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TO: House Judiciary Committee

FROM: Kansas Judicial Council – Christy Molzen

DATE: March 11, 2015

RE: Judicial Council Testimony on SB 57 – Written only

The Judicial Council supports Senate Bill 57, a bill which is based on the work product of the Council's Probate Law Advisory Committee. The attached report provides some background on the study process that resulted in the drafting of SB 57 and how that bill differs from last year's 2014 SB 355.

REPORT OF THE PROBATE LAW ADVISORY COMMITTEE ON 2014 SENATE BILL 355

In May 2014, Representative Lance Kinzer asked the Judicial Council to study 2014 S.B. 355 relating to durable powers of attorney. The Council referred the study to the Probate Law Advisory Committee.

METHOD OF STUDY

At the suggestion of Senator Jeff King, the Probate Committee added three ad hoc members during its review of the bill: Loren Snell, Deputy Attorney General; Mitzi McFatrach, Kansas Advocates for Better Care; and Michelle Niedens, Alzheimers Association. (A full list of the members of the Probate Law Advisory Committee can be found at the end of this report.) The Committee met three times, and Senator King, who helped author S.B. 355, joined the Committee by telephone at its first meeting to give them additional background about the bill.

BACKGROUND

Over the past few years, there have been a number of bills introduced amending the Kansas Power of Attorney Act in an attempt to prevent fraud and financial exploitation of the elderly. For example, in 2009, the legislature passed 2009 S.B. 45, a bill requested by the Judicial Council that amended the power of attorney statutes to require that the attorney in fact maintain records of transactions made on behalf of the principal and prohibited the commingling of funds.

In 2010, the Attorney General requested 2010 H.B. 2568, which contained further amendments relating to durable powers of attorney. That bill died after a hearing in House Judiciary but was referred to the Judicial Council for study. With input from Deputy Attorney General Loren Snell, the Probate Committee reviewed 2010 H.B. 2568. The Committee agreed with some of the bill's provision but not others. For example, the Committee agreed that durable powers of attorney should include warning statements about the powers being delegated by the principal and the duties being undertaken by the attorney in fact. The Committee did not agree, however, that durable powers of attorney should be required to be signed by two witnesses or publicly recorded.

As a result of its study of 2010 H.B. 2568, the Probate Committee recommended an alternative bill, 2011 H.B. 2068. After a hearing in House Judiciary, the bill died in Committee.

In 2014, the Attorney General supported introduction of S.B. 355, the subject of the current study. Senate Bill 355 had some similarities to the earlier Council bill, 2011 H.B. 2068, but it differed in several important respects. S.B. 355 passed the Senate unanimously but died in House Judiciary before being referred to the Council for study. A copy of the bill is attached at the end of this report.

A companion bill to S.B. 355 relating to criminal penalties was passed by the legislature in 2014. Under 2014 S.B. 256, violations of the Power of Attorney Act or the Uniform Trust Code may constitute mistreatment of a dependent adult or an elder person.

COMMITTEE DISCUSSION OF 2014 S.B. 355

The Committee recognized that S.B. 355 is an attempt to address the growing problem of misuse and abuse of powers of attorney; however, the Committee was concerned that some of the bill's provisions were so burdensome on the attorney in fact that powers of attorney would no longer be a useful tool, especially for families. Instead of using powers of attorney, families might be driven to other alternatives such as simply placing a family member's name on assets and accounts (an inexpensive but risky decision) or seeking a conservatorship (a safer choice because of court supervision but far more expensive).

Two concepts in the bill provoked the most concern: 1) defining "best interest" to mean that an attorney in fact must act "solely" or "strictly" for the benefit of the principal, and 2) shifting the burden to the attorney in fact to prove that the principal had capacity at the time the power of attorney was executed.

Best interest

The bill contains a number of provisions stating that an attorney in fact must act "strictly" in the principal's best interest and defining best interest as acts that are "solely" for the principal's benefit. The Committee found these provisions troubling because an attorney in fact is often a family member or caregiver to the principal and his or her actions may benefit not just the principal but also other members of the principal's family.

On the other hand, the Committee agreed that it would be helpful to define "best interest." The Committee recommends the following definition: "An act is in the 'best interest' of the principal if the attorney in fact acts in accordance with his or her fiduciary duty to the principal and the act: (1) benefits the principal; or (2) is consistent with the principal's intent as expressed in the power of attorney."

