omitted.

The new Kansas Guardianship and Conservatorship Act includes powers of attorney in the list of appropriate alternatives which may obviate the need for a guardian or conservator, and provides that upon application of the conservator the court may modify or suspend the authority of the attorney in fact.

15 New Sec. 8. (a) As between the principal and attorney in fact or  
16 successor attorney in fact, and any agents appointed by either of them,  
17 unless the power of attorney is coupled with an interest, the authority  
granted in a power of attorney shall be modified or terminated as follows:

(1) On the date shown in the power of attorney and in accordance  
20 with the express provisions of the power of attorney;

21 (2) when the principal, orally or in writing, or the principal's legal  
22 representative in writing informs the attorney in fact or successor that the  
23 power of attorney is modified or terminated, or when and under what  
24 circumstances it is modified or terminated; or

25 (3) when a written notice of modification or termination of the power  
26 of attorney is filed by the principal or the principal's legal representative  
27 for record in the office of the register of deeds in the county of the  
28 principal's residence or, if the principal is a nonresident of the state, in  
29 the county of the residence of the attorney in fact last known to the  
30 principal, or in the county in which is located any property specifically  
31 referred to in the power of attorney.

32 (b) As between the principal and attorney in fact or successor attor-  
33 ney in fact, and any agents appointed by either of them, unless the power  
34 of attorney is coupled with an interest, the authority granted in a power  
35 of attorney shall be modified, terminated or suspended as follows:

36 (1) On the death of the principal, except that if the power of attorney  
37 grants authority under subsection (f)(7) or (f)(8) of section 5, and amend-  
38 ments thereto, the power of attorney and the authority of the attorney in  
39 fact shall continue for the limited purpose of carrying out the authority  
40 granted under either or both of such subsections for a reasonable length  
41 of time after the death of the principal;

42 (2) when the attorney in fact under a power of attorney is not qual-  
43 ified to act for the principal;

1 (3) on the filing of any action for annulment, separate maintenance  
2 or divorce of the principal and the principal's attorney in fact who were  
3 married to each other at or subsequent to the time the power of attorney  
4 was created, unless the power of attorney provides otherwise; or

5 (4) the authority of an attorney in fact, under a power of attorney  
6 that is nondurable, is suspended during any period that the principal is  
7 disabled to the extent that the principal is unable to receive or evaluate  
8 information or to communicate decisions with respect to the subject of  
9 the power of attorney. An attorney in fact exercising authority under a  
10 power of attorney that is nondurable shall not act in the principal's behalf  
11 during any period that the attorney in fact knows the principal is so  
12 disabled.

Comment

This section generally follows section 404.717 of RSMo. However, the  
Committee did change subsections (b)(1), (b)(2) and (b)(3) from the Missouri  
draft. In the Missouri draft these subsections either modified or terminated  
the authority granted in the power of attorney. As redrafted by the  
Committee subsections (b)(1) relating to termination on death of principal,  
(b)(2) relating to when attorney in fact is not qualified and (b)(3) relating to  
divorce were made matters that "terminated" and not "modified or  
terminated" the power of attorney. In addition, reference to separate  
maintenance and annulment were inserted in (b)(3). Also subsection (b)(4)  
was originally found at RSMo. 404.714(6).

Only ten states have addressed the impact of divorce or legal separation  
on the authority of a spouse/attorney in fact and only four provide for  
revocation upon filing of the petition. Because an attorney in fact could  
wreak considerable havoc with a principal's property while a divorce action  
is pending it is the opinion of the Committee that Kansas should provide that  
if an attorney in fact is married to the principal that the power of attorney  
terminates upon the filing of any action for annulment, separate notice or  
divorce.

13 (c) Whenever any of the events described in subsection (a) operate  
14 merely to terminate the authority of the particular person designated as  
15 the attorney in fact, rather than terminating the power of attorney, if the  
16 power of attorney designates a successor or contingent attorney in fact or  
17 prescribes a procedure whereby a successor or contingent attorney in fact  
18 may be designated, then the authority provided in the power of attorney  
19 shall extend to and vest in the successor or contingent attorney in fact in  
20 lieu of the attorney in fact whose power and authority was terminated  
21 under any of the circumstances referred to in subsection (a).

22 (d) As between the principal and attorney in fact or successor, acts  
23 and transactions of the attorney in fact or successor undertaken in good  
24 faith, in accordance with section 7, and amendments thereto, and without  
25 actual knowledge of the death of the principal or without actual knowl-  
26 edge, or constructive knowledge pursuant to subsection (a)(3), that the  
27 authority granted in the power of attorney has been suspended, modified  
28 or terminated, relieves the attorney in fact or successor from liability to  
29 the principal and the principal's successors in interest.

