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Kansas Judicial Center  
301 S.W. Tenth Street, Suite 140  
Topeka, Kansas 66612-1507

Telephone (785) 296-2498  
Facsimile (785) 296-1035

judicial.council@ks.gov  
www.kansasjudicialcouncil.org

EXECUTIVE DIRECTOR  
NANCY J. STROUSE

STAFF ATTORNEYS  
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**TO: Senate Judiciary Committee**  
**FROM: Kansas Judicial Council – Mark Knackendoffel**  
**DATE: March 12, 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. 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 and rely upon 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 may reject 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.

### House Committee Amendments

The House Judiciary Committee made several amendments to the bill, most at the request of the Attorney General's Office or the Kansas Land Title Association. For the most part, the Committee has no objection to the amendments. In particular, the Committee believes the amendments to Section 1, which address the validity of powers of attorney executed before the effective date of the amendments, are especially helpful.

The Committee does take issue, however, with the addition of provisions allowing a third person to request and rely on an opinion of counsel from the third person's own attorney. The Committee understands that this language was based, in part, on similar language in the Uniform Power of Attorney Act (UPOAA), but it differs from the UPOAA in that the UPOAA allows the third person to request that the opinion of counsel be provided by the agent (rather than the third party's own attorney).

The Committee believes that the opinion of counsel language in the bill as currently drafted is problematic. There is no need to create a statutory provision to allow a third person to ask for their own attorney's opinion, and some of the provisions simply don't make sense in that context.

On the other hand, the Committee is not in favor of the UPOAA approach either. The Committee is concerned that the UPOAA approach could lead to potential abuse if third parties started requiring opinions of counsel from the agent in every instance. This could become

unreasonably burdensome for consumers and obviate the other provisions of the Act that were intended to encourage acceptance of DPOAs.

The Committee believes that a good compromise is to allow a third person to request and rely on an opinion of counsel to be provided by the agent, but to prohibit a third person from requiring an opinion of counsel from the agent. To accomplish this, the Committee would propose striking the phrase, “the third person’s” at page 4, line 43, and also striking the phrase, “an opinion of counsel” in subsection (g)(4) at page 5, line 29. (Subsection (g)(4) would otherwise allow a third person to reject a DPOA if an opinion of counsel is not provided upon request.) This would constitute a slight deviation from the UPOAA language. A proposed balloon amendment is attached.

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

Sarah Bootes Shattuck, Chair	Ashland
Eric Anderson	Salina
Shannon Barks	Kansas City, MO
Cheryl Boushka	Kansas City, MO
Emily Donaldson	Topeka
Christine Graham	Kansas City, MO
Mark Knackendoffel	Manhattan
Hon. Edward Larson	Topeka
Hon. James McCabria	Lawrence
Kent Meyerhoff	Wichita
Rep. Fred Patton	Topeka
Philip Ridenour	Cimarron
Dave Snapp	Dodge City

1 or the power of attorney was for any other reason void or voidable, if the  
 2 power of attorney appears to be regular on its face;  
 3 ~~(13)~~~~(14)~~(13) whether the principal is alive;  
 4 ~~(14)~~~~(15)~~(14) whether the principal and attorney in fact were married  
 5 at or subsequent to the time the power of attorney was created and whether  
 6 an action for annulment, separate maintenance or divorce has been filed by  
 7 either party; or  
 8 ~~(15)~~~~(16)~~(15) the truth or validity of any facts or statements made in  
 9 an affidavit of the attorney in fact or successor with regard to the ability or  
 10 capacity of the principal, the authority of the attorney in fact or successor  
 11 under the power of attorney, the happening of any event or events vesting  
 12 authority in any successor or contingent attorney in fact, the identity or  
 13 authority of a person designated in the power of attorney to appoint a  
 14 substitute or successor attorney in fact or that the principal is alive.