Burden shifting

The bill also contains provisions shifting the burden to prove capacity to the attorney in fact in both civil and criminal proceedings. In a criminal proceeding, the attorney in fact must prove by clear and convincing evidence that the principal had capacity. In a civil proceeding, the burden to prove capacity shifts to the attorney in fact if the person challenging the power of attorney proves that the principal was an "elder person" (a person over 70) at the time the power of attorney was executed. See S.B. 355, Sec. 2(b)(4).

Mr. Snell explained that these provisions were based largely on Arizona law and were included in the bill as one way of making it easier to prosecute exploitation cases. He noted that it is easier for the parties to a power of attorney to demonstrate capacity at the time the document was executed than for a prosecutor to prove that capacity was lacking at that remote point in time.

As to the provision shifting the burden in a criminal proceeding, the Committee believed this provision was likely unconstitutional, because it would require a criminal defendant to prove his or her innocence rather than requiring the State to prove guilt. The Committee was also troubled by the provision shifting the burden in a civil case simply based on the principal's age. The Committee believed these provisions were unduly burdensome on an attorney in fact and would deter people from using powers of attorney.

Although the Committee rejected the provisions discussed above, it approved several other provisions of S.B. 355, with some minor technical changes for clarity.

Warning statements

Under the bill, a durable power of attorney would be required to include a warning statement to the principal about the powers being delegated and a warning statement to the attorney in fact about the duties and responsibilities being undertaken. The Committee agreed that these statements could be helpful, especially to users of online forms who have not sought the advice of an attorney and may not fully understand the ramifications of the document they are signing.

Requirement that attorney in fact sign the power of attorney

The bill would also require the attorney in fact to sign the power of attorney. The Committee agreed that requiring the attorney in fact to sign the document would encourage that person to think twice before accepting the responsibility of serving. It could also assist prosecutors in showing that an attorney in fact understood his or her legal obligations. The Committee added some additional language to clarify that an attorney in fact need not sign the document at the same time as the principal.

Penalty for commingling funds or failing to maintain adequate records

Current law requires an attorney in fact to maintain adequate records of any receipts, disbursements and transactions made by the attorney in fact on behalf of the principal and prohibits an attorney in fact from commingling his or her funds or assets with those of the principal, but it doesn't say what happens if the attorney in fact violates these provisions. Under the bill, an attorney who fails to maintain adequate records or commingles funds would be liable for any costs, including reasonable attorney fees, incurred in obtaining or reproducing records or recovering funds or assets. The Committee approved these provisions.

CONCLUSION

The Committee recommends the attached proposed legislation amending the Kansas Power of Attorney Act.

MEMBERS OF THE PROBATE LAW ADVISORY COMMITTEE

The members of the Probate Law Advisory Committee are:

Sarah Bootes Shattuck, Chair; Ashland
Eric N. Anderson; Salina
Cheryl C. Boushka; Kansas City, MO
Hon. Sam K. Bruner; Overland Park
James L. Bush; Overland Park
Tim Carmody; Overland Park
Prof. Martin B. Dickinson, Jr.; Lawrence
Mark Knackendoffel; Manhattan
Hon. Edward Larson; Topeka
Philip D. Ridenour; Cimarron
Nancy Schmidt Roush; Kansas City, MO
Jennifer L. Stultz; Wichita
Molly M. Wood; Lawrence

Ad Hoc Members

Michelle Niedens, Prairie Village
Loren Snell; Topeka
Mitzi McFatrach; Lawrence

Proposed Legislation

Section 1. K.S.A. 58-651 is hereby amended to read as follows: 58-651. As used in the Kansas power of attorney act:

(a) "Attorney in fact" means an individual, corporation or other legal entity appointed to act as agent of a principal in a written power of attorney.

(b) *An act is in the "best interest" of the principal if the attorney in fact acts in accordance with his or her fiduciary duty to the principal and the act: (1) benefits the principal; or (2) is consistent with the principal's intent as expressed in the power of attorney.*

(c) "Court" means the district court.

~~(e)-(d)~~ *"Capacity" means that at the time the power of attorney was executed, the principal was capable of understanding in a reasonable manner the nature and effect of the act of executing and granting the power of attorney.*

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

~~(d)-(f)~~ "Durable power of attorney" means a written power of attorney in which the authority of the attorney in fact does not terminate in the event the principal becomes disabled or in the event of later uncertainty as to whether the principal is dead or alive and which complies with subsection (a) of K.S.A. 58-652, and amendments thereto, or is durable under the

laws of any of the following places:

- (1) The law of the place where executed;
- (2) the law of the place of the residence of the principal when executed; or
- (3) the law of a place designated in the written power of attorney if that place has a reasonable relationship to the purpose of the instrument.