30 (e) This section does not prohibit the principal, acting individually,  
31 and the person designated as the attorney in fact from entering into a  
32 written agreement that sets forth their duties and liabilities as between  
33 themselves and their successors, and which expands or limits the appli-  
34 cation of this act, with the exception of those acts enumerated in subsec-  
35 tion (g) of section 5, and amendments thereto.

36 (f) As between the principal and any attorney in fact or successor, if  
37 the attorney in fact or successor undertakes to act, and if in respect to  
38 such act, the attorney in fact or successor acts in bad faith, fraudulently  
39 or otherwise dishonestly, or if the attorney in fact or successor intention-  
40 ally acts after receiving actual notice that the power of attorney has been  
41 revoked or terminated, and thereby causes damage or loss to the principal  
42 or to the principal's successors in interest, such attorney in fact or suc-  
43 cessor shall be liable to the principal or to the principal's successors in  
1 interest, or both, for such damages, together with reasonable attorney  
2 fees, and punitive damages as allowed by law.



3 New Sec. 9. (a) A third person, who is acting in good faith, without  
4 liability to the principal or the principal's successors in interest, may rely  
5 and act on any power of attorney executed by the principal. A third per-  
6 son, with respect to the subjects and purposes encompassed by or separ-  
7 ately expressed in the power of attorney, may rely and act on the instruc-  
8 tions of or otherwise contract and deal with the principal's attorney in  
9 fact or successor attorney in fact and, in the absence of actual knowledge,  
10 as defined in subsection (c), is not responsible for determining and has  
11 no duty to inquire as to any of the following:

- 12 (1) The authenticity of a copy of a power of attorney furnished by
- 13 the principal's attorney in fact or successor;
- 14 (2) the validity of the designation of the attorney in fact or successor;
- 15 (3) whether the attorney in fact or successor is qualified to act as an
- 16 attorney in fact for the principal;
- 17 (4) the propriety of any act of the attorney in fact or successor in the
- 18 principal's behalf, including, but not limited to, whether or not an act
- 19 taken or proposed to be taken by the attorney in fact, constitutes a breach
- 20 of any duty or obligation owed to the principal, including, but not limited
- 21 to, the obligation to the principal not to modify or alter the principal's
- 22 estate plan or other provisions for distributions of assets at death, as pro-
- 23 vided in subsection (a) of section 7, and amendments thereto;
- 24 (5) whether any future event, condition or contingency making ef-
- 25 fective or terminating the authority conferred in a power of attorney has
- 26 occurred;
- 27 (6) whether the principal is disabled or has been adjudicated
- 28 disabled;
- 29 (7) whether the principal, the principal's legal representative or a
- 30 court has given the attorney in fact any instructions or the content of any
- 31 instructions, or whether the attorney in fact is following any instructions
- 32 received;
- 33 (8) whether the authority granted in a power of attorney has been
- 34 modified by the principal, a legal representative of the principal or a court;
- 35 (9) whether the authority of the attorney in fact has been terminated,
- 36 except by an express provision in the power of attorney showing the date
- 37 on which the power of attorney terminates;
- 38 (10) whether the power of attorney, or any modification or termina-
- 39 tion thereof, has been recorded, except as to transactions affecting real
- 40 estate;
- 41 (11) whether the principal had legal capacity to execute the power of
- 42 attorney at the time the power of attorney was executed;
- 43 (12) whether, at the time the principal executed the power of attor-
- 1 ney, the principal was subjected to duress, undue influence or fraud, or
- 2 the power of attorney was for any other reason void or voidable, if the
- 3 power of attorney appears to be regular on its face;
- (13) whether the principal is alive;

Comment

This section is nearly identical to section 404.719 of RSMo.

This section addresses several issues. Twenty states expressly provide protection to third parties who in good faith rely on a durable power of attorney, but one could argue that this protection is implied in section 5 of the Uniform Act, which forty-one jurisdictions have adopted in whole or in part.

Another issue is that of refusal to accept an attorney in fact's authority. Reluctance to recognize powers of attorney is an often cited problem. Only eight states expressly address liability of third parties for refusal to accept the attorney in fact's authority, and only three of these states provide for special damages, attorney's fees or costs. Missouri's statute and the language recommended by Kansas do not address the subject of liability of third parties for refusal to accept the attorney in fact's authority.