15 (b) *Nothing in subsection (a) shall relieve a third person of any duty*  
 16 *to report abuse, neglect or exploitation pursuant to K.S.A. 39-1402 or 39-*  
 17 *1431, and amendments thereto, and making such report shall relieve the*  
 18 *third person of any liability for not accepting a power of attorney as*  
 19 *provided in subsection (f)(6).*  
 20 (c) A third person, in good faith and without liability to the principal  
 21 or the principal's successors in interest, even with knowledge that the  
 22 principal is disabled, may rely and act on the instructions of or otherwise  
 23 contract and deal with the principal's attorney in fact or successor attorney  
 24 in fact acting pursuant to authority granted in a durable power of attorney.  
 25 (e)(d) A third person that conducts activities through employees shall  
 26 not be charged under this act with actual knowledge of any fact relating to  
 27 a power of attorney, nor of a change in the authority of an attorney in fact,  
 28 unless the information is received at a home office or a place where there  
 29 is an employee with responsibility to act on the information, and the  
 30 employee has a reasonable time in which to act on the information using  
 31 the procedures and facilities that are available to the third person in the  
 32 regular course of its operations.

33 (d)(e) A third person, when being requested to engage in transactions  
 34 with a principal through the principal's attorney in fact, may:

- 35 (1) Require the attorney in fact to provide specimens of the attorney
- 36 in fact's signature and any other information reasonably necessary or
- 37 appropriate in order to facilitate the actions of the third person in
- 38 transacting business through the attorney in fact;
- 39 (2) **require request and rely upon a certification by the attorney in**
- 40 **fact to provide a certification, provided under penalty of perjury, of any**
- 41 **factual matter concerning the principal, attorney in fact or power of**
- 42 **attorney;**

43 (3) **request and rely upon an opinion of** ~~the third person's~~ **counsel**

*delete*

1 **as to any matter of law concerning the power of attorney if the third**  
 2 **person provides in a writing or other record the reason for the**  
 3 **request;**

4 (4) require the attorney in fact to indemnify the third person against  
 5 forgery of the power of attorney, by bond or otherwise. If the power of  
 6 attorney is durable as defined in ~~subsection (b)~~ of K.S.A. 58-652(a), and  
 7 amendments thereto, and if either the principal or the attorney in fact  
 8 seeking to act is and has been a resident of this state for at least two years,  
 9 and if the attorney in fact has executed in the name of the principal and  
 10 delivered to the third person an indemnity agreement reasonably  
 11 satisfactory in form to such third person, no such bond shall be required;  
 12 and

13 ~~(5)~~~~(5)~~ prescribe the place and manner in which the third person  
 14 will be given any notice respecting the principal's power of attorney and  
 15 the time in which the third person has to comply with any notice.

16 (f) *A third person may not require an additional or different form of*  
 17 *power of attorney for authority granted in the power of attorney*  
 18 *presented.*

19 (g) *A third person shall accept a power of attorney acknowledged in*  
 20 *the manner prescribed by K.S.A. 53-501 et seq., and amendments*  
 21 *thereto, unless:*

22 (1) *The person is not otherwise required to engage in a transaction*  
 23 *with the principal in the same circumstances;*

24 (2) *engaging in a transaction with the attorney in fact or principal in*  
 25 *the same circumstances would be inconsistent with federal law;*

26 (3) *the person has actual knowledge of the termination of the*  
 27 *attorney in fact's authority or of the power of attorney before the exercise*  
 28 *of the power;*

29 (4) *a request for information, certification* ~~(an opinion of counsel)~~ *for*  
 30 *indemnification under subsection (e) is refused;*

31 (5) *the person in good faith believes that the power is not valid or*  
 32 *that the attorney in fact does not have the authority to perform the act*  
 33 *requested, whether or not a certification or an opinion of counsel under*  
 34 *subsection (e) has been requested or provided; or*

35 (6) *the person makes, or has actual knowledge that another person*  
 36 *has made, a report under K.S.A. 39-1402 or 39-1431, and amendments*  
 37 *thereto, stating a good faith belief that the principal may be subject to*  
 38 *physical or financial abuse, neglect, exploitation or abandonment by the*  
 39 *attorney in fact or a person acting for or with the attorney in fact.*

40 (h) *A third person that refuses to accept a power of attorney*  
 41 *acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and*  
 42 *amendments thereto, in violation of this section is subject to a court*  
 43 *order mandating acceptance of the power of attorney. Reasonable*

*delete*