Approved: 2/17/11
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on January 31, 2011, in Room 345.

All members were present.

Committee staff present:
Jill Wolters, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Tamera Lawrence, Office of the Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Loren Snell, Attorney General Office
Kent Meyerhoff, Executive Committee of KBA Real Estate, Probate and Trust Section
Kirk Nystrom, Attorney, Topeka
Helen Pedigo, Special Council to Chief Justice

Others Attending:
See attached list.

There were no bill introductions.

The Hearing on **HB - 2068 - Amending the Kansas power of attorney act regarding durable power of attorney and duties of the attorney in fact,** was opened.

Loren Snell, Deputy Attorney General and Director of the Medicaid Fraud and Abuse Division of the Attorney General's Office, spoke to the committee as a proponent. He explained their need to participate in meetings with the Kansas Judicial Council Probate Law Advisory Committee in the review and drafting of the amendments in this bill. Their goal was to find a balance between the need to maintain the ease of acquiring and utilizing DPOA's (Durable Power of Attorney) and still protect our vulnerable citizens from exploitation. He stated this bill will also serve as an education tool to give notice to the requirements and responsibilities of a DPOA for all concerned. (Attachment 1)

Written testimony in support of this bill was provided by the following:
Joe Ewert, Kansas Association of Homes and Services for the Aging (KAHSA). (Attachment 2)
Robert Harvey, AARP-Diversity Counsel Member Volunteer (Attachment 3)

Kent Meyerhoff, Executive Committee of KBA Real Estate, Probate and Trust Section, addressed the committee in opposition of the bill. While he agrees abuse of fiduciary authority by individuals acting as Agents has increased over the last several decades, he is dubious as to whether this bill will have a substantive ameliorative effect on the very problem it is intended to address. He offered many comments on the content of the bill. (Attachment 4)

After many questions and answers, Representative Colloton asked Mr. Meyerhoff if he would provide the additional language to the Revisors for preparation of a balloon to cover some of the issues he would like to see changed before passage.

Kirk Nystrom, Attorney, Topeka, spoke in opposition of the bill, stating he has worked in the areas of estate planning and probate for thirty years and this proposed amendment has some language that will have the effect of making Powers of Attorney void or unenforceable. He stated he has prepared thousands of these forms and they were only misused a few times, and that this is a problem not in search of a solution. He also agreed with the problem of the "do it yourself" forms you can purchase at the store or get off the internet. (Attachment 5)

The Hearing on **HB 2068** was closed.

The Hearing on **HB 2071 – Inheritance rights; automatically revoking ex-spouses inheritance rights**

Minutes of the House Judiciary Committee at 3:30 p.m. on January 31, 2011, in Room 345.
upon divorce, was opened.

Kent Meyerhoff, Attorney, presented testimony on behalf of the Kansas Judicial Council as a proponent. He stated Kansas law addressed the divorce issue to require that divorce decrees provide for any changes in beneficiary designation, however, statute K.S.A. 30-1610 still requires the obligation to actually change the beneficiary by the filing of such change with the insurer in accordance with terms of the policy. Although K.S.A. 59-610 has provided a provision whereby a will for a spouse is automatically revoked if the spouses divorce after the will is executed, it does not cover the more current methods such as revocable trusts or placing "pay on death" or "transfer on death" designations on most of their property so the property does not pass by the will. (Attachment 6)

After discussion, Chairman Kinzer asked the Revisor Staff to prepare a balloon that states everything would be revoked and if the desire was for the divorced spouse to remain as a beneficiary, it would require the initiation of notification to the insurers.

There were no opponents.

The Hearing on **HB 2071** was closed.

The Hearing on **HB 2070 - Requiring plaintiff or plaintiff's attorney to notify defendants of payment of appraisers' award within 15 days** was opened.

An overview of the bill was presented by Staff Revisor, Tamera Lawrence.

Due to the icy roads, Alice Adams, Clerk of the District Clerk, Geary County, Eighth Judicial District, was unable to attend, therefore, Helen Pedigo, Special Counsel to the Chief Justice, presented testimony on her behalf as a proponent. She stated this bill involves condemnation procedures and this amendment would eliminate duplicate reporting by the clerks as they have found the plaintiff's attorneys are generally sending the notice as well. She stated that the responsibility should lie with the attorneys, as does the rest of the process. (Attachment 7)

The Hearing on **HB 2070** was closed.

Chairman Kinzer announced the meeting scheduled for tomorrow, February 1, 2011, would be canceled due to the announcement that Legislative Session was being canceled on account of the incoming blizzard conditions.

Chairman Kinzer also announced the play at the Women's Prison has been canceled for this evening due to weather conditions.

The next meeting is scheduled for February 2, 2011.

The meeting was adjourned at 5:25 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: 1-31-11

NAME	REPRESENTING
Randy Hearrell	Judicial Council
[illegible]	Judicial Council & KBA Repr Code
Joe Molna	KS BAR ASSN.
Lisa Wilson	OJA
Helen Pedigo	OJA
RJ Wilson	KSAJ
Loren Snell	KSAG
Whitney James	KS Bar Assn.
Jeff Milosh	Capitol Strategies

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

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House Judiciary Committee
House Bill 2068
Deputy Attorney General Loren Snell
January 31, 2011

Dear Chairman Kinzer and Members of the Committee:

I would like to begin by thanking you for the opportunity to appear today on behalf of Attorney General Derek Schmidt and to testify in support of House Bill No 2068. My name is Loren Snell, and I am a Deputy Attorney General and the Director of the Medicaid Fraud and Abuse Division of the Kansas Attorney General's Office.

