

HOUSE BILL No. 2068

By Committee on Judiciary

1-24

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. 2010 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) "Court" means the district court.

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

16 (d) "Durable power of attorney" means a written power of attorney
17 in which the authority of the attorney in fact does not terminate in
18 the event the principal becomes disabled or in the event of later uncertainty
19 as to whether the principal is dead or alive and which complies with
20 subsection (a) of K.S.A. 58-652, and amendments thereto, or is durable
21 under the laws of any of the following places:

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

23 (2) the law of the place of the residence of the principal when
24 executed; or

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

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

29 (f) "Nondurable power of attorney" means a written power of
30 attorney which does not meet the requirements of a durable power of
31 attorney.

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

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

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

1 durable or nondurable.

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

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

15 Sec. 2. K.S.A. 2010 Supp. 58-652 is hereby amended to read as
16 follows: 58-652. (a) The authority granted by a principal to an attorney in
17 fact in a written power of attorney is not terminated in the event the
18 principal becomes wholly or partially disabled or in the event of later
19 uncertainty as to whether the principal is dead or alive if:

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

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

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

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

31 (3) *the durable power of attorney:*

32 (A) ~~the power of attorney~~ Is signed by the principal, and dated and
33 acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and
34 amendments thereto. If the principal is physically unable to sign the
35 power of attorney but otherwise competent and conscious, the power of
36 attorney may be signed by an adult designee of the principal in the
37 presence of the principal and at the specific direction of the principal
38 expressed in the presence of a notary public. The designee shall sign the
39 principal's name to the power of attorney in the presence of a notary
40 public, following which the document shall be acknowledged in the
41 manner prescribed by K.S.A. 53-501 et seq., and amendments thereto, to
42 the same extent and effect as if physically signed by the principal; *and*

43 (B) *is not effective until it is signed and dated by the attorney in fact*

1 before a notary public acknowledging that the attorney in fact or
2 successor attorney in fact is the person identified in the durable power of
3 attorney as an attorney in fact for the principal, that such person has
4 read the "Notice to Person Accepting the Appointment as Attorney in
5 Fact," and that such person understands and acknowledges the legal
6 responsibilities imposed upon such person as attorney in fact;

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

11 "Notice to Person Executing Durable Power of Attorney.

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

19 (5) the durable power of attorney contains the following notice
20 statement to the attorney in fact at the conclusion of the durable power of
21 attorney, in not less than 12- point type, or a reasonable equivalent
22 thereof:

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

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

32 1. The legal duty to act according to the instructions from the
33 principal, or, where there are no instructions, solely in the best interests
34 of the principal, avoiding conflicts of interest that would impair your
35 ability to act in the principal's best interests.

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

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

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

43 You may not use the principal's assets to benefit yourself or make gifts

1 *to yourself or anyone else unless the principal has specifically granted*
2 *you that authority in the durable power of attorney. If you have been*
3 *granted that authority, you must act according to the instructions of the*
4 *principal or, where there are no such instructions, in the principal's best*
5 *interests. Failure to do so may result in criminal prosecution under the*
6 *laws of the state of Kansas. In addition to criminal prosecution, you may*
7 *also be sued in civil court.*

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

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

14 (b) All acts done by an attorney in fact pursuant to a durable power
15 of attorney shall inure to the benefit of and bind the principal and the
16 principal's successors in interest, notwithstanding any disability of the
17 principal. *Any acts done by the attorney in fact not strictly for the benefit*
18 *of the principal or the principal's estate are in violation of the power of*
19 *attorney, unless such acts are otherwise specifically provided for in the*
20 *power of attorney, and may result in prosecution under the criminal laws*
21 *of the state of Kansas.*