~~(e)~~ (g) "Legal representative" means a decedent's personal representative, a guardian or a conservator.

~~(f)~~—(h) "Nondurable power of attorney" means a written power of attorney which does not meet the requirements of a durable power of attorney.

~~(g)~~—(i) "Person" means an adult individual, corporation or other legal entity.

~~(h)~~—(j) "Personal representative" means a legal representative as defined in K.S.A. 59-102, and amendments thereto.

~~(i)~~—(k) "Power of attorney" means a written power of attorney either durable or nondurable.

~~(j)~~—(l) "Principal's family" means the principal's parent, grandparent, uncle, aunt, brother, sister, son, daughter, grandson, granddaughter and their descendants, whether of the whole blood or the half blood, or by adoption, and the principal's spouse, *spouse's parent*, stepparent and stepchild.

~~(k)~~—(m) "Third person" means any individual, corporation or legal entity that acts on a request from, contracts with, relies on or otherwise deals with an attorney in fact pursuant to authority granted by a principal in a power of

attorney and includes a partnership, either general or limited, governmental agency, financial institution, issuer of securities, transfer agent, securities or commodities broker, real estate broker, title insurance company, insurance company, benefit plan, legal representative, custodian or trustee.

Sec. 2. K.S.A. 2014 Supp. 58-652 is hereby amended to read as follows: 58-652. (a) The authority granted by a principal to an attorney in fact in a written power of attorney is not terminated in the event the principal becomes wholly or partially disabled or in the event of later uncertainty as to whether the principal is dead or alive if:

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

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

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

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

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

physically unable to sign the power of attorney but otherwise competent and conscious, the power of attorney may be signed by an adult designee of the principal in the presence of the principal and at the specific direction of the principal expressed in the presence of a notary public. The designee shall sign the principal's name to the power of attorney in the presence of a notary public, following which the document shall be acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and amendments thereto, to the same extent and effect as if physically signed by the principal;

(4) *the durable power of attorney contains the following warning statement to the principal at the beginning of the durable power of attorney, in not less than 14-point boldface type, or a reasonable equivalent thereof:*

"Notice to Person Executing Durable Power of Attorney.

A durable power of attorney is an important legal document. You should read this durable power of attorney carefully. When effective, this durable power of attorney will give your attorney in fact the right to deal with property that you now own or might acquire in the future. If you do not understand the durable power of attorney, or any provision of it, you should seek legal advice prior to signing the document"; and

(5) *the durable power of attorney contains the following notice statement to the attorney in fact at the conclusion of the durable power of attorney, in not less than 14-point*

boldface type, or a reasonable equivalent thereof:

"Notice to Person Accepting the Appointment as Attorney in Fact.

A person who is appointed an attorney in fact under a durable power of attorney has no duty to exercise the authority conferred in the power of attorney, unless the attorney in fact has agreed expressly in writing to act for the principal in such circumstances. By acting or agreeing to act as the attorney in fact under this durable power of attorney, you assume the fiduciary and other legal responsibilities of an agent. This relationship will continue until you resign or the durable power of attorney is revoked or terminated. Your responsibilities shall include:

- 1. The legal duty to act according to the instructions from the principal, or, where there are no instructions, in the best interest of the principal, avoiding conflicts of interest that would impair your ability to act in the principal's best interest.*

- 2. Keeping the principal's funds and property separate and distinct from any funds or assets you own or control, unless otherwise permitted by law.*

- 3. Keeping a record of all receipts, disbursements and transactions made on behalf of the principal.*

- 4. Disclosing your identity as an attorney in fact whenever you act for the principal.*

You may not use the principal's assets to benefit yourself or make gifts to yourself or anyone else unless the principal has specifically

granted you that authority in the durable power of attorney. If you have been granted that authority, you must act according to the instructions of the principal or, where there are no such instructions, in the principal's best interest. Failure to do so may result in criminal prosecution under the laws of the state of Kansas. In addition to criminal prosecution, you may also be sued in civil court.

You may resign by giving written notice to the principal and to any co-attorney in fact, successor attorney in fact, or the principal's guardian if one has been appointed.

If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice before accepting the appointment."

(b) (1) All acts done by an attorney in fact pursuant to a durable power of attorney shall inure to the benefit of and bind the principal and the principal's successors in interest, notwithstanding any disability of the principal.

(2) Any acts done by the attorney in fact not in the best interest of the principal are in violation of the Kansas power of attorney act, unless such acts are otherwise specifically authorized in the power of attorney.

(3) Any acts done by the attorney in fact to intimidate or deceive the principal in procuring the power of attorney are in violation of the Kansas power of attorney act.