While the primary mission of the Kansas Medicaid Fraud and Abuse Division is the pursuit of fraud committed against the Kansas Medicaid Program, our Division is also charged with investigating and prosecuting physical abuse, financial exploitation and neglect perpetrated against patients in residential care facilities operating in the State of Kansas. This is why our office felt compelled to participate in the meetings of the Kansas Judicial Council Probate Law Advisory Committee in the review and drafting of the amendments proposed in HB 2068, and why I am testifying before you today.

During my service in the Kansas Medicaid Fraud and Abuse Division I have had many opportunities, too many, to review case files of individuals who were the unsuspecting victims of financial exploitation. Exploitation that has occurred despite their best efforts to protect their assets. Exploitation that has most often occurred at a time in their lives when they lack the ability to fully understand or comprehend the full impact of what has taken place. Unsuspecting individuals execute DPOAs authorizing relatives, friends or others to handle their financial affairs, placing their complete and total trust in those individuals to act according to their best interests. Within a relative short period of time, their entire life savings are spent, leaving them with absolutely nothing. Many times this occurs without the victim even being aware that they are being victimized, whether that is due to a loss of capacity or just being too trusting of their attorney in fact. By the time that they or someone on their behalf learns of the victimization, the money is often spent and the opportunity to recover the funds is long since passed.

An inherent conflict exists between the basic assumptions of agency law and the operation of DPOAs. Agency law presumes that the person executing a power of attorney will retain the capacity to oversee the agent appointed to manage his or her affairs. A DPOA is designed to do the exact opposite; it creates a situation where the agent appointed continues to have the power to manage and control assets even if the grantor loses the ability to oversee. Once the person granting the power of attorney becomes incapacitated, there is essentially no oversight or supervision of the person managing his or her affairs. This can lead to a situation where the appointed agent exploits the finances of the incapacitated principal for their own benefit.

Each year our office receives many referrals of cases involving this very scenario, while at the same time, even more cases don't make it to our office because they simply do not meet the federal requirements necessary for our unit to be able to become involved. Since January of 2000, the Medicaid Fraud and Abuse Division has opened active investigations in forty-four (44) cases involving suspected financial exploitation through the use of a DPOA. All but four (4) of these cases were opened since 2005, with twenty (28) of those cases being reported in the past three (3) years alone. Even more unfortunate, and contrary to what some might have you believe, this is a growing problem. According to statistics provided by the Abuse, Neglect and Exploitation Unit of the Kansas Attorney General's Office, 179 cases, which equates to almost sixty percent (60%) of the confirmed adult case findings from last year, involved financial exploitation and fiduciary abuse. All studies and reports seem to indicate that as our population continues to age, coupled with the difficult economic times, the problem of financial exploitation of our elderly adults will become more pervasive.

Looking at the problem economically, from the State's vantage point, it is a reason for serious concern. As if it is not enough that our victims lose their entire life savings that they have worked so hard throughout their lives to accumulate; now they must rely upon the State for their care. At one point they had sufficient finances saved to pay for their accommodations and care for the remainder of their lives. Because of the actions of an unscrupulous attorney-in-fact they are now forced to rely on the State of Kansas to pay for their care. Often times the Kansas Medicaid program is looked to in order to pay for skilled nursing facilities, doctor services, prescriptions, and any other medically necessary services. While payments are being made by the State, on the victim's behalf, those are dollars that could have been used to pay for services for someone else, someone who truly is in need and never had the financial resources available.

House Bill 2068 does not propose to solve all exploitation problems. In fact, I am not sure there is any way that we could possibly do away with all exploitation. What it does do is propose changes that will result in more awareness and guidance in the use of the DPOA. It requires steps to be taken by all involved acknowledging the expectations and requirements that go along with executing a DPOA, while at the same time preserving the personal nature of the DPOA, as well as the ease of use. The hope is that this will serve as a deterrent to would-be thieves hoping to take advantage of people once they reach the later stages of life that are simply looking for someone to assist them in their day-to-day activities.

DPOAs are created and governed by state statutes, and therefore the requirements to create a DPOA vary from state to state. In general, the requirements to create a DPOA are simple: the principal must be competent at the time the DPOA is created, the durable power of attorney must be in writing and signed by the principal, and the principal must express the intention that the power be durable. A number of states today also require the power of attorney to be notarized or witnessed, and some require both. In Kansas, the current statutes require only that:

1. The power of attorney be described as a DPOA,
2. The power of attorney be signed by the principal,
3. Dated and acknowledged by the principal in the same manner as K.S.A. 53-501 et.seq. (Notary statutes)

Careful consideration was given to these proposed amendments contained in HB 2068 by many experts in the field of probate law, many of whom practice with these very documents on a daily basis. The discussion repeatedly came back to making sure that there was a balance between the need to maintain the ease of acquiring and utilizing the DPOA, with the increasing desire to protect our vulnerable citizens from exploitation.

We have proposed additional requirements to the DPOA that will serve to put both the principal and the proposed attorney in fact on notice. The idea is not to try to intimidate or scare someone from utilizing this very valuable estate tool, but rather to foster an awareness of exactly what is involved in this process and the responsibilities that are being given and received. This includes providing the principal with every opportunity to understand the breadth of the power being conferred upon the attorney in fact, as well as reminding them to seek advice of an attorney if they do not understand any aspect of the DPOA. While this is generally not a problem with principals that are working through an attorney to draft and execute the DPOA, for those that are resorting to online services or fill-in-the-blank forms purchased at your local office supply store, it certainly is a serious concern.