5 (14) whether the principal and attorney in fact were married at or  
6 subsequent to the time the power of attorney was created and whether  
7 an action for annulment, separate maintenance or divorce has been filed  
by either party; or

10 (15) the truth or validity of any facts or statements made in an affi-  
11 davit of the attorney in fact or successor with regard to the ability or  
12 capacity of the principal, the authority of the attorney in fact or successor  
13 under the power of attorney, the happening of any event or events vesting  
14 authority in any successor or contingent attorney in fact, the identity or  
15 authority of a person designated in the power of attorney to appoint a  
substitute or successor attorney in fact or that the principal is alive.

16 (b) A third person, in good faith and without liability to the principal  
17 or the principal's successors in interest, even with knowledge that the  
18 principal is disabled, may rely and act on the instructions of or otherwise  
19 contract and deal with the principal's attorney in fact or successor attorney  
20 in fact acting pursuant to authority granted in a durable power of attorney.

21 (c) A third person that conducts activities through employees shall  
22 not be charged under this act with actual knowledge of any fact relating  
23 to a power of attorney, nor of a change in the authority of an attorney in  
24 fact, unless the information is received at a home office or a place where  
25 there is an employee with responsibility to act on the information, and  
26 the employee has a reasonable time in which to act on the information  
27 using the procedures and facilities that are available to the third person  
28 in the regular course of its operations.

29 (d) A third person, when being requested to engage in transactions  
30 with a principal through the principal's attorney in fact, may: (1) Require  
31 the attorney in fact to provide specimens of the attorney in fact's signature  
32 and any other information reasonably necessary or appropriate in order  
33 to facilitate the actions of the third person in transacting business through  
34 the attorney in fact; (2) require the attorney in fact to indemnify the third  
35 person against forgery of the power of attorney, by bond or otherwise. If  
36 the power of attorney is durable as defined in subsection (a) of section 3,  
37 and amendments thereto, and if either the principal or the attorney in  
38 fact seeking to act is and has been a resident of this state for at least two  
39 years, and if the attorney in fact has executed in the name of the principal  
40 and delivered to the third person an indemnity agreement reasonably  
41 satisfactory in form to such third person, no such bond shall be required;  
42 and (3) prescribe the place and manner in which the third person will be  
43 given any notice respecting the principal's power of attorney and the time  
1 in which the third person has to comply with any notice.

2 New Sec. 10. (a) As between the principal and third persons, the  
3 authority granted in a power of attorney shall terminate on the date of  
4 termination, if any, set out in the power of attorney or on the date when  
5 the third person acquires actual knowledge of the death of the principal  
6 or that the authority granted in the power of attorney has been suspended,  
7 modified or terminated.

8 (b) As between the principal and third persons, the acts and trans-  
9 actions of an attorney in fact are binding on the principal and the prin-  
10 cipal's successors in interest in any situation in which a third person is  
11 entitled to rely under section 9, and amendments thereto.

12 (c) This section shall not prohibit the principal, acting individually,  
13 and a third person from entering into a written agreement that sets forth  
14 their duties and liabilities as between themselves and their successors,  
15 and which expands or limits the application of this act, except that no  
16 agreement shall limit or restrict the right of the principal to act with  
17 respect to the third person through an attorney in fact appointed in a  
18 power of attorney.

Comment

This section is nearly identical to section 404.721 of RSMo.

19 New Sec. 11. (a) If the principal has expressly authorized such del-  
20 egation pursuant to subsection (f) of section 5, and amendments thereto,  
21 an attorney in fact or successor from time to time may revocably delegate  
24 any or all of the powers granted in a durable power of attorney to one or  
25 more qualified persons, subject to any directions or limitations of the  
26 principal expressed in the durable power of attorney, but the attorney in  
27 fact making the delegation shall remain responsible to the principal for  
28 the exercise or nonexercise of the powers delegated.

29 (b) The principal in a durable power of attorney may revocably: (1)  
30 Name one of more qualified persons as successor attorneys in fact to  
31 exercise the authority granted in the durable power of attorney in the  
32 order named in the event a prior named attorney in fact resigns, dies,  
33 becomes disabled, is not qualified to act or refuses to act; and (2) grant  
34 a power to another person, designated by name, by office or by function,  
35 including the initial and any successor attorneys in fact, whereby there  
36 may be revocably named at any time one or more successor attorneys in  
37 fact.

38 (c) A delegated or successor attorney in fact need not indicate such  
39 attorney in fact's capacity as a delegated or successor attorney in fact.