(4) A power of attorney executed by a person who does not have capacity is invalid.

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

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

(3) If a power of attorney is recorded any revocation of that power of attorney must be recorded in the same manner for the revocation to be effective. If a power of attorney is not recorded it may be revoked by a recorded revocation or in any other appropriate manner.

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

(d)(1) A durable power of attorney must be signed and dated by the attorney in fact before a notary public acknowledging that the attorney in fact or successor attorney in fact is the person identified in the durable power of attorney as an attorney in fact for the principal, that such person has read the "Notice to Person Accepting the Appointment as Attorney in Fact," and that such person understands and acknowledges the legal responsibilities imposed upon such person as attorney in fact. An attorney in fact need not sign the power of attorney at the same time as the principal but must sign the power of attorney before taking any action on behalf of the principal.

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

(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: (1) A specified future date; (2) the occurrence of a specified future event; or (3) the existence of a specified condition which may occur in the future. In the absence of actual knowledge to the contrary, any person to whom such writing is presented shall be entitled to rely on an affidavit, executed by the attorney in fact, setting forth that such event has occurred or condition exists.

(f) A person who in good faith contracts with, buys from or sells to an attorney in fact is protected as if the attorney in fact properly exercised such power, regardless of whether the authority of such person as the attorney in fact has been terminated or invalidated.

Sec. 3. K.S.A. 2014 Supp. 58-656 is hereby amended to read as follows: 58-656. (a)

An attorney in fact who ~~elects~~ *agrees* to act under a power of attorney is under a duty to act in the interest of the principal and to avoid conflicts of interest that impair the ability of the attorney in fact so to act. A person who is appointed an attorney in fact under a power of attorney who undertakes to exercise the authority conferred in the power of attorney, has a fiduciary ~~obligation~~ *duty to the principal* to exercise the powers conferred in the best ~~interests~~ *interest* of the principal, and to avoid self-dealing and conflicts of interest, as in the case of a trustee with respect to the trustee's beneficiary or beneficiaries. ~~The attorney in fact shall keep a record of receipts, disbursements and transactions made on behalf of the principal and shall not commingle funds or assets of the principal with the funds or assets of the attorney in fact.~~ In the absence of explicit authorization, the attorney in fact shall exercise a high degree of care in maintaining, without modification, any estate plan which the principal may have in place, including, but not limited to, arrangements made by the principal for disposition of assets at death through beneficiary designations, ownership by joint tenancy or tenancy by the entirety, trust arrangements or by will or codicil. Unless otherwise provided in the power of attorney or in a separate agreement between the principal and attorney in fact, an attorney in fact who ~~elects~~ *agrees* to act shall exercise the authority granted in a power of attorney with that degree of care that would be observed by a prudent person dealing with the property and conducting the

affairs of another, except that all investments made on or after July 1, 2003, shall be in accordance with the provisions of the Kansas uniform prudent investor act, K.S.A. 58-24a01 et seq., and amendments thereto. If the attorney in fact has special skills or was appointed attorney in fact on the basis of representations of special skills or expertise, the attorney in fact has a duty to use those skills in the principal's behalf.

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

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

(d) A principal may nominate by a power of attorney, guardian or conservator, or both, for consideration by the court. If a petition to appoint

a guardian or conservator, or both, is filed, the court shall make the appointment in accordance with the principal's most recent nomination in the power of attorney, so long as the individual nominated is a fit and proper person.

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

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

(g) On the death of the principal, the attorney in fact shall follow the instructions of the court, if any, having jurisdiction over the estate of the principal, or any part thereof, and shall communicate with and be accountable to the principal's personal representative, or if none, the principal's successors. The attorney in fact shall promptly deliver to and put in the possession and control of the principal's personal representative or successors, any property of the principal and copies of any records of the attorney in fact relating to transactions undertaken in the principal's behalf that are deemed by the personal representative or the court to be

necessary or helpful in the administration of the decedent's estate.

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

(i) The attorney in fact shall maintain adequate records as necessary to disclose fully the nature of the receipts, disbursements and transactions made by the attorney in fact on behalf of the principal. Such records shall be maintained by the attorney in fact for five years after the date on which the receipt, disbursement or transaction occurred. An attorney in fact who fails to maintain such records, whether intentionally or negligently, shall be liable for all costs, fees and expenses, including reasonable attorney fees, incurred in acquiring or reproducing such records.

(j) An attorney in fact who commingles funds or assets of the principal with funds or assets of the attorney in fact contrary to the best interest of the principal shall be liable to restore such funds or assets to the principal and shall be liable for all costs of recovering the funds and assets of the principal, including reasonable attorney fees.

