KANSAS JUDICIAL COUNCIL

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TO: **House Judiciary Committee**
FROM: **Kansas Judicial Council – Mark Knackendoffel**
DATE: **January 28, 2020**
RE: **2020 HB 2500 amending the Kansas Power of Attorney Act**

The Kansas Judicial Council and its Probate Law Advisory Committee (Committee) recommend HB 2500, which amends the Kansas Power of Attorney Act, primarily K.S.A. 58-658. This bill is intended to address the problem of entities that improperly refuse to accept durable powers of attorney. The topic initially came to the attention of the Committee because members were hearing anecdotally about problems with banks and other entities requiring customers to use the entity's own form or rejecting documents that are more than a couple of years old. This is especially problematic when the principal has already lost capacity and can't execute a new power of attorney. From Committee members' experience, these problems can often be resolved by working up the chain of command at the bank, but this can be time-consuming and expensive for the client.

After further inquiry to several advocacy groups confirmed that this issue is not uncommon, the Committee decided to continue its study of the problem. The Committee reviewed laws from other states, including the Uniform Power of Attorney Act, which has been adopted in 26 states. The Committee also invited input from other interested groups including the Kansas Bankers Association, the Kansas Bar Association, and the Attorney General's office.

The proposed amendments to K.S.A. 58-658, which are found in Section 2 of the bill, are drawn from Sections 119 and 120 of the Uniform Power of Attorney Act (UPOAA). The amendments are intended to encourage acceptance of powers of attorney by protecting third parties that accept such powers in good faith and by sanctioning third parties that refuse to accept powers of attorney without a legitimate reason.

Like the UPOAA, current Kansas law already provides protection for persons that accept an acknowledged power of attorney in good faith and without actual knowledge that the power of attorney is revoked, terminated, or invalid or that the attorney in fact has engaged in any impropriety. However, the addition of K.S.A. 58-658(a)(4) should make crystal clear that a third party has no duty to inquire whether the attorney in fact is exceeding or improperly exercising his or her powers. This amendment is specifically intended to reject ambiguous and potentially contrary language in *Maenhoudt v. Stanley Bank*, 34 Kan. App. 2d 150, Syl. ¶ 4, 115 P.3d 157 (2005), stating that a third party may rely on a power of attorney "as long as there are no circumstances that would indicate a potential of misappropriation of the principal's funds."

New subsection (b) makes clear that third parties continue to have an independent duty to report abuse, neglect or exploitation under K.S.A. 39-1431.

The amendment at subsection (e)(2) would allow a third party to request a sworn certification from the attorney in fact as to any factual matter regarding the principal, attorney in fact, or power of attorney. For example, the attorney in fact might be asked to attest that the power of attorney remains valid and has not been revoked. This represents an additional protection for third parties.

New subsections (f) through (h) set out when third parties can refuse a power of attorney and impose sanctions for a refusal that violates the statute. Subsection (f) prohibits a third party from requiring the use of a new and different form for the power of attorney. Subsection (g) sets out when a third party must accept a power of attorney. And subsection (h) imposes liability for a third party who refuses to accept a power of attorney in violation of the statute.

Finally, HB 2500 requires that forms for a power of attorney and an attorney in fact's certification be substantially in compliance with forms created by the Judicial Council. The hope is that having standardized forms in common use will enhance the rate of acceptance by third parties.

The members of the Judicial Council Probate Law Advisory Committee are:

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