40 (d) If there is no attorney in fact or successor designated in a durable  
41 power of attorney who is willing, able and available to act, the court in  
42 lieu of appointing a conservator may appoint any adult person or financial  
43 institution as successor attorney in fact to act pursuant to the disabled  
44 principal's durable power of attorney, with or without bond and with or  
45 without court supervision, upon such terms and conditions as the court

1 may require. None of the actions described in this subsection shall be  
2 taken by the court until after hearing upon reasonable notice to all persons  
3 identified in a verified statement supplied by the petitioner who is re-  
4 questing such action identifying the immediate relatives of the principal  
5 and any other persons known to the petitioner to be interested in the  
6 welfare of the principal. Except that in the event of an emergency as  
7 determined by the court, the court, without notice, may enter such tem-  
8 porary order as seems proper to the court, but no such temporary order  
9 shall be effective for more than 30 days unless extended by the court after  
10 hearing on reasonable notice to the persons identified as herein provided.

Comment

This section generally follows section 404.723 of RSMo. However, subsection (a) was amended to require that in order for an attorney in fact to delegate powers granted in a durable power of attorney, such delegation must be expressly authorized in the power of attorney. This is a change from the Missouri law.

Subsections (b) and (c) of this section are nearly identical to subsections 2 and 3 of section 404.723 of RSMo.

Subsection (d) is amended to simplify the qualifying language. Language referring to the Missouri statute is stricken.

Missouri is one of eleven jurisdictions that specifically address the concept of successor attorneys in fact.

Comment

11 New Sec. 12. Subject to the provisions of the power of attorney and  
12 any separate agreement, an attorney in fact is entitled to reasonable com-  
13 pensation for services rendered to the principal as attorney in fact and  
14 reimbursement for reasonable expenses incurred as a result of acting as  
15 attorney in fact for the principal.

This section is identical to section 404.725 of RSMo.

Despite the fact that only eight jurisdictions address the issues of compensation and reimbursement, the Committee recommends this section be adopted.

16 New Sec. 13. (a) The principal may petition the court for an ac-  
17 counting by the principal's attorney in fact or the legal representative of  
18 the attorney in fact. If the principal is disabled or deceased, a petition for  
19 accounting may be filed by the principal's legal representative, an adult  
member of the principal's family or any person interested in the welfare  
of the principal.

22 (b) Any requirement for an accounting may be waived or an account-  
23 ing may be approved by the court without hearing, if the accounting is  
24 waived or approved by a principal who is not disabled, or by a principal  
25 whose legal capacity has been restored, or by all creditors and distributees  
26 of a deceased principal's estate whose claims or distributions theretofore  
27 have not been satisfied in full. The approval or waiver shall be in writing,  
28 signed by the affected persons and filed with the court.

29 (c) For the purposes of subsection (b), a legal representative or a  
30 person providing services to the principal's estate shall not be considered  
31 a creditor of the principal's estate. No express approval or waiver shall be  
32 required from the legal representative of a disabled principal if the prin-  
33 cipal's legal capacity has been restored, or from the personal represen-  
34 tative of a deceased principal's estate, or from any other person entitled  
35 to compensation or expense for services rendered to a disabled or de-  
36 ceased principal's estate, unless the principal or the principal's estate is  
37 unable to pay in full the compensation and expense to which the person  
38 rendering the services may be entitled.

39 (d) The principal, the principal's attorney in fact, an adult member  
40 of the principal's family or any person interested in the welfare of the  
41 principal may petition the district court in the county where the principal  
42 is then residing to determine and declare whether a principal, who has  
43 executed a power of attorney, is a disabled person.

1 (e) If the principal is a disabled person, on petition of the principal's  
2 legal representative, an adult member of the principal's family or any  
3 interested person, including a person interested in the welfare of the  
4 principal, for good cause shown, the court may:

- 5 (1) Order the attorney in fact to exercise or refrain from exercising
- 6 authority in a durable power of attorney in a particular manner or for a
- 7 particular purpose;
- 8 (2) modify the authority of an attorney in fact under a durable power
- 9 of attorney;
- 10 (3) declare suspended a power of attorney that is nondurable;
- 11 (4) terminate a durable power of attorney;
- 12 (5) remove the attorney in fact under a durable power of attorney;
- 13 (6) confirm the authority of an attorney in fact or a successor attorney
- 14 in fact to act under a durable power of attorney; and

Comment

This section is nearly identical to section 404.727 of RSMo. In  
subsection (f) reference to "other remedies available under law" was added.



15 (7) issue such other orders as the court finds will be in the best in-  
16 terest of the disabled principal, including appointment of a conservator  
17 for the principal pursuant to K.S.A. 59-3050, *et seq.*, and amendments  
18 thereto.