Sec. 4. K.S.A. 58-664 is hereby amended to read as follows: 58-664.

(a) The repeal of the uniform durable power of attorney act, K.S.A. 58-610 through 58-617 and the repeal of K.S.A. 58-601 and 58-602, shall

not affect the validity of powers of attorney created under those sections, the validity of the acts and transactions of attorneys in fact under authority granted in powers of attorney executed under those sections, or the duties of attorneys in fact under powers of attorney executed under those sections.

(b) Powers of attorney created and fully executed by the principal prior to July 1, 2015, shall be governed by the laws existence at the time such powers of attorney were created and fully executed.

Sec. 5. K.S.A. 58-651 and 58-664 and K.S.A. 2014 Supp. 58-652 and 58-656 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

{As Amended by Senate Committee of the Whole}

As Amended by Senate Committee

Session of 2014

SENATE BILL No. 355

By Committee on Judiciary

2-7

1 AN ACT concerning the Kansas power of attorney act; relating to durable
2 powers of attorney; duties of the attorney in fact; amending K.S.A. 58-
3 651 and 58-664 and K.S.A. 2013 Supp. 58-652 and 58-656 and
4 repealing the existing sections.

5
6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. K.S.A. 58-651 is hereby amended to read as follows: 58-
8 651. As used in the Kansas power of attorney act:

9 (a) "Attorney in fact" means an individual, corporation or other legal
10 entity appointed to act as agent of a principal in a written power of
11 attorney.

12 (b) *"Best interest" means the attorney in fact acts solely for the*
13 *principal's benefit.*

14 (c) "Court" means the district court.

15 ~~(e)~~ (d) *"Capacity" means that at the time the power of attorney was*
16 *executed, the principal was capable of understanding in a reasonable*
17 *manner the nature and effect of the act of executing and granting the*
18 *power of attorney.*

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

22 ~~(d)~~ (f) "Durable power of attorney" means a written power of attorney
23 in which the authority of the attorney in fact does not terminate in the
24 event the principal becomes disabled or in the event of later uncertainty as
25 to whether the principal is dead or alive and which complies with
26 subsection (a) of K.S.A. 58-652, and amendments thereto, or is durable
27 under the laws of any of the following places:

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

29 (2) the law of the place of the residence of the principal when
30 executed; or

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

33 (g) *"Elder person" shall mean the same as provided in K.S.A 50-676,*
34 *and amendments thereto.*

- 1 ~~(e)~~ *(h)* "Legal representative" means a decedent's personal
2 representative, a guardian or a conservator.
- 3 ~~(f)~~ *(i)* "Nondurable power of attorney" means a written power of
4 attorney which does not meet the requirements of a durable power of
5 attorney.
- 6 ~~(g)~~ *(j)* "Person" means an adult individual, corporation or other legal
7 entity.
- 8 ~~(h)~~ *(k)* "Personal representative" means a legal representative as
9 defined in K.S.A. 59-102, and amendments thereto.
- 10 ~~(i)~~ *(l)* "Power of attorney" means a written power of attorney, either
11 durable or nondurable.
- 12 ~~(j)~~ *(m)* "Principal's family" means the principal's parent, grandparent,
13 uncle, aunt, brother, sister, son, daughter, grandson, granddaughter and
14 their descendants, whether of the whole blood or the half blood, or by
15 adoption, and the principal's spouse, *spouse's parent*, stepparent and
16 stepchild.
- 17 ~~(k)~~ *(n)* "Third person" means any individual, corporation or legal
18 entity that acts on a request from, contracts with, relies on or otherwise
19 deals with an attorney in fact pursuant to authority granted by a principal
20 in a power of attorney and includes a partnership, either general or limited,
21 governmental agency, financial institution, issuer of securities, transfer
22 agent, securities or commodities broker, real estate broker, title insurance
23 company, insurance company, benefit plan, legal representative, custodian
24 or trustee.
- 25 Sec. 2. K.S.A. 2013 Supp. 58-652 is hereby amended to read as
26 follows: 58-652. (a) The authority granted by a principal to an attorney in
27 fact in a written power of attorney is not terminated in the event the
28 principal becomes wholly or partially disabled or in the event of later
29 uncertainty as to whether the principal is dead or alive if:
- 30 (1) The power of attorney is denominated a "durable power of
31 attorney";
- 32 (2) the power of attorney includes a provision that states in substance
33 one of the following:
- 34 (A) "This is a durable power of attorney and the authority of my
35 attorney in fact shall not terminate if I become disabled or in the event of
36 later uncertainty as to whether I am dead or alive"; or
- 37 (B) "This is a durable power of attorney and the authority of my
38 attorney in fact, when effective, shall not terminate or be void or voidable
39 if I am or become disabled or in the event of later uncertainty as to
40 whether I am dead or alive"; ~~and~~
- 41 (3) *the durable power of attorney:*
- 42 (A) ~~the power of attorney~~ Is signed by the principal, and dated and
43 acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and