Having recently been questioned by my great uncle about the process of obtaining a DPOA, I came to realize just how dangerous these forms can be when placed in the hands of people that simply do not understand them. In order to prevent people like my great uncle from becoming the next victims, it is imperative that we do what we can to place them in the safest position possible. The same is true for the attorney in fact. It is important that they too understand their responsibilities as an attorney in fact. The notice proposed in HB 2068 will give them the basic information, while at the same time encouraging them to seek advice of counsel if they have questions or concerns. This is also the place where we have chosen to put would be criminals on notice that if they do attempt to take advantage of a principal through their position as attorney in fact, they may be subject to criminal prosecution according to the laws of the State.

The common misperception throughout the state seems to be that exploitation committed by an attorney-in-fact, acting under the color of the DPOA, is a civil matter that falls outside of the purview of the criminal courts. While I would openly disagree with this perception, and have successfully prosecuted or supervised prosecution of a number of these cases, I acknowledge that this perception exists nonetheless. This simple statement puts the world on notice, along with prosecutors throughout the state, that these matters are not simply civil matters, and that appropriate prosecutorial steps may be taken when warranted by the law. We understand that there may be some concern by placing such a direct statement in the DPOA and that it might serve to scare off would be attorneys in fact. On the other hand, any attorney in fact that is acting within the scope of their power, and according to the best

interests of the principal has nothing to worry about. Those who should be concerned by this notice are those that are entering into this agreement looking at it as an opportunity to supplement their own income or assets with the assets of the principal.

A concern raised to the committee was how to ensure that the attorney in fact is aware, not only of their appointment as the attorney in fact, but also of their responsibilities. In order to achieve this it was decided that the simplest method would be to require an acknowledgment by the attorney in fact in the presence of a notary public. This would be a separate section at the end of the document, placed at the bottom of the required notice. In order for the DPOA to become effective, and for the attorney in fact to have any power to act accordingly, they must execute the acknowledgement identifying them as the proposed attorney in fact, and positively stating that they have read and understand the proposed notice. For the principal that desires to retain their privacy with regards to their appointments, this will respect such privacy. At the same time, it will serve as evidence that the attorney in fact was placed on notice upon agreeing to take on their trusted position to act on behalf of the principal.

The final amendments set forth in Section 3 of HB 2068 are aimed at completing what was begun during the 2009 legislative session. In 2009 the Legislature amended the power of attorney statutes to require that the attorney in fact had to maintain records associated with their service as attorney in fact, and prohibited the commingling of funds. That was a well intentioned first step, but may require more in order to truly be effective as a measure to prevent fraud or exploitation. For the attorney in fact that is performing according to the DPOA, and is truly acting for the benefit of the principal, keeping these records is generally not a problem. Where this has become an issue is in the cases involving the attorney in fact who tries to cover up improper dealings. These amendments in Section 3 of HB 2068 were proposed to impose potential civil liability upon the attorney in fact for failure to maintain the necessary records. The proposed remedy is to make the attorney in fact liable for the costs, fees and expenses, including reasonable attorney fees, incurred in acquiring or reproducing such records. As with any case of this sort, the records are very important in uncovering the events leading up to any allegations of misdealing. In addition to liability for costs to acquire and reproduce records, the attorney in fact may also face liability for commingling his or her personal funds or assets with those of the principal. IN that instance, the attorney in fact would be liable for costs associated with restoring such funds or assets to the principal, including reasonable attorney fees.

It is important to recognize that there is an impact to financial exploitation that can be felt well beyond the unsuspecting victims. Nursing homes and other related facilities throughout the state are left to deal with bills that go unpaid for services provided to their clients without remuneration from the attorney in fact responsible for taking care of those expenses. There is a widespread impact on every citizen of the State of Kansas, the taxpayers, as they are called upon to foot the bill for more citizens being placed upon the Medicaid rolls. Then there are those individuals that are on Medicaid, those individuals that are forced on to waiting lists for funds to become available to pay for their services while our victims, left with no place to turn, are forced to accept Medicaid benefits.

Careful consideration and discussion, by all involved in the committee meetings, was given to the changes being proposed in this legislation. In fact, as is often the case, many suggestions were left out of the bill that is before you today because of the lengthy, yet productive, debates that were held. The changes being proposed will serve to create an awareness and provide guidance, for those granting and those receiving powers under a DPOA, without dramatically impacting the ability to utilize these very important documents. While we do not profess to have created legislation that will end all financial exploitation of the elderly in Kansas, we do believe it is a very positive step in the right direction and will help to better protect our most vulnerable citizens from future victimization. On behalf of the very distinguished members of the Kansas Judicial Council Probate Law Advisory Committee and Kansas Attorney General Derek Schmidt, I encourage you to report HB 2068 out of committee favorably, as written.

Respectfully,

OFFICE OF THE ATTORNEY GENERAL
DEREK SCHMIDT

Loren F. Snell Jr.,
Deputy Attorney General, Director
Kansas Medicaid Fraud and Abuse Division

KAHSA
creating the future of aging services

To: Representative Lance Kinzer, Chair, and Members House Judiciary Committee.
From: Joe Ewert, KAHSA Government Affairs Director
Date: January 31, 2011
Re: HB 2068

Testimony in Support of HB 2068

Thank you Chairman Kinzer, and members of the Committee, for this opportunity to provide testimony in support of HB 2068. I am Joe Ewert, and I am the Government Affairs Director for the Kansas Association of Homes and Services for the Aging. KAHSA represents 160 not-for-profit long term care provider organizations throughout the state. 20,000 Kansans are served by our members, which include retirement communities, nursing homes, hospital-based long term care units, assisted living residences, senior housing and community service providers.