(f) In addition to any other remedies available under law, if after  
notice and hearing, the court determines that there has been a showing  
that the principal is a disabled person and that the attorney in fact has  
breached such attorney in fact's fiduciary duty to the principal or that  
there is a reasonable likelihood that such attorney in fact may do so in  
the immediate future, the court, in its discretion, may issue an order that  
some or all of the authority granted by the durable power of attorney be  
suspended or modified, and that a different attorney in fact be authorized  
to exercise some or all of the powers granted by the durable power of  
attorney. Such attorney in fact may be designated by the court. The court  
may require any person petitioning for any such order to file a bond in  
such amount and with such sureties as required by the court to indemnify  
either the attorney in fact who has been acting on behalf of the principal  
or the principal and the principal's successors in interest for the expenses,  
including attorney fees, incurred by any such persons with respect to such  
proceeding. The court, after hearing, may allow payment or enter judg-  
ment for any such amount in the manner as provided by subsection (f)  
of section 15, and amendments thereto. None of the actions described in  
this subsection shall be taken by the court until after hearing upon rea-  
sonable notice to all persons identified in a verified statement supplied  
by the petitioner who is requesting such action identifying the immediate  
relatives of the principal and any other persons known to the petitioner  
to be interested in the welfare of the principal. Except that in the event  
of an emergency as determined by the court, the court, without notice,  
may enter such temporary order as seems proper to the court, but no

1 such temporary order shall be effective for more than 30 days unless  
2 extended by the court after hearing on reasonable notice to the persons  
3 identified as herein provided.

(g) If a power of attorney is suspended or terminated by the court or  
the attorney in fact is removed by the court, the court may require an  
accounting from the attorney in fact and order delivery of any property  
belonging to the principal and copies of any necessary records of the  
attorney in fact concerning the principal's property and affairs to a suc-  
cessor attorney in fact or the principal's legal representative.

(h) In a proceeding under this act or in any other proceeding, or upon  
petition of an attorney in fact or successor, the court may:

(1) Require or permit an attorney in fact under a power of attorney  
to account;

14 (2) authorize the attorney in fact under a power of attorney to enter  
15 into any transaction, or approve, ratify, confirm and validate any trans-  
16 action entered into by the attorney in fact that the court finds is, was or  
7 will be beneficial to the principal and which the court has power to au-  
thorize for a conservator pursuant to K.S.A. 59-3050 *et seq.*, and amend-  
19 ments thereto; and

20 (3) relieve the attorney in fact of any obligation to exercise authority  
21 for a disabled principal under a durable power of attorney.

22 (i) Unless previously barred by adjudication, consent or limitation,  
23 any cause of action against an attorney in fact or successor for breach of  
24 duty to the principal shall be barred as to any principal who has received  
25 an account or other statement fully disclosing the matter unless a pro-  
26 ceeding to assert the cause of action is commenced within two years after  
27 receipt of the account or statement by the attorney in fact or, if the  
28 principal is a disabled person, by a guardian or conservator of the disabled  
29 person's estate. If a disabled person has no guardian or conservator of  
30 the disabled person's estate at the time an account or statement is pre-  
31 sented, then the cause of action shall not be barred until one year after  
32 the removal of the principal's disability or incapacity, one year after the  
33 appointment of a conservator for the principal or one year after the death  
34 of the principal. The cause of action thus barred does not include any  
35 action to recover from an attorney in fact or successor for fraud, misrep-  
36 resentation or concealment related to the settlement of any transaction  
37 involving the agency relationship of the attorney in fact with the principal.

1-22

38 New Sec. 14. (a) This act applies to the acts and transaction in this  
39 state of attorneys in fact under powers of attorney executed in this state  
40 or by residents of this state. Further, this act applies to acts and trans-  
actions of attorneys in fact in this state or outside this state under powers  
of attorney that refer to the power of attorney law of Kansas in the in-  
43 strument creating the power of attorney, if any of the following conditions  
1 are met:

- 2 (1) The principal or attorney in fact was a resident of this state at the
- 3 time the power of attorney was executed;
- 4 (2) the powers and authority conferred relate to property, acts or
- 5 transactions in this state;
- 6 (3) the acts and transactions of the attorney in fact or successor oc-
- 7 curred or were to occur in this state;
- 8 (4) the power of attorney was executed in this state; or
- 9 (5) there is otherwise a reasonable relationship between this state and
- 10 the subject matters of the power of attorney.

11 The power of attorney so created remains subject to this act despite a  
12 subsequent change in residence of the principal or the attorney in fact  
13 and any successor, or the removal from this state of property which was  
14 the subject of the power of attorney.

