

## **Proposed Amendments to Kansas Power of Attorney Act**

### **BACKGROUND**

In 2003, the Kansas Power of Attorney Act was passed by the Legislature. The act was drafted by the Kansas Judicial Council's Probate Advisory Committee (PLAC) and recommended by the Judicial Council

In July of 2006, the National Conference of Commissioners on Uniform State Laws approved the Uniform Power of Attorney Act. The PLAC reviewed the Uniform Power of Attorney Act and noted that in several respects the Kansas act was more comprehensive. Therefore, PLAC did not recommend the adoption of the Uniform act at this time. However, it was the consensus of the Committee that after a number of states (including some that border Kansas) have adopted the act, that the PLAC will again review the Uniform act.

Though the PLAC did not recommend adoption of the Uniform Power of Attorney act at this time, the Committee did propose three amendments to the Kansas Power of Attorney act which are based on the Uniform Act.

### **PROPOSED AMENDMENTS**

K.S.A 58-652 (at page 1) outlines the process for executing a power of attorney document, including key provisions to be included. However, it does not deal with the issue of the execution by a party who is competent, but physically unable to sign the document. Therefore, an amendment to K.S.A. 58-652(a)(3) is proposed which permits the document to be physically signed by a designee of the principal, in the presence of the principal and in the presence of a notary public.

K.S.A. 58-656 (at page 3) enumerates the general duties of the attorney in fact. However, the act currently does not explicitly require the attorney in fact to keep record of all receipts, disbursements and transaction made in a fiduciary capacity. Therefore, this proposed amendment specifically requires the attorney in fact to keep funds separate and to account for all transactions.

K.S.A. 58-657 (at page 5) describes the process for modifying, terminating or suspending the fiduciary relationship by the principal. However, the act does not specifically authorize the attorney in fact to resign. This proposed amendment establishes a formal procedure for the voluntary resignation by the attorney in fact.

**58-652. Effectiveness of power of attorney; recording; revocation; attorney in fact.**

(a) The authority granted by a principal to an attorney in fact in a written power of attorney is not terminated in the event the principal becomes wholly or partially disabled or in the event of later uncertainty as to whether the principal is dead or alive if:

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

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

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

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

(3) the power of attorney is signed by the principal, and dated and acknowledged in the manner prescribed by K.S.A. 53-501 *et seq.*, and amendments thereto.

(b) All acts done by an attorney in fact pursuant to a durable power of attorney shall inure to the benefit of and bind the principal and the principal's successors in interest, notwithstanding any disability of the principal.

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

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

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

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

If the principal is physically unable to sign the power of attorney but otherwise competent and conscious, the power of attorney may be signed by an adult designee of the principal in the presence of the principal and at the specific direction of the principal. The designee shall sign the principal's name to the power of attorney in the presence of a notary public, following which the document shall be acknowledged in the manner prescribed by K.S.A. 53-501 *et seq.* to the same extent and effect as if physically signed by the principal.

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

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

**History:** L. 2003, ch. 58, § 3; July 1.

**Source or Prior Law:**  
58-601, 58-602.

**58-656. Duties of attorney in fact; relation of attorney in fact to court-appointed fiduciary; death of principal.** (a) An attorney in fact who elects to act under a power of attorney is under a duty to act in the interest of the principal and to avoid conflicts of interest that impair the ability of the attorney in fact so to act. A person who is appointed an attorney in fact under a power of attorney who undertakes to exercise the authority conferred in the power of attorney, has a fiduciary obligation to exercise the powers conferred in the best interests of the principal, and to avoid self-dealing and conflicts of interest, as in the case of a trustee with respect to the trustee's beneficiary or beneficiaries. In the absence of explicit authorization, the attorney in fact shall exercise a high degree of care in maintaining, without modification, any estate plan which the principal may have in place, including, but not limited to, arrangements made by the principal for disposition of assets at death through beneficiary designations, ownership by joint tenancy or tenancy by the entirety, trust arrangements or by will or codicil. Unless otherwise provided in the power of attorney or in a separate agreement between the principal and attorney in fact, an attorney in fact who elects to act shall exercise the authority granted in a power of attorney with that degree of care that would be observed by a prudent person dealing with the property and conducting the affairs of another, except that all investments made on or after July 1, 2003, shall be in accordance with the provisions of the Kansas uniform prudent investor act, K.S.A. 58-24a01 *et seq.*, and amendments thereto. If the attorney in fact has special skills or was appointed attorney in fact on the basis of representations of special skills or expertise, the attorney in fact has a duty to use those skills in the principal's behalf.

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

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

The attorney in fact shall keep a record of all receipts, disbursements and transactions made on behalf of the principal and shall not commingle funds or assets of the principal with the funds or assets of the attorney in fact.

