

SENATE BILL No. 57

By Committee on Judiciary

1-22

1 AN ACT concerning the Kansas power of attorney act; relating to durable
2 power of attorney; definitions; duties of attorney in fact; laws
3 governing powers of attorney executed prior to July 1, 2015; amending
4 K.S.A. 58-651 and 58-664 and K.S.A. 2014 Supp. 58-652 and 58-656
5 and repealing the existing sections.
6

7 *Be it enacted by the Legislature of the State of Kansas:*

8 Section 1. K.S.A. 58-651 is hereby amended to read as follows: 58-
9 651. As used in the Kansas power of attorney act:

10 (a) "Attorney in fact" means an individual, corporation or other legal
11 entity appointed to act as agent of a principal in a written power of
12 attorney.

13 (b) *"Best interest" refers to an act of the attorney in fact that is in*
14 *accordance with such attorney in fact's fiduciary duty to the principal and*
15 *the act: (1) Benefits the principal; or (2) is consistent with the principal's*
16 *intent as expressed in the power of attorney.*

17 (c) "Court" means the district court.

18 (d) *"Capacity" means that at the time the power of attorney was*
19 *executed, the principal was capable of understanding in a reasonable*
20 *manner the nature and effect of the act of executing and granting such*
21 *power of attorney.*

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

25 ~~(f)~~ (f) "Durable power of attorney" means a written power of attorney
26 in which the authority of the attorney in fact does not terminate in the
27 event the principal becomes disabled or in the event of later uncertainty as
28 to whether the principal is dead or alive and which complies with
29 ~~subsection (a) of~~ K.S.A. 58-652(a), and amendments thereto, or is durable
30 under the laws of any of the following places:

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

32 (2) the law of the place of the residence of the principal when
33 executed; or

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

36 ~~(g)~~ (g) "Legal representative" means a decedent's personal

1 representative, a guardian or a conservator.

2 ~~(f)~~ (h) "Nondurable power of attorney" means a written power of
3 attorney which does not meet the requirements of a durable power of
4 attorney.

5 ~~(g)~~ (i) "Person" means an adult individual, corporation or other legal
6 entity.

7 ~~(h)~~ (j) "Personal representative" means a legal representative as
8 defined in K.S.A. 59-102, and amendments thereto.

9 ~~(i)~~ (k) "Power of attorney" means a written power of attorney, either
10 durable or nondurable.

11 ~~(j)~~ (l) "Principal's family" means the principal's parent, grandparent,
12 uncle, aunt, brother, sister, son, daughter, grandson, granddaughter and
13 their descendants, whether of the whole blood or the half blood, or by
14 adoption, and the principal's spouse, *spouse's parent*, stepparent and
15 stepchild.

16 ~~(k)~~ (m) "Third person" means any individual, corporation or legal
17 entity that acts on a request from, contracts with, relies on or otherwise
18 deals with an attorney in fact pursuant to authority granted by a principal
19 in a power of attorney and includes a partnership, either general or limited,
20 governmental agency, financial institution, issuer of securities, transfer
21 agent, securities or commodities broker, real estate broker, title insurance
22 company, insurance company, benefit plan, legal representative, custodian
23 or trustee.

24 Sec. 2. K.S.A. 2014 Supp. 58-652 is hereby amended to read as
25 follows: 58-652. (a) The authority granted by a principal to an attorney in
26 fact in a written power of attorney is not terminated in the event the
27 principal becomes wholly or partially disabled or in the event of later
28 uncertainty as to whether the principal is dead or alive if:

29 (1) The power of attorney is denominated a "durable power of
30 attorney";

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

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

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

40 (3) the *durable* power of attorney is signed by the principal, and dated
41 and acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and
42 amendments thereto. If the principal is physically unable to sign the power
43 of attorney but otherwise competent and conscious, the power of attorney

1 may be signed by an adult designee of the principal in the presence of the
2 principal and at the specific direction of the principal expressed in the
3 presence of a notary public. The designee shall sign the principal's name to
4 the power of attorney in the presence of a notary public, following which
5 the document shall be acknowledged in the manner prescribed by K.S.A.
6 53-501 et seq., and amendments thereto, to the same extent and effect as if
7 physically signed by the principal-;