15 (b) A person who acts as an attorney in fact or successor pursuant to  
16 a power of attorney governed by this act is subject to personal jurisdiction  
17 in this state with respect to matters relating to acts and transactions of  
18 the attorney in fact or successor performed in this state, performed for a  
19 resident of this state or affecting property in this state.

20 (c) A durable power of attorney that purports to have been made  
21 under the provisions of the durable power of attorney act of another state  
22 is governed by the law of that state and, if durable where executed, is  
23 durable and may be carried out and enforced in this state.

24 (f) A power of attorney executed by a resident of another state, may  
25 authorize the carrying out in this state of all acts permitted to be delegated  
26 to an attorney in fact by the laws of the state of the residence of the  
27 principal, the laws of the state where the power of attorney is executed  
28 or the laws of this state, whichever law is most favorable toward author-  
29 izing such delegation, and is durable if so designated either under the  
30 laws of this state, under the laws of the state of residence of the principal  
31 or under the laws of the state where the power of attorney is executed.

Comment

This section is similar to section 404.730 of RSMo. Subsections (3)  
and (4) of the Missouri law have been stricken.

The section contains an express provision recognizing the validity of  
an out of jurisdiction durable power of attorney. Only ten jurisdictions  
have such express provisions.

33 New Sec. 15. The repeal of the uniform durable power of attorney  
34 act, K.S.A. 58-610 through 58-617 and the repeal of K.S.A. 58-601 and  
35 58-602, shall not affect the validity of powers of attorney created under  
36 those sections, the validity of the acts and transactions of attorneys in fact  
37 under authority granted in powers of attorney executed under those sec-  
38 tions, or the duties of attorneys in fact under powers of attorney executed  
under those sections.

Comment

This section is similar to subsection 1 of section 404.735 of RSMo.  
The Committee did not adopt subsections 2 through 5.

The subsection was amended to apply to both powers of attorney  
which are durable and powers of attorney which are non durable.

39 Sec. 16. K.S.A. 2002 Supp. 58a-602 is hereby amended to read as  
40 follows: 58a-602. (a) Unless the terms of a trust expressly provide that  
41 the trust is irrevocable, the settlor may revoke or amend the trust. This  
42 subsection does not apply to a trust created under an instrument executed  
43 before the effective date of this code *January 1, 2003*.

1 (b) If a revocable trust is created or funded by more than one settlor:

2 (1) To the extent the trust consists of community property, the trust  
3 may be revoked by either spouse acting alone but may be amended only  
4 by joint action of both spouses; and

5 (2) to the extent the trust consists of property other than community  
6 property, each settlor may revoke or amend the trust with regard to the  
7 portion of the trust property attributable to that settlor's contribution.

8 (c) The settlor may revoke or amend a revocable trust:

9 (1) By substantial compliance with a method provided in the terms  
10 of the trust; or

11 (2) if the terms of the trust do not provide a method or the method  
12 provided in the terms is not expressly made exclusive, by:

13 (A) A later will or codicil that expressly refers to the trust or specif-  
14 ically devises property that would otherwise have passed according to the  
15 terms of the trust; or

16 (B) any other method manifesting clear and convincing evidence of  
17 the settlor's intent.

18 (d) Upon revocation of a revocable trust, the trustee shall deliver the  
19 trust property as the settlor directs.

20 (e) A settlor's powers with respect to revocation, amendment, or dis-  
21 tribution of trust property may be exercised by an agent under a power  
22 of attorney only to the extent expressly authorized by ~~the terms of the~~  
23 ~~trust or the power of attorney.~~

24 (f) A conservator of the settlor may exercise a settlor's powers with  
25 respect to revocation, amendment, or distribution of trust property only  
26 with the approval of the court supervising the conservatorship.

27 (g) A trustee who does not know that a trust has been revoked or  
28 amended is not liable to the settlor or settlor's successors in interest for  
29 distributions made and other actions taken on the assumption that the  
30 trust had not been amended or revoked.

31 Sec. 17. K.S.A. 58-601, 58-602, 58-610, 58-611, 58-612, 58-613, 58-  
32 614, 58-615, 58-616 and 58-617 and K.S.A. 2002 Supp. 58a-602 are  
33 hereby repealed.

34 Sec. 18. This act shall take effect and be in force from and after its  
35 publication in the statute book.





January 28, 2003

To: Members of the House Judiciary Committee

From: Kathleen Taylor Olsen, Kansas Bankers Association

**Re: HB 2034: Kansas Power of Attorney Act**

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear today in support of **HB 2034**, a major overhaul to the Kansas Power of Attorney Act. We were pleased to have the opportunity to make comments to the Judicial Council's Probate Law Advisory Committee regarding this project.