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

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

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

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

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

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

10 Sec. 3. K.S.A. 2010 Supp. 58-656 is hereby amended to read as
11 follows: 58-656. (a) An attorney in fact who ~~elects~~*agrees* to act under a
12 power of attorney is under a duty to act in the interest of the principal and
13 to avoid conflicts of interest that impair the ability of the attorney in fact
14 so to act. A person who is appointed an attorney in fact under a power of
15 attorney who undertakes to exercise the authority conferred in the power
16 of attorney, has a fiduciary obligation to exercise the powers conferred in
17 the best interests of the principal, and to avoid self-dealing and conflicts
18 of interest, as in the case of a trustee with respect to the trustee's
19 beneficiary or beneficiaries. ~~The attorney in fact shall keep a record of~~
20 ~~receipts, disbursements and transactions made on behalf of the principal~~
21 ~~and shall not commingle funds or assets of the principal with the funds or~~
22 ~~assets of the attorney in fact.~~ In the absence of explicit authorization, the
23 attorney in fact shall exercise a high degree of care in maintaining,
24 without modification, any estate plan which the principal may have in
25 place, including, but not limited to, arrangements made by the principal
26 for disposition of assets at death through beneficiary designations,
27 ownership by joint tenancy or tenancy by the entirety, trust arrangements
28 or by will or codicil. Unless otherwise provided in the power of attorney
29 or in a separate agreement between the principal and attorney in fact, an
30 attorney in fact who ~~elects~~*agrees* to act shall exercise the authority
31 granted in a power of attorney with that degree of care that would be
32 observed by a prudent person dealing with the property and conducting
33 the affairs of another, except that all investments made on or after July 1,
34 2003, shall be in accordance with the provisions of the Kansas uniform
35 prudent investor act, K.S.A. 58-24a01 et seq., and amendments thereto. If
36 the attorney in fact has special skills or was appointed attorney in fact on
37 the basis of representations of special skills or expertise, the attorney in
38 fact has a duty to use those skills in the principal's behalf.

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

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

10 (d) A principal may nominate by a power of attorney, a guardian or
11 conservator, or both, for consideration by the court. If a petition to
12 appoint a guardian or conservator, or both, is filed, the court shall make
13 the appointment in accordance with the principal's most recent
14 nomination in the power of attorney, so long as the individual nominated
15 is a fit and proper person.

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

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

26 (g) On the death of the principal, the attorney in fact shall follow the
27 instructions of the court, if any, having jurisdiction over the estate of the
28 principal, or any part thereof, and shall communicate with and be
29 accountable to the principal's personal representative, or if none, the
30 principal's successors. The attorney in fact shall promptly deliver to and
31 put in the possession and control of the principal's personal representative
32 or successors, any property of the principal and copies of any records of
33 the attorney in fact relating to transactions undertaken in the principal's
34 behalf that are deemed by the personal representative or the court to be
35 necessary or helpful in the administration of the decedent's estate.

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

41 (i) *The attorney in fact shall maintain adequate records of receipts,*
42 *disbursements and transactions made on behalf of the principal and shall*
43 *not commingle funds or assets of the principal with funds or assets of the*

1 attorney in fact.

2 (j) (1) Failure to maintain adequate records is negligently failing
3 to maintain such records as are necessary to disclose fully the nature of
4 the receipts, disbursements and transactions made by the attorney in fact
5 on behalf of the principal. Such records of receipts, disbursements and
6 transactions shall be maintained by the attorney in fact for five years
7 after the date on which such receipt, disbursement or transaction occurs.

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

12 (3) If the attorney in fact is found to have commingled funds or
13 assets of the principal with the funds or assets of the attorney in fact, the
14 attorney in fact shall be liable to restore such funds or assets to the
15 principal, and shall be liable for all costs of recovering those funds or
16 assets, including reasonable attorney fees.

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

18 (a) The repeal of the uniform durable power of attorney act, K.S.A. 58-
19 610 through 58-617 and the repeal of K.S.A. 58-601 and 58-602, shall
20 not affect the validity of powers of attorney created under those sections,
21 the validity of the acts and transactions of attorneys in fact under
22 authority granted in powers of attorney executed under those sections, or
23 the duties of attorneys in fact under powers of attorney executed under
24 those sections.

25 (b) Powers of attorney created and fully executed by the principal
26 prior to July 1, 2011, shall be governed by the laws in existence at the
27 time such powers of attorney were created and fully executed.

28 Sec. 5. K.S.A. 58-651 and 58-664 and K.S.A. 2010 Supp. 58-652
29 and 58-656 are hereby repealed.

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