Durable Power of Attorney are valuable instruments and are used extensively in our field. Unfortunately, our members are witnessing a growing trend of individuals operating as Powers of Attorney who simply do not distinguish a difference between the funds of their principal, and those of their own. While the overwhelming majority of individuals holding a Power of Attorney operate solely in the best interest of their principal, we are experiencing a dramatic number of cases in which attorneys in fact refuse to pay healthcare, pharmacy and other bills of their principal and instead use the elder's resources for their own personal pleasure and benefit. Victims of fiduciary abuse are often left destitute, in mental anguish, and in increased jeopardy because they cannot pay for necessary services to maintain their health and safety. Too often fiduciary abuse is not considered a crime by those involved.

In 2009, the Legislature passed SB 45, which prohibited a power of attorney from comingling the funds of their principal with their own, and required a power of attorney to maintain a record of the transactions they make from their principal's accounts. HB 2068 further strengthens power of attorney instruments by clarifying the responsibilities, and restrictions of their use, and establishing measures to increase accountability for those who refuse to act responsibly as a power of attorney.

KAHSA has worked with its members to increase education among older Kansans, and their powers of attorney as to the legal responsibilities and limitations placed on power of attorney instruments, and we continue to promote early intervention practices in financial abuse cases. HB 2068 will be helpful in addressing this statewide issue, and urge the committee to pass this bill favorably this year.

Thank you for addressing this bill. I would be pleased to answer questions regarding our interest in this matter.

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House Judiciary
Date 1-31-11
Attachment # 2

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January 30, 2011

The Honorable Lance Kinzer, Chair
House Judiciary Committee

Reference: HB 2068 Kansas Power of Attorney Act.

Good afternoon Chairman Kinzer and members of the House Judiciary Committee. My name is Robert Harvey and I serve as a member of the AARP Kansas Diversity Council. I was previously an AARP National Policy Council member. That council develops and makes public policy recommendations to the AARP Board of Directors regarding AARP's federal, state and local legislative and regulatory issues. In making public policy recommendations the NPC studies public policy options and considers opinions of members, guidance of staff and analysis from nationally-renowned policy experts. On behalf of our 341,000 plus Kansas members, we thank you for this opportunity to express our support of HB 2068.

AARP has long been the champion of personal and legal rights and believes that there should be strong legal protection against all forms of exploitation and abuse of incapacitated and vulnerable adults. Accordingly, AARP Kansas strongly supports HB 2068 that aims to highlight the significance of a durable power of attorney to the principal, and clearly explain the responsibilities and duties to the appointed attorney in fact.

Additionally, the record keeping requirements clearly express the prohibition against commingling or misuse regarding the funds or assets of the principal. Specifically declaring that misuse, if found, imposes a liability to repay not only the funds, but associated costs provides both an important warning, in addition to a valuable tool should abuse occur.

AARP Kansas believes HR 2068 provides modifications in Kansas Power of Attorney law that will deter wrongdoing by agents and provide legal remedies for such wrongdoing. We support this proposal and offer any assistance to the committee that will promote enactment.

We respectfully request your support on this bill.

Robert Harvey

House Judiciary
Date 1-31-11
Attachment # 3

Presentation Before the Judiciary Committee of the Kansas House of Representatives

House Bill 2068

Presenter: Kent Meyerhoff

Date: January 31, 2011

On Behalf of: Executive Committee of KBA Real Estate, Probate and Trust Section

Section Comments

The Executive Committee of the Real Estate, Probate and Trust Section of the Kansas Bar Association (the Section) shares the Attorney General's (AG's) concerns about the abuse of financial powers of attorney by "attorneys in fact" (Agents). Several factors have contributed to this situation, including the accessibility of forms off the internet, a "do it yourself" philosophy promulgated by internet ads, and some would no doubt say, perhaps even a decline in our moral and social fabric that fosters their abuse. Whatever the reasons, despite only being a small percentage of circumstances, abuse of fiduciary authority by individuals acting as Agents has unquestionably increased over the last several decades.

The Section fully appreciates the fact that House Bill 2068 (the Bill), which is the product of several meetings between the AG's office and the Probate Advisory Committee of the Judicial Council (the Council), is designed to address this problem. The AG's office and the Council are certainly to be commended for their efforts. Nonetheless, the Section has very serious concerns regarding the Bill.

As an initial comment, the Section is quite dubious as to whether the Bill will have any substantive ameliorative effect on the very problem it is intended to address. If that was the Section's only concern, the Bill's impact would be merely benign. However, the Section believes that the Bill will have significant unintended adverse social and legal consequences on the proper usage of financial powers of attorney. Such adverse consequences, which are discussed below, are likely to more than offset any tangible benefits which might conceivably be achievable by the Bill in mollifying abuses of financial powers of attorney. In addition, the Section believes there are significant issues regarding the wording in some of its provisions, also which are more fully addressed below.

The Section respectfully submits that its breadth of experience provides for a well reasoned analysis. And no doubt the passage of the Bill would economically benefit its members. If the Bill was passed in its present form and actually achieved its desired objective, legal counsel would be sought by more principals and agents prior to executing powers of attorney. Whether it achieved its objective or not, legal issues raised by problematic language in the Bill also would be in need of legal opinions and potential judicial resolution. Nonetheless, the Section believes it has a higher responsibility in placing such concerns above any economic benefit that might otherwise inure to its members by its passage.

It should be acknowledged by the Section at the outset that neither the Section as a whole, nor the Kansas Bar Association, has yet taken a formal position either in support of, or in opposition to, the Bill.

Source of the Problem

It is beyond reasonable debate that financial powers of attorney drafted by attorneys are rarely the source of the problem. Clients are normally well advised by their counsel of the authority they are granting to Agents and the pros and cons of using family members versus independent parties to serve as Agents. Queries are also typically made by such counsel as to the individual circumstances and personal characteristics of Agents clients have a predilection to select. Finally, attorneys are charged with the responsibility of determining the competency of their clients.