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

12 *"Notice to Person Executing Durable Power of Attorney.*

13 *A durable power of attorney is an important legal document. You*
14 *should read this durable power of attorney carefully. When effective, this*
15 *durable power of attorney will give your attorney in fact the right to deal*
16 *with property that you now own or might acquire in the future. If you do*
17 *not understand the durable power of attorney, or any provision of it, you*
18 *should seek legal advice prior to signing the 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 14-point boldface type, or a reasonable*
22 *equivalent 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 the*
28 *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 shall include:*

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

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 you*
2 *that authority in the durable power of attorney. If you have been granted*
3 *that authority, you must act according to the instructions of the principal*
4 *or, where there are no such instructions, in the principal's best interest.*
5 *Failure to do so may result in criminal prosecution under the laws of the*
6 *state of Kansas. In addition to criminal prosecution, you may also be sued*
7 *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) (1) All acts done by an attorney in fact pursuant to a durable
15 power of attorney shall inure to the benefit of and bind the principal and
16 the principal's successors in interest, notwithstanding any disability of the
17 principal.

18 (2) *Any acts done by the attorney in fact not in the best interest of the*
19 *principal are in violation of the Kansas power of attorney act, unless such*
20 *acts are otherwise specifically authorized in the power of attorney.*

21 (3) *Any acts done by the attorney in fact to intimidate or deceive the*
22 *principal in procuring the power of attorney are in violation of the Kansas*
23 *power of attorney act.*

24 (4) *A power of attorney executed by a person who does not have*
25 *capacity is invalid.*

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

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

32 (3) If a power of attorney is recorded any revocation of that power of
33 attorney must be recorded in the same manner for the revocation to be
34 effective. If a power of attorney is not recorded it may be revoked by a
35 recorded revocation or in any other appropriate manner.

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

39 (d) (1) *A durable power of attorney must be signed and dated by the*
40 *attorney in fact before a notary public acknowledging that the attorney in*
41 *fact or successor attorney in fact is the person identified in the durable*
42 *power of attorney as an attorney in fact for the principal, that such*
43 *person has read the "Notice to Person Accepting the Appointment as*

1 *Attorney in Fact," and that such person understands and acknowledges*
2 *the legal responsibilities imposed upon such person as attorney in fact. An*
3 *attorney in fact need not sign the power of attorney at the same time as the*
4 *principal but must sign the power of attorney before taking any action on*
5 *behalf of the principal.*

6 (2) A person who is appointed an attorney in fact under a durable
7 power of attorney has no duty to exercise the authority conferred in the
8 power of attorney, unless the attorney in fact has agreed expressly in
9 writing to act for the principal in such circumstances. An agreement to act
10 on behalf of the principal is enforceable against the attorney in fact as a
11 fiduciary without regard to whether there is any consideration to support a
12 contractual obligation to do so. Acting for the principal in one or more
13 transactions does not obligate an attorney in fact to act for the principal in
14 subsequent transactions.

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

24 (f) *A person who in good faith contracts with, buys from or sells to an*
25 *attorney in fact is protected as if the attorney in fact properly exercised*
26 *such power, regardless of whether the authority of such person as the*
27 *attorney in fact has been terminated or invalidated.*

28 Sec. 3. K.S.A. 2014 Supp. 58-656 is hereby amended to read as
29 follows: 58-656. (a) An attorney in fact who ~~elects~~ *agrees* to act under a
30 power of attorney is under a duty to act in the interest of the principal and
31 to avoid conflicts of interest that impair the ability of the attorney in fact
32 so to act. A person who is appointed an attorney in fact under a power of
33 attorney who undertakes to exercise the authority conferred in the power of
34 attorney, has a fiduciary ~~obligation~~ *duty to the principal* to exercise the
35 powers conferred in the best ~~interests~~ *interest* of the principal, and to avoid
36 self-dealing and conflicts of interest, as in the case of a trustee with respect
37 to the trustee's beneficiary or beneficiaries. ~~The attorney in fact shall keep~~
38 ~~a record of receipts, disbursements and transactions made on behalf of the~~
39 ~~principal and shall not commingle funds or assets of the principal with the~~
40 ~~funds or assets of the attorney in fact.~~ In the absence of explicit
41 authorization, the attorney in fact shall exercise a high degree of care in
42 maintaining, without modification, any estate plan which the principal may
43 have in place, including, but not limited to, arrangements made by the

