

SESSION OF 2014

**SUPPLEMENTAL NOTE ON SENATE BILL NO. 355**

As Amended by Senate Committee of the Whole

**Brief\***

SB 355 would make several amendments to the Kansas Power of Attorney Act.

The bill would require a durable power of attorney to contain a statement warning the principal of the effect of the document and instructing the principal to seek legal advice before signing the document if the principal does not understand the document. Also, a statement would be required notifying the attorney in fact of the specific responsibilities assumed by acting or agreeing to act as an attorney in fact, the duration of the durable power of attorney and how it may be resigned, and prohibited conduct and the possibility of criminal prosecution or civil action.

The bill would require an attorney in fact to use the principal's money, property, or other assets only in the principal's best interest and not for the benefit of the attorney in fact. Any acts contrary to this requirement and not specifically permitted by the durable power of the attorney, or any intimidating or deceptive act by the attorney in fact in procuring the power of attorney, would violate the Power of Attorney Act and could result in criminal prosecution. A power of attorney executed by a person without capacity would be invalid, and the attorney in fact would have the burden of proving, by clear and convincing evidence in a criminal proceeding or by a preponderance of the evidence in a civil proceeding, that the principal had capacity.

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\*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

An attorney in fact would be required to maintain adequate records of receipts, disbursements, and transactions for five years after the date on which such occurred, and failure to do so would be considered negligent. Such failure could make the attorney in fact liable for all costs, fees, and expenses (including reasonable attorneys fees) incurred in acquiring or reproducing such records. If the attorney in fact violates the prohibition on commingling funds or assets of the principal with the funds or assets of the attorney in fact, the attorney in fact would be liable for the restoration of such funds or assets and liable for the costs of recovery, including reasonable attorneys fees.

The bill would protect a person who, in good faith, contracts with, buys from, or sells to an attorney in fact who properly exercised such power, regardless of whether the attorney in fact's authority had been terminated or invalidated.

The bill would define "best interest," "capacity," and "elder person," and add "spouse's parent" to the definition of "principal's family."

Finally, the bill would specify that powers of attorney created and fully executed by the principal prior to July 1, 2014, would be governed by the laws in existence at the time of creation and full execution.

## **Background**

The bill was introduced by the Senate Committee on Judiciary at the request of Senator O'Donnell. In the Senate Committee, Senator O'Donnell; the Kansas State Long-Term Care Ombudsman; representatives of the Attorney General's Office, Kansas Alzheimer's Association chapters, the Kansas County and District Attorneys Association, and LeadingAge Kansas; and a recently retired adult care home director testified in support of the bill. Written testimony supporting the bill was received from Attorney General Schmidt, a representative of AARP Kansas, and representatives of

assisted living facilities. A representative of the Kansas Bankers Association testified as a neutral conferee and suggested an amendment that would include invalidation in the good faith provision. There was no opponent testimony.

The Senate Committee adopted the amendment suggested by the Kansas Bankers Association.

The Senate Committee of the Whole amended the bill by replacing the phrase "ask your attorney to explain it to you" with "seek legal advice" in the warning statement to the principal.

According to the fiscal note prepared by the Division of the Budget on the bill, the Office of Judicial Administration indicates the bill, as introduced, would have no measurable fiscal effect on Judicial Branch expenditures.