1 amendments thereto. If the principal is physically unable to sign the power
2 of attorney but otherwise competent and conscious, the power of attorney
3 may be signed by an adult designee of the principal in the presence of the
4 principal and at the specific direction of the principal expressed in the
5 presence of a notary public. The designee shall sign the principal's name to
6 the power of attorney in the presence of a notary public, following which
7 the document shall be acknowledged in the manner prescribed by K.S.A.
8 53-501 et seq., and amendments thereto, to the same extent and effect as if
9 physically signed by the principal; and

10 *(B) is signed and dated by the attorney in fact before a notary public*
11 *acknowledging that the attorney in fact or successor attorney in fact is the*
12 *person identified in the durable power of attorney as an attorney in fact*
13 *for the principal, that such person has read the "Notice to Person*
14 *Accepting the Appointment as Attorney in Fact," and that such person*
15 *understands and acknowledges the legal responsibilities imposed upon*
16 *such person as attorney in fact;*

17 *(4) the durable power of attorney contains the following warning*
18 *statement to the principal at the beginning of the durable power of*
19 *attorney, in not less than 14-point boldface type, or a reasonable*
20 *equivalent thereof:*

21 *"Notice to Person Executing Durable Power of Attorney.*

22 *A durable power of attorney is an important legal document. You*
23 *should read this durable power of attorney carefully. When effective, this*
24 *durable power of attorney will give your attorney in fact the right to deal*
25 *with property that you now own or might acquire in the future. If you do*
26 *not understand the durable power of attorney, or any provision of it, you*
27 *should ask your attorney to explain it to you {seek legal advice} prior to*
28 *signing the document"; and*

29 *(5) the durable power of attorney contains the following notice*
30 *statement to the attorney in fact at the conclusion of the durable power of*
31 *attorney, in not less than 14-point boldface type, or a reasonable*
32 *equivalent thereof:*

33 *"Notice to Person Accepting the Appointment as Attorney in Fact.*

34 *A person who is appointed an attorney in fact under a durable power*
35 *of attorney has no duty to exercise the authority conferred in the power of*
36 *attorney, unless the attorney in fact has agreed expressly in writing to act*
37 *for the principal in such circumstances. By acting or agreeing to act as the*
38 *attorney in fact under this durable power of attorney, you assume the*
39 *fiduciary and other legal responsibilities of an agent. This relationship*
40 *will continue until you resign or the durable power of attorney is revoked*
41 *or terminated. Your responsibilities shall include:*

42 *1. The legal duty to act according to the instructions from the*
43 *principal, or, where there are no instructions, solely in the best interests of*

1 *the principal, avoiding conflicts of interest that would impair your ability*
2 *to act in the principal's best interests.*

3 2. *Keeping the principal's funds and property separate and distinct*
4 *from any funds or assets you own or control, unless otherwise permitted*
5 *by law.*

6 3. *Keeping a record of all receipts, disbursements and transactions*
7 *made on behalf of the principal.*

8 4. *Disclosing your identity as an attorney in fact whenever you act*
9 *for the principal.*

10 *You may not use the principal's assets to benefit yourself or make gifts*
11 *to yourself or anyone else unless the principal has specifically granted you*
12 *that authority in the durable power of attorney. If you have been granted*
13 *that authority, you must act according to the instructions of the principal*
14 *or, where there are no such instructions, in the principal's best interests.*
15 *Failure to do so may result in criminal prosecution under the laws of the*
16 *state of Kansas. In addition to criminal prosecution, you may also be sued*
17 *in civil court.*

18 *You may resign by giving written notice to the principal and to any co-*
19 *attorney in fact, successor attorney in fact, or the principal's guardian if*
20 *one has been appointed.*

21 *If there is anything about this document or your responsibilities that*
22 *you do not understand, you should seek legal advice before accepting the*
23 *appointment."*