Nor is it likely that, bereft of legal advice, principals who independently execute power of attorney forms they have gathered from the Internet or other sources, and their Agents who execute them, are unaware of the general authority being granted to the Agent and the responsibilities the Agent has to act for the benefit of the principal. Finally, even in the absence of legal advice, it would also appear to be highly unlikely that there is a significant percentage of Agents who exercise their authority for their own benefit because they were unaware that such actions were in violation of the terms of the instrument and their fiduciary responsibilities.

Nonetheless, the principal thrust of the Bill assumes the foregoing circumstances to be the principal genesis of the problem. Certainly, there also can be questions of competency when legal counsel is not involved; however, the Bill does not address that issue.

Unquestionably, it is nefarious individuals and others who give little to no deference to their legal responsibilities as Agents that are the root of the problem. Unfortunately, given that Agents act independently, without supervision, as more fully discussed below, no statutory efforts are likely to be effective in ameliorating this problem. Such illegal activities are already subject to both civil and criminal penalties and it equally highly doubtful that a significant percentage of Agents misappropriating the principal's money or assets under powers of attorney are simply unaware that there could be potential adverse legal and criminal consequences.

Intractability of the Problem

Although there is a palpable abuse of fiduciary authority by Agents and any well reasoned approach which has a realistic prospect of reducing the problem should be welcomed, it should equally be acknowledged that this occurs in only a small minority of circumstances. Yet these are 100% of the situations the AG encounters, almost all of which would involve individual, as opposed to corporate, Agents. As noted above, it is highly unlikely that any significant percentage of the abuse the AG faces is the result of Agents failing to understand their legal responsibilities or principals not understanding the authority they are granting. With very little question, most of such abuse is the result of principals who do not have the advice of an attorney and Agents of who will choose to intentionally violate the terms of the instrument irrespective of the procedures in its execution.

Statutory revisions would have to reduce the frequency of Agents of ill intent procuring such forms and influencing principals, particularly principals of limited capacity, to sign the form before a disinterested notary without benefit of legal counsel. Legislators understandably feel pressure when constituents or governmental agencies tell them "something should be done" with regard to any particular problem. However, any meaningful legislation which would significantly reduce fiduciary abuse, beyond extant statutory and legal remedies, is likely to remain illusory. There is no selection process that could legally, practically, politically, or even rightfully, be legislatively imposed that would "wean out" individuals who are either financially incompetent or possessed of ill intent from serving as Agents or prevent individuals from executing readily accessible powers of attorney without advice of legal counsel. As much as all of us would wish it to be otherwise, this is the grim reality. It is the same intractable problem that exists in analogous situations when joint tenants and trustees of revocable trusts abuse their authority or improperly exploit their relationship with relatives.

For the foregoing reasons, the Bill is likely to be little more than a palliative. Nonetheless, whatever prospect the Bill may have in reducing abuses of powers of attorney, given their rather low percentage of incidence, the Section believes that any serious effort to reduce the problem should also not have any significant adverse impact on the remaining vast majority of circumstances in which such instruments are properly employed. In short, "the cure should not be worse than the disease." It was this adverse prospect that resulted in the Section opposing the legislative proposal of the AG's office addressing this issue in last year's legislative session. As above noted, it subsequently took several meetings between the Council and the AG's office to come to a compromise agreement on the provisions of the Bill in preparation for its introduction in the 2011 legislative session. Despite such efforts, the Section believes certain provisions of the Bill still will have serious adverse consequences.

Section's Concerns as to Specific Provisions

The Bill requires a notary public to acknowledge that the Agent signing the instrument is the person identified as Agent in the instrument. This poses no problem, for attorneys routinely add this acknowledgement to powers of attorney both to give it additional credibility and so that the instrument may be recorded if necessary. However, in addition to the Agent having to agree to serve as Agent in writing before assuming authority as Agent, which is a current statutory requirement not modified by the Bill, the Bill imposes additional anomalous requirements on the notary acknowledging the Agent's signature.

The notary must further acknowledge that the Agent has read the "Notice to Person Accepting the Appointment as Attorney in Fact," and that such principal "understands and acknowledges the legal responsibilities imposed upon such person as attorney in fact." These additional requirements are an onerous imposition on a notary. Does the notary have to actually see the Agent read the Notice or can the notary accept the Agent's word with respect to same? Literally, the language would seem to require the former. Far more troubling is that the notary is required to also acknowledge that the Agent understands the Agent's legal responsibilities under the instrument. Unless the notary is a lawyer and desires to undertake such responsibility at probably no compensation, it is difficult to conceive how this requirement could be met. Possibly, this provision might be more liberally construed so as to require the notary to only

acknowledge that the Agent has stated that the Agent understands his or her legal responsibilities. If such is the intent, the language should be revised to make such intent clear.

In short, this provision not only appears to raise serious concerns regarding the responsibilities of notaries, but also the potential liability it may unfairly impose on them. As such, it would have a "chilling effect" on the willingness of notaries to acknowledge that such requirements have been met.

There also appears to be some problematic language in the Notice. The Notice provides that the Agent "may not use the principal's assets to benefit [the Agent]" and that the legal duty of the Agent is to "act according to the instructions from the principal, or where there are no instructions, solely in the best interests of the principal...." [Emphasis supplied.] The initial concern with this language is that is lacking in the level of accuracy needed to properly advise the Agent. In most circumstances, an Agent is acting following a disability of the principal. In that situation, the Agent should not necessarily follow any direction of the principal, but instead act independently in the principal's best interests.

