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TO: House Judiciary Committee
FROM: Kansas Judicial Council – Mark Knackendoffel
DATE: March 10, 2021
RE: 2021 SB 103 amending the Kansas Power of Attorney Act

The Kansas Judicial Council and its Probate Law Advisory Committee (Committee) recommend SB 103, which amends the Kansas Power of Attorney Act. This bill is intended to address the problem of entities that improperly refuse to accept durable powers of attorney. The topic initially came to the attention of the Committee because members were hearing anecdotally about problems with banks and other entities requiring customers to use the entity's own form or rejecting documents that are more than a couple of years old. This is especially problematic when the principal has already lost capacity and can't execute a new power of attorney. From Committee members' experience, these problems can often be resolved by working up the chain of command at the bank, but this can be time-consuming and expensive for the client.

After further inquiry to several advocacy groups confirmed that this issue is not uncommon, the Committee decided to continue its study of the problem. The Committee reviewed laws from other states, including the Uniform Power of Attorney Act, which has been adopted in 26 states. The Committee also invited input from other interested groups including the Kansas Bankers Association, the Kansas Bar Association, and the Attorney General's office.

The proposed amendments to K.S.A. 58-658, which are found in Section 2 of the bill, are drawn from Sections 105, 119 and 120 of the Uniform Power of Attorney Act (Uniform Act). The amendments are intended to encourage acceptance of powers of attorney by protecting third parties that accept such powers in good faith and by sanctioning third parties that refuse to accept powers of attorney without a legitimate reason.

Like the Uniform Act, current Kansas law already provides protection for persons that accept an acknowledged power of attorney in good faith and without actual knowledge that the power of attorney is revoked, terminated, or invalid or that the attorney in fact has engaged in any impropriety. See K.S.A. 58-658(a). Senate Bill 103 adds additional protections for third parties. For example, the amendment to subsection (a) makes clear that an acknowledged signature on a power of attorney is presumed to be genuine. Also, new subsection (b), which reminds third parties of their independent duty to report abuse, neglect or exploitation under K.S.A. 39-1402 and 39-1431, provides that making such a report relieves the third party from liability for rejecting a power of attorney.

New subsections (e)(2) and (e)(3) provide even more protections for third parties. New subsection (e)(2) allows a third party to request and rely upon a sworn certification from the attorney in fact as to any factual matter regarding the principal, attorney in fact, or power of attorney. For example, the attorney in fact might be asked to attest that the power of attorney remains valid and has not been revoked. New subsection (e)(3) allows a third party to request and rely upon an opinion of counsel as to any legal matter regarding the power of attorney, so long as the third party explains the reason for the request in writing or another record.

New subsections (f) through (h) then set out the circumstances when a third party can reject a power of attorney and impose sanctions for a refusal that violates the statute. Subsection (f) prohibits a third party from requiring the use of a new and different form for the power of attorney. Subsection (g) provides that a third party must accept a power of attorney unless a specific exception exists. And subsection (h) imposes liability for a third party who refuses to accept a power of attorney if the court finds that the third party did not act in good faith.

Senate Bill 103 also requires that forms for a power of attorney and an attorney in fact's certification be substantially in compliance with forms created by the Judicial Council. The hope is that having standardized forms in common use will enhance the rate of acceptance by third parties. However, powers of attorney executed before July 1, 2021, will continue to be valid even if not in substantial compliance with the Judicial Council form.

Last year's legislation

Senate Bill 103 is very similar to last year's 2020 HB 2500, which was amended in this committee. The Probate Committee had no objection to most of the amendments made by this committee, but there were two changes that the Committee found problematic. Those changes related to language that was added allowing a third party to request and rely on an opinion of counsel.

Our Probate Committee worked with representatives from Capitol Federal on a compromise that would allow a third party to request and rely on an opinion of counsel to be provided by the agent, but would prohibit a third party from requiring an opinion of counsel from the agent. Those changes are included in SB 103.

We made one other small change from last year's version of the bill, again after working with representatives of CapFed. That was to add the new second sentence in Section 2 stating that an acknowledged signature is presumed to be valid.

Committee membership

The members of the Judicial Council Probate Law Advisory Committee are:

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Shannon Barks	Kansas City, MO
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