1 principal for disposition of assets at death through beneficiary
2 designations, ownership by joint tenancy or tenancy by the entirety, trust
3 arrangements or by will or codicil. Unless otherwise provided in the power
4 of attorney or in a separate agreement between the principal and attorney
5 in fact, an attorney in fact who ~~elects~~ *agrees* to act shall exercise the
6 authority granted in a power of attorney with that degree of care that
7 would be observed by a prudent person dealing with the property and
8 conducting the affairs of another, except that all investments made on or
9 after July 1, 2003, shall be in accordance with the provisions of the Kansas
10 uniform prudent investor act, K.S.A. 58-24a01 et seq., and amendments
11 thereto. If the attorney in fact has special skills or was appointed attorney
12 in fact on the basis of representations of special skills or expertise, the
13 attorney in fact has a duty to use those skills in the principal's behalf.

14 (b) On matters undertaken or to be undertaken in the principal's
15 behalf and to the extent reasonably possible under the circumstances, an
16 attorney in fact has a duty to keep in regular contact with the principal, to
17 communicate with the principal and to obtain and follow the instructions
18 of the principal.

19 (c) If, following execution of a durable power of attorney, a court of
20 the principal's domicile appoints a conservator, guardian of the estate or
21 other fiduciary charged with the management of all of the principal's
22 property or all of the principal's property except specified exclusions, the
23 attorney in fact is accountable to the fiduciary as well as to the principal.
24 The fiduciary has the same power to revoke or amend the durable power of
25 attorney that the principal would have had if the principal were not an
26 adult with an impairment in need of a guardian or conservator or both as
27 defined by ~~subsection (a)~~ of K.S.A. 59-3051(a), and amendments thereto.

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

34 (e) An attorney in fact shall exercise authority granted by the
35 principal in accordance with the instrument setting forth the power of
36 attorney, any modification made therein by the principal or the principal's
37 legal representative or a court, and the oral and written instructions of the
38 principal, or the written instructions of the principal's legal representative
39 or a court.

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

1 (g) On the death of the principal, the attorney in fact shall follow the
2 instructions of the court, if any, having jurisdiction over the estate of the
3 principal, or any part thereof, and shall communicate with and be
4 accountable to the principal's personal representative, or if none, the
5 principal's successors. The attorney in fact shall promptly deliver to and
6 put in the possession and control of the principal's personal representative
7 or successors, any property of the principal and copies of any records of
8 the attorney in fact relating to transactions undertaken in the principal's
9 behalf that are deemed by the personal representative or the court to be
10 necessary or helpful in the administration of the decedent's estate.

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

16 (i) *The attorney in fact shall maintain adequate records as necessary*
17 *to disclose fully the nature of the receipts, disbursements and transactions*
18 *made by the attorney in fact on behalf of the principal. Such records shall*
19 *be maintained by the attorney in fact for five years after the date on which*
20 *the receipt, disbursement or transaction occurred. An attorney in fact who*
21 *fails to maintain such records, whether intentionally or negligently, shall*
22 *be liable for all costs, fees and expenses, including reasonable attorney*
23 *fees, incurred in acquiring or reproducing such records.*

24 (j) *An attorney in fact who commingles funds or assets of the*
25 *principal with funds or assets of the attorney in fact contrary to the best*
26 *interest of the principal shall be liable to restore such funds or assets to*
27 *the principal and shall be liable for all costs of recovering the funds and*
28 *assets of the principal, including reasonable attorney fees.*

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

30 (a) The repeal of the uniform durable power of attorney act, K.S.A. 58-610
31 through 58-617 and the repeal of K.S.A. 58-601 and 58-602, shall not
32 affect the validity of powers of attorney created under those sections, the
33 validity of the acts and transactions of attorneys in fact under authority
34 granted in powers of attorney executed under those sections, or the duties
35 of attorneys in fact under powers of attorney executed under those
36 sections.

37 (b) *A power of attorney created and fully executed by the principal*
38 *prior to July 1, 2015, shall be governed by the laws in existence at the*
39 *time such power of attorney was created and fully executed.*

40 Sec. 5. K.S.A. 58-651 and 58-664 and K.S.A. 2014 Supp. 58-652 and
41 58-656 are hereby repealed.

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