Second, the "solely" requirement would seem to denote that the Agent may not receive any indirect benefit from exercising the Agent's authority. For example, spouses may receive an indirect benefit if the principal's assets are used to benefit the principal's homestead in which the spouse is also residing. The same could be said of a child acting as Agent for a parent who lives in the parent's residence. The construction that the exercise of the Agent's authority in such circumstances would necessarily be a violation of the Agent's fiduciary duty is not consonant with current law. Consequentially, such provision may have a significant chilling effect on an otherwise suitable person agreeing to serving as Agent who might indirectly benefit from such position. It also might conceivably give pause to an Agent who could not indirectly benefit from providing a benefit to a principal where any other person would receive an indirect benefit.

Later verbiage in the required Notice informs the Agent that the Agent "must act according to the instructions of the principal or, where there are no such instructions, in the principal's best interests" is also somewhat troublesome. Beyond there being a redundancy between this later verbiage and the above discussed earlier provision of the Notice addressing the same issue, such later verbiage is inconsistent with such earlier provision in that it omits the "solely" requirement. Such later verbiage also notifies the Agent that the failure to comply with the foregoing provisions may result in criminal prosecution under the laws of the state of Kansas." The Section has a concern that inferring that an Agent will be exposed to the possibility of criminal prosecution simply due to not following the directions of the principal is likewise misleading and overreaching. By additionally notifying the Agent that simply not acting in the Agent's best interests in and of itself could subject the Agent to criminal penalties, is similarly misleading. Such overbroad ominous warnings to lay persons no doubt would make even dutiful persons wary of serving as Agents.

This potential problem is compounded by Section (b) of the Bill, which provides in pertinent part that "Any acts done by the attorney in fact not strictly for the benefit of the principal or the principal's estate are in violation of the power of attorney, ...and may result in prosecution under the criminal laws of the state of Kansas." [Emphasis supplied.] This statutory provision, separate and apart from the required provisions in the Notice, appears to serve no

useful purpose. The "strictly" requirement is inconsistent with the language in both of the foregoing provisions of the Notice, redundant with same, and not consonant with Kansas law. Due to it being an independent statutory provision, it further has the troubling aspect of possibly being construed as creating a new cause of action when Agents do not act "strictly" for the principal's benefit. Absent such provision having just such an independent legal consequence, there would be no reason for including such provision in the statute.

Unintended Adverse Consequences

For the above reasons, the Section believes the counterproductive chilling effects of the Bill will far outweigh any conceivable ability of its provisions to dissuade Agents from abusing their authority. Such chilling effect would not only redound upon Agents who might otherwise be willing to serve, but also notaries who would be expected to be highly reticent to make the requisite acknowledgement and others will inadvertently incur due to not realizing such unusual requirement was being imposed upon them. Some members of the Section also have expressed a concern that they will be more reluctant to advise clients on financial powers of attorney if the Bill is passed in its current form due to their possible exposure to lawsuits for not fully advising Agents of the extent of their responsibilities and liability.

The Bill may have its greatest dissuasive effect on the willingness of corporate fiduciaries to serve as Agent. Abuses of fiduciary authority by corporate fiduciaries serving as Agents are almost non-existent. To ensure both proper management of assets and preserve family harmony among children, an increasing number of individuals are choosing corporate fiduciaries to serve as both their Agents and trustees under their revocable trusts. Individuals often do so to preserve family harmony, ensure that their finances are well managed, and to avoid other family members such as children having to take time away from their job and family to perform such duties. It is already difficult enough to get corporate fiduciaries, who are concerned with their perceived liability and fiduciary authority, to serve as Agents without them having to consider the additional uncertainties and risks posed by the Bill. Faced with a diminished pool of corporate fiduciaries willing to serve as Agents, the Bill could force many individuals who would otherwise have chosen a corporate fiduciary to have to name individuals to serve as Agents. Ironically, as there is far less certainty with regard to the proper and prudent management of assets when an individual, rather than a corporate fiduciary, is serving as Agent, this would increase the frequency of the very type of abuse of fiduciary authority the Bill is intended to attenuate.

Due to the possible additional liability of notaries and the perceived, if not real, additional liability of Agents, the Section believes that there will be a less frequent usage of powers of attorney in the vast majority of situations in which no fiduciary abuse would have occurred. If so, there will be an increased burden on our courts due to the concomitant increase in the number of disabled individuals who will be forced to resort to a conservatorship for the management of their financial affairs in the event of a disability. Although individuals who use a revocable trust will be at a lesser risk of this occurrence, assets are frequently not in the revocable trust and certain financial matters of a disabled grantor cannot be handled by the trustee (e.g., their individual income tax returns and litigation) and a conservatorship still may become necessary in the absence of a power of attorney.

Finally, there could be additional liability imposed on third parties accepting powers of attorney dated on or after July 1, 2011, that does not include all of the additional new requirements. They may do so simply because they are unaware of the new requirements or inadvertently fail to check the date on the instrument. This problem is exacerbated by the nature of the new requirements, which have nothing to do with typical provisions reviewed by third parties, viz., the authority reposed in the Agent and whether the power of attorney only becomes effective upon the disability of the principal. In such circumstance, the transaction may be voided and the loss imposed on the unsuspecting third party. These new requirements undoubtedly will also make third parties even more reluctant to accept financial powers of attorney, resulting in additional legal costs and otherwise avoidable commencements of conservatorships for the principal.

Suggested Changes to the Bill

Nonetheless, irrespective of the fundamental issue of whether the Bill will actually have a significant effect on the problem it is intended to address, the Section has no desire to stand in the way of any legislative attempt to at least "try to do something" to reduce the problem. However, it believes the foregoing significant adverse consequences will ensue unless the Bill is significantly modified. The "net" adverse consequences to the general public are even greater if the Bill does not result in any meaningful reduction in the abuse of fiduciary authority by Agents.