24 (b) (1) *All acts done by an attorney in fact pursuant to a durable*
25 *power of attorney shall inure to the benefit of and bind the principal and*
26 *the principal's successors in interest, notwithstanding any disability of the*
27 *principal. An attorney in fact shall use the principal's money, property or*
28 *other assets only in the principal's best interest and the attorney in fact*
29 *shall not use the principal's money, property or other assets for the benefit*
30 *of the attorney in fact.*

31 (2) *Any acts done by the attorney in fact not strictly in the principal's*
32 *best interest or the best interest of the principal's estate are in violation of*
33 *the Kansas power of attorney act, unless such acts are otherwise*
34 *specifically provided for in written detail in the power of attorney, and*
35 *may result in prosecution under the criminal laws of the state of Kansas.*

36 (3) *Any acts done by the attorney in fact to intimidate or deceive the*
37 *principal in procuring the power of attorney are in violation of the Kansas*
38 *power of attorney act may result in prosecution under the criminal laws*
39 *of the state of Kansas.*

40 (4) *A power of attorney executed by a person who does not have*
41 *capacity is invalid. In a criminal proceeding, the attorney in fact has the*
42 *burden of proving by clear and convincing evidence that the principal had*
43 *capacity. In a civil proceeding, if the party challenging the validity of the*

1 *power of attorney on the grounds of lack of capacity proves by a*
2 *preponderance of the evidence that, at the time the power of attorney was*
3 *executed, the principal was an elder person, the attorney in fact has the*
4 *burden of proving by a preponderance of the evidence that the principal*
5 *had capacity.*

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

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

12 (3) If a power of attorney is recorded any revocation of that power of
13 attorney must be recorded in the same manner for the revocation to be
14 effective. If a power of attorney is not recorded it may be revoked by a
15 recorded revocation or in any other appropriate manner.

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

19 (d) A person who is appointed an attorney in fact under a durable
20 power of attorney has no duty to exercise the authority conferred in the
21 power of attorney, unless the attorney in fact has agreed expressly in
22 writing to act for the principal in such circumstances. An agreement to act
23 on behalf of the principal is enforceable against the attorney in fact as a
24 fiduciary without regard to whether there is any consideration to support a
25 contractual obligation to do so. Acting for the principal in one or more
26 transactions does not obligate an attorney in fact to act for the principal in
27 subsequent transactions.

28 (e) The grant of power or authority conferred by a power of attorney
29 in which any principal shall vest any power or authority in an attorney in
30 fact, if such writing expressly so provides, shall be effective only upon: (1)
31 A specified future date; (2) the occurrence of a specified future event; or
32 (3) the existence of a specified condition which may occur in the future. In
33 the absence of actual knowledge to the contrary, any person to whom such
34 writing is presented shall be entitled to rely on an affidavit, executed by
35 the attorney in fact, setting forth that such event has occurred or condition
36 exists.

37 (f) *A person who in good faith contracts with, buys from or sells to an*
38 *attorney in fact is protected as if the attorney in fact properly exercised*
39 *such power, regardless of whether the authority of such person as the*
40 *attorney in fact has been terminated or invalidated.*

41 Sec. 3. K.S.A. 2013 Supp. 58-656 is hereby amended to read as
42 follows: 58-656. (a) An attorney in fact who ~~elects~~ *agrees* to act under a
43 power of attorney is under a duty to act in the interest of the principal and

1 to avoid conflicts of interest that impair the ability of the attorney in fact
2 so to act. A person who is appointed an attorney in fact under a power of
3 attorney who undertakes to exercise the authority conferred in the power
4 of attorney, has a fiduciary obligation to exercise the powers conferred in
5 the best interests of the principal, and to avoid self-dealing and conflicts of
6 interest, as in the case of a trustee with respect to the trustee's beneficiary
7 or beneficiaries. ~~The attorney in fact shall keep a record of receipts,~~
8 ~~disbursements and transactions made on behalf of the principal and shall~~
9 ~~not commingle funds or assets of the principal with the funds or assets of the~~
10 ~~attorney in fact.~~ In the absence of explicit authorization, the attorney in
11 fact shall exercise a high degree of care in maintaining, without
12 modification, any estate plan which the principal may have in place,
13 including, but not limited to, arrangements made by the principal for
14 disposition of assets at death through beneficiary designations, ownership
15 by joint tenancy or tenancy by the entirety, trust arrangements or by will or
16 codicil. Unless otherwise provided in the power of attorney or in a separate
17 agreement between the principal and attorney in fact, an attorney in fact
18 who ~~elects~~ agrees to act shall exercise the authority granted in a power of
19 attorney with that degree of care that would be observed by a prudent
20 person dealing with the property and conducting the affairs of another,
21 except that all investments made on or after July 1, 2003, shall be in
22 accordance with the provisions of the Kansas uniform prudent investor act,
23 K.S.A. 58-24a01 et seq., and amendments thereto. If the attorney in fact
24 has special skills or was appointed attorney in fact on the basis of
25 representations of special skills or expertise, the attorney in fact has a duty
26 to use those skills in the principal's behalf.