The KBA's interest in the revision of the Kansas Power of Attorney Act was to promote certainty and reliability with regard to the actual document – the Power of Attorney. Bank employees receive numerous requests from attorneys in fact to complete transactions in reliance on the fact that a Power of Attorney is valid.

It is our opinion that the current law gives little guidance or protection to third parties who act in good faith reliance on the Power of Attorney. We believe that **HB 2034** answers a lot of the questions that we field from bankers who are trying to understand their rights and duties with regard to the Power of Attorney.

Some of the issues that **HB 2034** addresses include: guidance on how to title property being held by an attorney in fact for a principal; providing protection to third parties who, in good faith, rely on and act on a Power of Attorney; and clarification of when termination of the attorney in fact's authority occurs.

One of the issues about which we voiced concern, was the right of a third person to not accept a Power of Attorney. There are occasions when a bank employee has reason to suspect that the principal would not approve of a transaction if he or she knew what the attorney in fact was attempting to do. With these suspicions, the bank employee may no longer qualify for the protections provided under the "good faith" exemption from liability. The Committee indirectly dealt with this issue by allowing a third person to require the attorney in fact to indemnify the third person against forgery of the Power of Attorney. In the absence of additional guidance, we believe third persons will continue to have the right not to accept a Power of Attorney if they have reason to suspect fraud.

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**HB 2034**

January 28, 2003

Page Two

In reviewing the bill and comparing it against an earlier draft we received from the Committee, we believe that an amendment is in order for New Section 8, on Page 9, Line 35. The words, "modified" and "suspended" should be struck as the events following that line are means by which a Power of Attorney is terminated. Please find a suggested amendment attached to this testimony.

In conclusion, the Kansas Bankers Association would like to urge you to consider **HB 2034** favorably for passage.

1 instructions of the court, if any, having jurisdiction over the estate of the  
 2 principal, or any part thereof, and shall communicate with and be ac-  
 3 countable to the principal's personal representative, or if none, the prin-  
 4 cipal's successors. The attorney in fact shall promptly deliver to and put  
 5 in the possession and control of the principal's personal representative or  
 6 successors, any property of the principal and copies of any records of the  
 7 attorney in fact relating to transactions undertaken in the principal's be-  
 8 half that are deemed by the personal representative or the court to be  
 9 necessary or helpful in the administration of the decedent's estate.

10 (h) If an attorney in fact has a property or contract interest in the  
 11 subject of the power of attorney or the authority of the attorney in fact  
 12 is otherwise coupled with an interest in a person other than the principal,  
 13 this section does not impose any duties on the attorney in fact that would  
 14 conflict or be inconsistent with that interest.

15 New Sec. 8. (a) As between the principal and attorney in fact or  
 16 successor attorney in fact, and any agents appointed by either of them,  
 17 unless the power of attorney is coupled with an interest, the authority  
 18 granted in a power of attorney shall be modified or terminated as follows:

19 (1) On the date shown in the power of attorney and in accordance  
 20 with the express provisions of the power of attorney;

21 (2) when the principal, orally or in writing, or the principal's legal  
 22 representative in writing informs the attorney in fact or successor that the  
 23 power of attorney is modified or terminated, or when and under what  
 24 circumstances it is modified or terminated; or

25 (3) when a written notice of modification or termination of the power  
 26 of attorney is filed by the principal or the principal's legal representative  
 27 for record in the office of the register of deeds in the county of the  
 28 principal's residence or, if the principal is a nonresident of the state, in  
 29 the county of the residence of the attorney in fact last known to the  
 30 principal, or in the county in which is located any property specifically  
 31 referred to in the power of attorney.

32 (b) As between the principal and attorney in fact or successor attor-  
 33 ney in fact, and any agents appointed by either of them, unless the power  
 34 of attorney is coupled with an interest, the authority granted in a power  
 35 of attorney shall be ~~modified, terminated or suspended~~ as follows:

36 (1) On the death of the principal, except that if the power of attorney  
 37 grants authority under subsection (f)(7) or (f)(8) of section 5, and amend-  
 38 ments thereto, the power of attorney and the authority of the attorney in  
 39 fact shall continue for the limited purpose of carrying out the authority  
 40 granted under either or both of such subsections for a reasonable length  
 41 of time after the death of the principal;

42 (2) when the attorney in fact under a power of attorney is not qual-  
 43 ified to act for the principal;



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MEMORANDUM

TO: Members of the House Judiciary Committee

FROM: Trista Beadles Curzydlo, KBA Lobbyist

DATE: January 28, 2003

RE: Written Testimony on HB 2034  
An Act concerning the Kansas power of attorney act

The Legislative Committee of the Kansas Bar Association is generally supportive of HB 2034. During the legislative interim, a sub-committee was formed to review the proposal of the Judicial Council and those members made several recommendations. The Judicial Council has been provided with those recommendations and the KBA sub-committee and the Council are in the process of discussing the implementation of those recommendations.