More specifically, the Section believes the requisite "Notice to Person Accepting the Appointment as Attorney in Fact" should be revised to address its inconsistencies, inaccuracies and its raising of an overly ominous and overreaching specter of imposing criminal responsibilities on Agents. In addition, the acknowledgement of the notary with regard to the signature of the Agent should also be revised. Beyond acknowledging that the Agent executing the instrument is the same person identified therein, it should additionally only require the notary to acknowledge that the Agent has stated in the notary's presence that the Agent has read the Notice and understands the Agent's legal responsibilities under the instrument.

Even then, such requirement would go beyond the singular duty of notaries in almost every other instance, i.e., to attest and acknowledge that the person signing the document is the same person named in the instrument. Imposing any additional anomalous responsibilities on notaries, however benign they may appear, is likely to result in many notaries choosing to eschew such responsibility and the potential liability it may carry with it. Others acknowledging the signature of Agents could inadvertently be exposed to a liability because they did not notice the acknowledgement contained this new directive and thus failed to comply.

Perhaps the intent of this provision would have been better served by requiring Agents to sign a statement, acknowledged before a notary, providing that the Agent agrees to assume fiduciary responsibility as Agent, states that the Agent has read the provisions of the power of attorney, understands the Agent's responsibilities to the principal under the instrument and independent responsibilities such as avoiding commingling and keeping financial records for five years, and that the Agent is aware that the Agent is subject to civil remedies in the event of the Agent's breach of the Agent's responsibilities, as well as potential criminal responsibilities under provisions of Kansas theft and embezzlement laws should the Agent misappropriate assets of the

principal for the benefit of the Agent or other third persons. In this manner, the Agent will have acknowledged awareness of all salient factors in a way which is accurate, non-threatening, precise, and which carefully avoids the appearance of possibly imposing new criminal or civil liabilities on the Agent.

Finally, the Section believes that the new statutory provisions in section (b) should be deleted to avoid any construction that it creates the potential for a new standard for imposing criminal liability on an Agent that is inconsistent with current law.

In the event the Committee should choose not to modify the provisions of the Bill to address the Section's concerns, it strongly urges the Committee to at the very least exempt corporate fiduciaries from its import. Corporate fiduciaries do not contribute to the fiduciary abuse which is the cynosure of the Bill. Any such failure to exempt corporate fiduciaries is likely to significantly reduce the number of corporate fiduciaries willing to serve as Agents.

Due it having short notice on the hearing on the Bill, the Section unfortunately is not prepared at this time to offer specific amendments to the Bill addressing the foregoing issues. However, it is certainly willing to do so if given the opportunity.

We appreciate your attention and willingness to listen to our concerns.

Authored on behalf of the Section by Tim O'Sullivan and Terry Fry.

My name is Kirk Nystrom, and for thirty years I have worked in the areas of estate planning and probate.

I speak in opposition to HB 2068.

The requirement that the document have the language set forth in 58-652 (a)(4) will have the effect of making Powers of Attorney lacking that language void or unenforceable.

The requirement that the document have the language set forth in 58-652 (a)(3)(B) signed by the agent(s) before the document is effective will mean that the document must be circulated to each agent, which will cause delay and expense.

The goal of cutting down on fraud is laudable, however I have prepared thousands of these forms and they were only misused a very few times, perhaps three or four. This bill would not have stopped the misuse, but would have created delay and expense in most other cases.

Respectfully Submitted,

K. Kirk Nystrom
112 SW 6th
Topeka, KS 66603
235-6977

House Judiciary
Date 1-31-11
Attachment # 5

KANSAS JUDICIAL COUNCIL

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Memorandum

To: House Judiciary Committee
From: Kansas Judicial Council - Kent A. Meyerhoff
Date: January 31, 2011
Re: 2011 House Bill 2071Relating to Revocation of Inheritance Rights of Divorced Spouse

The background of HB 2071 is that I prepared and presented a memorandum titled "Inheritance Rights of Ex-Spouses Should Automatically Be Revoked Upon Divorce," to the Probate Committee of the Wichita Bar Association in January of 2010. Some time after that presentation, the Executive Committee of the Real Estate, Probate and Trust Section of the Kansas Bar Association discussed the issue and referred it to a subcommittee chaired by Dan Peare of the Hinkle Elkouri law firm. Mr. Peare and I drafted the proposed statute as a result of the KBA subcommittee's work. I presented the draft to the Probate Law Advisory Committee of the Kansas Judicial Council in November of 2010. The Probate Law Advisory Committee recommended the bill for introduction to the Legislature, and the full Judicial Council agreed. HB 2071 is very similar to Uniform Probate Code Section 2-804, *Revocation of Probate and Nonprobate Transfers by Divorce; No Revocation by Other Changes of Circumstances*, with just a few changes to adapt it to Kansas.

One of the first estate administration matters I remember working on as a young attorney involved a case in which we represented the surviving children of a decedent. The decedent had divorced her husband some time prior to her death. In the divorce decree, each party was granted ownership of his/her own life insurance policies and retirement accounts. However, the decedent had never followed through with actually changing the beneficiary designations on her life insurance policies or IRA. Upon her death, they still named her ex-husband as the beneficiary. I was surprised to discover that under Kansas law, because the beneficiary designations were never changed, the ex-husband, and not the decedent's surviving children (who were named as the contingent beneficiaries), would receive the proceeds from both the life insurance policies and IRA. It was quite clear to everyone involved that the decedent would not

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have intended her ex-spouse to inherit the life insurance proceeds or IRA. However, because the beneficiary designations had never been changed, he did.