27 (b) On matters undertaken or to be undertaken in the principal's
28 behalf and to the extent reasonably possible under the circumstances, an
29 attorney in fact has a duty to keep in regular contact with the principal, to
30 communicate with the principal and to obtain and follow the instructions
31 of the principal.

32 (c) If, following execution of a durable power of attorney, a court of
33 the principal's domicile appoints a conservator, guardian of the estate or
34 other fiduciary charged with the management of all of the principal's
35 property or all of the principal's property except specified exclusions, the
36 attorney in fact is accountable to the fiduciary as well as to the principal.
37 The fiduciary has the same power to revoke or amend the durable power of
38 attorney that the principal would have had if the principal were not an
39 adult with an impairment in need of a guardian or conservator or both as
40 defined by subsection (a) of K.S.A. 59-3051, and amendments thereto.

41 (d) A principal may nominate by a power of attorney, a guardian or
42 conservator, or both, for consideration by the court. If a petition to appoint
43 a guardian or conservator, or both, is filed, the court shall make the

1 appointment in accordance with the principal's most recent nomination in
2 the power of attorney, so long as the individual nominated is a fit and
3 proper person.

4 (e) An attorney in fact shall exercise authority granted by the
5 principal in accordance with the instrument setting forth the power of
6 attorney, any modification made therein by the principal or the principal's
7 legal representative or a court, and the oral and written instructions of the
8 principal, or the written instructions of the principal's legal representative
9 or a court.

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

14 (g) On the death of the principal, the attorney in fact shall follow the
15 instructions of the court, if any, having jurisdiction over the estate of the
16 principal, or any part thereof, and shall communicate with and be
17 accountable to the principal's personal representative, or if none, the
18 principal's successors. The attorney in fact shall promptly deliver to and
19 put in the possession and control of the principal's personal representative
20 or successors, any property of the principal and copies of any records of
21 the attorney in fact relating to transactions undertaken in the principal's
22 behalf that are deemed by the personal representative or the court to be
23 necessary or helpful in the administration of the decedent's estate.

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

29 (i) *The attorney in fact shall maintain adequate records of receipts,*
30 *disbursements and transactions made on behalf of the principal and shall*
31 *not commingle funds or assets of the principal with funds or assets of the*
32 *attorney in fact.*

33 (j) (1) *Failure to maintain adequate records is negligently failing to*
34 *maintain such records as are necessary to disclose fully the nature of the*
35 *receipts, disbursements and transactions made by the attorney in fact on*
36 *behalf of the principal. Such records of receipts, disbursements and*
37 *transactions shall be maintained by the attorney in fact for five years after*
38 *the date on which such receipt, disbursement or transaction occurs.*

39 (2) *An attorney in fact who fails to maintain adequate records, as*
40 *defined in this subsection, may be liable for all costs, fees and expenses,*
41 *including reasonable attorney fees, incurred in acquiring or reproducing*
42 *such records of receipts, disbursements or transactions.*

43 (3) *If the attorney in fact is found to have commingled funds or assets*

1 *of the principal with the funds or assets of the attorney in fact, the attorney*
2 *in fact shall be liable to restore such funds or assets to the principal, and*
3 *shall be liable for all costs of recovering those funds or assets, including*
4 *reasonable attorney fees.*

5 Sec. 4. K.S.A. 58-664 is hereby amended to read as follows: 58-664.

6 (a) The repeal of the uniform durable power of attorney act, K.S.A. 58-610
7 through 58-617 and the repeal of K.S.A. 58-601 and 58-602, shall not
8 affect the validity of powers of attorney created under those sections, the
9 validity of the acts and transactions of attorneys in fact under authority
10 granted in powers of attorney executed under those sections, or the duties
11 of attorneys in fact under powers of attorney executed under those
12 sections.

13 (b) *Powers of attorney created and fully executed by the principal*
14 *prior to July 1, 2014, shall be governed by the laws in existence at the*
15 *time such powers of attorney were created and fully executed.*

16 Sec. 5. K.S.A. 58-651 and 58-664 and K.S.A. 2013 Supp. 58-652 and
17 58-656 are hereby repealed.

18 Sec. 6. This act shall take effect and be in force from and after its
19 publication in the statute book.