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

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

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

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

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

**History:** L. 2003, ch. 58, § 7; July 1.

**Source or Prior Law:**  
58-612.

**58-657. Modification, termination or suspension of power of attorney; successor attorney.** (a) As between the principal and attorney in fact or successor attorney in fact, and any agents appointed by either of them, unless the power of attorney is coupled with an interest, the authority granted in a power of attorney shall be modified or terminated as follows:

(1) On the date shown in the power of attorney and in accordance with the express provisions of the power of attorney;

(2) when the principal, orally or in writing, or the principal's legal representative in writing informs the attorney in fact or successor that the power of attorney is modified or terminated, or when and under what circumstances it is modified or terminated; or

(3) when a written notice of modification or termination of the power of attorney is filed by the principal or the principal's legal representative for record in the office of the register of deeds in the county of the principal's residence or, if the principal is a nonresident of the state, in the county of the residence of the attorney in fact last known to the principal, or in the county in which is located any property specifically referred to in the power of attorney.

(b) As between the principal and attorney in fact or successor attorney in fact, and any agents appointed by either of them, unless the power of attorney is coupled with an interest, the authority granted in a power of attorney shall be terminated as follows:

(1) On the death of the principal, except that if the power of attorney grants authority under subsection (f)(7), (f)(8) or (f)(13) of K.S.A. 58-654, and amendments thereto, the power of attorney and the authority of the attorney in fact shall continue for the limited purpose of carrying out the authority granted under either or both of such subsections for a reasonable length of time after the death of the principal;

(2) when the attorney in fact under a power of attorney is not qualified to act for the principal; or

(3) on the filing of any action for annulment, separate maintenance or divorce of the principal and the principal's attorney in fact who were married to each other at or subsequent to the time the power of attorney was created, unless the power of attorney provides otherwise.

(c) The authority of an attorney in fact, under a power of attorney that is nondurable, is suspended during any period that the principal is disabled to the extent that the principal is unable to receive or evaluate information or to communicate decisions with respect to the subject of the power of attorney. An attorney in fact exercising authority under a power of attorney that is nondurable shall not act in the principal's behalf during any period that the attorney in fact knows the principal is so disabled.

(d) Whenever any of the events described in subsection (a) operate merely to terminate the authority of the particular person designated as the attorney in fact, rather than terminating the power of attorney, if the power of attorney designates a successor or contingent attorney in fact or prescribes a procedure whereby a successor or contingent attorney in fact may be designated, then the authority provided in the power of attorney shall extend to and vest in the successor or contingent attorney in fact in lieu of the attorney in fact whose power and authority was terminated under any of the circumstances referred to in subsection (a).

(e) As between the principal and attorney in fact or successor, acts and transactions of the attorney in fact or successor undertaken in good faith, in accordance with K.S.A. 58-656, and amendments thereto, and without actual knowledge of the death of the principal or without actual knowledge, or constructive knowledge pursuant to subsection (a)(3), that the authority granted in the power of attorney has been suspended, modified or terminated, relieves the attorney in fact or successor from liability to the principal and the principal's successors in interest.

(f) This section does not prohibit the principal, acting individually, and the person designated as the attorney in fact from entering into a written agreement that sets forth their duties and liabilities as between themselves and their successors, and which expands or limits the application of this act, with the exception of those acts enumerated in subsection (g) of K.S.A. 58-654, and amendments thereto.

(g) As between the principal and any attorney in fact or successor, if the attorney in fact or successor undertakes to act, and if in respect to such act, the attorney in fact or successor acts in bad faith, fraudulently or otherwise dishonestly, or if the attorney in fact or successor intentionally acts after receiving actual notice that the power of attorney has been revoked or terminated, and thereby causes damage or loss to the principal or to the principal's successors in interest, such attorney in fact or successor shall be liable to the principal or to the principal's successors in interest, or both, for such damages, together with reasonable attorney fees, and punitive damages as allowed by law.

(h) If a power of attorney does not provide the method for an attorney in fact's resignation, an attorney in fact may resign by giving notice to the principal and, if the principal is disabled as defined by K.S.A. 58-651(c):

(1) to the conservator or guardian, if one has been appointed for the principal, any co-attorney in fact or successor attorney in fact, and the appointing court;

(2) to the successor attorney in fact if one is named in the power of attorney document;

or

(3) if there is no person described in subsections (h)(1) or (2) the notice may be given to:

(A) the principal's caregiver;

(B) another person reasonably believed by the attorney in fact to have sufficient interest in the principal's welfare; or

(C) a governmental agency having authority to protect the welfare of the principal.