Since the current Kansas Probate Code was adopted in 1939, K.S.A. 59-610 has provided that a provision in a Will for a spouse is automatically revoked if the spouses divorce after the Will is executed. However, this statute applies only to Wills. It does not apply to revocable trusts or to property passing other than pursuant to the terms of a Will. Today, more and more people are using Will substitutes, such as revocable trusts, or are placing "pay on death" or "transfer on death" designations on most of their property so that the property does not pass by Will. This means K.S.A. 59-610 does not apply. Kansas should adopt a new, broader law that automatically revokes any inheritance rights in favor of an ex-spouse upon divorce. This should apply to trusts, life insurance policies, annuities, IRAs, and transfer on death and pay on death designations. It also should automatically convert joint tenancy property to tenants in common in the event of a divorce.

The Kansas Legislature took a small step in 1996, when it amended K.S.A. 60-1610 to require that divorce decrees provide for any changes in beneficiary designation on:

(i) any insurance or annuity policy that is owned by a spouse, or, in the case of a group life policy, under which a spouse is a covered person;
(ii) any trust under which one spouse is the grantor or holds a power of appointment over all or part of the trust assets that may be exercised in favor of the other; or
(iii) any transfer on death or payable on death account under which one or both spouses are owner or beneficiary.

This statute goes on to provide that "Nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of such policy." It appears that although these issues are to be addressed in the divorce decree, it is still up to the parties to take steps to carry out the provisions of the divorce decree by executing a new beneficiary designation. In Cincinnati Life Insurance Company v. Palmer, 32 Kan. App.2d 160, 94 P.3d 729 (2004), the Kansas Court of Appeals held that although the divorce decree incorporated a property settlement agreement that provided that each spouse was to retain his or her own life insurance policy, because the husband had not changed the beneficiary designation on the policy prior to his death (and because the divorce decree had not specifically revoked or changed the beneficiary designation), his ex-spouse, who was still named as the beneficiary, was entitled to the entire death benefit.

Currently, Kansas does not track which cases are *pro se* in our district courts. Surveys of Kansas judges and clerks have indicated that judges are seeing a significant increase in the number of self-represented cases in their courts (Report of Kansas Self-Represented Study Committee, 2009). In May of 2010, the Kansas Supreme Court approved divorce forms

developed by the Judicial Council for use by self-represented parties. It is reasonable to expect that there will be an increasing number of self-represented parties in the future. While there have been problems in the past with persons not effectuating the changes in beneficiary designations, with an increasing number of persons representing themselves in divorce proceedings, it is reasonable to expect more such problems in the future. This is another reason to adopt HB 2071.

A better solution would be to provide for automatic revocation of any inheritance rights of an ex-spouse upon entry of a divorce decree or annulment, as has been done in many other states, including those that have adopted some version of the Uniform Probate Code. If someone desired to continue to name an ex-spouse as a beneficiary of a life insurance policy or other property (which would almost certainly occur only in a small minority of situations), such designation could be reconfirmed in writing following the divorce.

Three of our neighboring states have some form of automatic beneficiary revocation upon divorce. Oklahoma law provides that if, after entering into a written contract in which a beneficiary is designated or provision is made for the payment of any death benefit, the party who has the right to designate such beneficiary divorces the named beneficiary, all provisions in the contract in favor of the former spouse are revoked. Colorado has adopted a version of the Uniform Probate Code, which not only revokes provisions for a former spouse, but also for family members of the former spouse. Missouri's statute also revokes provisions for an ex-spouse and family members of the ex-spouse.

HB 2071 not only revokes inheritance rights of an ex-spouse, but it also revokes such rights for relatives of an ex-spouse, because those relatives are often named as alternate takers under trust documents or beneficiary designations. An exception is made in the attached proposed statute for employee benefit or retirement plans governed by ERISA. The United States Supreme Court, in Egelhoff v. Egelhoff, 532 U.S. 141 (2001) held that ERISA preempted a state statute that automatically revoked a beneficiary designation in favor of an ex-spouse upon divorce. Therefore HB 2071 specifically excepts property subject to federal law preemption from its application, so it should not run afoul of the Egelhoff decision. Finally, HB 2071 provides protection for innocent third party purchasers who purchase property without notice of the divorce, and for third parties such as insurance companies or banks who pay out funds based on a beneficiary designation without notice of the divorce.

In summary, the changes proposed by HB 2071 would ensure that whether someone does their estate planning using a Will, a trust, beneficiary designation, or joint tenancy, there will be consistent results in the event of a divorce, and the likely intent of the parties will be carried out without further affirmative action required on the part of the divorced spouses.

Members of the Kansas Judicial Council Probate Law Advisory Committee:

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House Bill 2070
Notice of Payment of Appraisers' Award
Condemnation Procedures

TESTIMONY
By: Alice Adams, Clerk of the District Court
Geary County District Court
Eighth Judicial District

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of the Kansas Association of District Court Clerks and Administrators regarding House Bill 2070.

In condemnation cases filed under KS.A. Chapter 26, Article 5, after the petition is filed, the court will appoint appraisers to value the property in question. The appraisers file their report in the office of the clerk of the district court with their finding, pursuant to K.S.A. 26-505. The condemner pays the amount stated in the report to the clerk of the district court as set out in K.S.A. 26-507(a). The condemner sends notice of the report to all parties as required by statute.

Clerks are currently complying with the statute, but we are finding that the plaintiff's attorneys are generally sending the notice as well. All parties are aware of the statutory time lines. We believe that there is no need for duplication, and that the responsibility should lie with the attorneys, as does the rest of the process.

Thank you for your time and consideration.

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House Judiciary
Date 1-31-11
Attachment # 7