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1-28-03

Attachment: 3



**Living Initiatives For End-Of-Life Care**

*Helping all Kansans live with dignity, comfort and peace at the end of life*

January 28, 2003

The Honorable Michael O'Neal  
Chair of the Kansas House Judiciary Committee  
Kansas Judicial Branch  
300 S.W. 10<sup>th</sup>, Room 170-W  
Topeka, KS 66612-1504

Dear Representative O'Neal and members of the House Judiciary Committee,

The Kansas LIFE Project works to help Kansans live with dignity, comfort and peace as they near the end of life. The LIFE Project is a collaborative effort of over 100 organizations, agencies and associations that represent citizens and advocacy groups, health care professionals and public policy leaders.

As you consider HB 2034 today, we call your attention to Section 5, F, Paragraph 10. The section says:

Any power of attorney may grant power or authority to an attorney in fact to carry out any of the following actions if the actions are expressly authorized in the power of attorney:

(10) to give consent to or prohibit any type of health care, medical care, treatment or procedure to the extent authorized by K.S.A. 58-625 et. seq., and amendments thereto.

As you know, the Kansas Durable Power of Attorney for Health Care Decisions, K.S.A. 58-625, allows Kansans to designate a healthcare surrogate in the event that they ever become unable to make healthcare decisions on their own behalf and/or speak for themselves. We are not clear, from reviewing this bill, what the impact might be on the current practice of utilizing Durable Powers of Attorney for Health Care Decisions.

As you know, when Durable Powers of Attorney for Health Care Decisions are utilized, families may be under considerable stress. The LIFE Project is concerned that citizen wishes be honored and that citizens are able to engage in advance care planning in the least cumbersome way. Last Acts, a national group working to improve end-of-life care, released a report, "*Means to a Better End: A Report on Dying in America*," in November

LIFE Project Foundation ♦ 1901 University ♦ Wichita, KS 67213-3325  
Phone: 316-263-6380 ♦ Fax: 316-263-6542 ♦ Email: [life@LIFEProject.org](mailto:life@LIFEProject.org) ♦ Website  
Statewide Consumer Toll-Free HelpLine: 888-202-LIFE (5433) ♦ Pain Management Hot  
The LIFE Project Foundation is a 501(c)3 non-profit organization

H. JUDICIARY

1-28-03

Attachment: 4

2002. In a state-by-state report card, the report gave Kansas an "F" for our advance care planning policies. The LIFE Project Partners are working as advocates for Kansas citizens as they engage in advance care planning and we know that you share that advocacy role.

Please consider and clarify:

Is Section 5, F, Paragraph 10 of HB 2034 meant to create an alternative methodology by which Kansans may name a surrogate healthcare decision maker?

Would a Kansan need to complete a Durable Power of Attorney for Health Care Decisions in any way other than the current practice?

Would a Kansan still need to complete a Durable Power of Attorney for Health Care Decisions or would naming a Durable Power of Attorney for Health Care, within one's Power of Attorney, be sufficient?

If both remain necessary, in order for patient wishes to be followed, we believe that careful consideration should be given to whether Section 5, F, paragraph 10 further confuses Kansans and complicates the process of working to assure that one's healthcare wishes will be honored.

If a Durable Power of Attorney for Health Care Decisions may indeed be included in a power of attorney, if a Kansan so chooses, the bill should be clarified to state this more clearly. If that is not the case, clarification is also needed.

Again, the LIFE Project asks only for careful consideration and clarification of the meaning and intent about Section 5, F, Paragraph 10 of HB 2034. If the intent is to allow Kansans to complete one power of attorney that may have a healthcare directive added in a durable way, if a Kansan so chooses, we believe the language of the Bill needs to be clarified. If this is not the intent, we believe this paragraph is misleading and confusing.

Thank you for attending to this concern. Your attention and clarification now will help to avoid further confusion and misreading of the bill's intent in this regard.

Sincerely,



Donna Bales  
President/CEO  
LIFE Project



Don Reynolds  
Director, Special Projects  
Midwest Bioethics