

SENATE BILL No. 103

AN ACT concerning the Kansas power of attorney act; relating to the effectiveness of a power of attorney; exemption of third persons from liability in certain circumstances; amending K.S.A. 58-658 and K.S.A. 2020 Supp. 58-652 and repealing the existing sections.

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

Section 1. K.S.A. 2020 Supp. 58-652 is hereby amended to read as follows: 58-652. (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. 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 expressed in the presence of a notary public. 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., and amendments thereto, to the same extent and effect as if physically signed by the principal.

(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.

(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.

(f) A power of attorney executed on or after July 1, 2021, shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council. The judicial council shall develop a form for use under this section.

(g) The amendments made to this section by this act apply prospectively and shall not affect the validity of a power of attorney executed prior to July 1, 2021.

Sec. 2. K.S.A. 58-658 is hereby amended to read as follows: 58-658. (a) A third person, who is acting in good faith, without liability to the principal or the principal's successors in interest, may rely and act on any power of attorney executed by the principal *and acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and amendments thereto. A signature on a power of attorney is presumed to be genuine if acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and amendments thereto.* A third person, with respect to the subjects and purposes encompassed by or separately expressed in the power of attorney, may rely and act on the instructions of or otherwise contract and deal with the principal's attorney in fact or successor attorney in fact and, in the absence of actual knowledge, as defined in subsection ~~(e)~~ (d), is not responsible for determining and has no duty to inquire as to any of the following:

(1) The authenticity of a copy of a power of attorney furnished by the principal's attorney in fact or successor;

(2) the validity of the designation of the attorney in fact or successor;

(3) whether the attorney in fact or successor is qualified to act as an attorney in fact for the principal;

(4) the propriety of any act of the attorney in fact or successor in the principal's behalf, including, but not limited to, whether or not an act taken or proposed to be taken by the attorney in fact, constitutes a breach of any duty or obligation owed to the principal, including, but not limited to, the obligation to the principal not to modify or alter the principal's estate plan or other provisions for distributions of assets at death, as provided in ~~subsection (a) of~~ K.S.A. 58-656(a), and amendments thereto;

(5) whether any future event, condition or contingency making effective or terminating the authority conferred in a power of attorney has occurred;

(6) whether the principal is disabled or has been adjudicated disabled;

(7) whether the principal, the principal's legal representative or a court has given the attorney in fact any instructions or the content of any instructions, or whether the attorney in fact is following any instructions received;

(8) whether the authority granted in a power of attorney has been modified by the principal, a legal representative of the principal or a court;

(9) whether the authority of the attorney in fact has been terminated, except by an express provision in the power of attorney showing the date on which the power of attorney terminates;

(10) whether the power of attorney, or any modification or

termination thereof, has been recorded, except as to transactions affecting real estate;

(11) whether the principal had legal capacity to execute the power of attorney at the time the power of attorney was executed;

(12) whether, at the time the principal executed the power of attorney, the principal was subjected to duress, undue influence or fraud, or the power of attorney was for any other reason void or voidable, if the power of attorney appears to be regular on its face;

(13) whether the principal is alive;

(14) whether the principal and attorney in fact were married at or subsequent to the time the power of attorney was created and whether an action for annulment, separate maintenance or divorce has been filed by either party; or

(15) the truth or validity of any facts or statements made in an affidavit of the attorney in fact or successor with regard to the ability or capacity of the principal, the authority of the attorney in fact or successor under the power of attorney, the happening of any event or events vesting authority in any successor or contingent attorney in fact, the identity or authority of a person designated in the power of attorney to appoint a substitute or successor attorney in fact or that the principal is alive.

(b) *Nothing in subsection (a) shall relieve a third person of any duty to report abuse, neglect or exploitation pursuant to K.S.A. 39-1402 or 39-1431, and amendments thereto, and making such report shall relieve the third person of any liability for not accepting a power of attorney as provided in subsection (g)(6).*

(c) A third person, in good faith and without liability to the principal or the principal's successors in interest, even with knowledge that the principal is disabled, may rely and act on the instructions of or otherwise contract and deal with the principal's attorney in fact or successor attorney in fact acting pursuant to authority granted in a durable power of attorney.

~~(e)~~(d) A third person that conducts activities through employees shall not be charged under this act with actual knowledge of any fact relating to a power of attorney, nor of a change in the authority of an attorney in fact, unless the information is received at a home office or a place where there is an employee with responsibility to act on the information, and the employee has a reasonable time in which to act on the information using the procedures and facilities that are available to the third person in the regular course of its operations.

~~(d)~~(e) A third person, when being requested to engage in transactions with a principal through the principal's attorney in fact, may:

(1) Require the attorney in fact to provide specimens of the attorney in fact's signature and any other information reasonably necessary or appropriate in order to facilitate the actions of the third person in transacting business through the attorney in fact;

(2) *request and rely upon a certification by the attorney in fact, provided under penalty of perjury, of any factual matter concerning the principal, attorney in fact or power of attorney;*

(3) *request and rely upon an opinion of counsel as to any matter of law concerning the power of attorney if the third person provides in a writing or other record the reason for the request;*

(4) require the attorney in fact to indemnify the third person against forgery of the power of attorney, by bond or otherwise. If the power of attorney is durable as defined in ~~subsection (a) of K.S.A. 58-652(a)~~, and amendments thereto, and if either the principal or the attorney in fact seeking to act is and has been a resident of this state for at least two years, and if the attorney in fact has executed in the name

of the principal and delivered to the third person an indemnity agreement reasonably satisfactory in form to such third person, no such bond shall be required; and

~~(3)~~(5) prescribe the place and manner in which the third person will be given any notice respecting the principal's power of attorney and the time in which the third person has to comply with any notice.

(f) A third person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

(g) A third person shall accept a power of attorney acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and amendments thereto, unless:

(1) The person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(2) engaging in a transaction with the attorney in fact or principal in the same circumstances would be inconsistent with federal law;

(3) the person has actual knowledge of the termination of the attorney in fact's authority or of the power of attorney before the exercise of the power;

(4) a request for information, certification or indemnification under subsection (e) is refused;

(5) the person in good faith believes that the power is not valid or that the attorney in fact does not have the authority to perform the act requested, whether or not a certification or an opinion of counsel under subsection (e) has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report under K.S.A. 39-1402 or 39-1431, and amendments thereto, stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the attorney in fact or a person acting for or with the attorney in fact.

(h) A third person that refuses to accept a power of attorney acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and amendments thereto, in violation of this section is subject to a court order mandating acceptance of the power of attorney. Reasonable attorney fees and costs may be awarded in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney if the court determines the third person did not act in good faith.

(i) An attorney in fact's certification shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council. The judicial council shall develop a form for use under this section.

Sec. 3. K.S.A. 58-658 and K.S.A. 2020 Supp. 58-652 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

SENATE adopted

Conference Committee Report _____

President of the Senate.

Secretary of the Senate.

Passed the HOUSE

as amended _____

HOUSE adopted

Conference Committee Report _____

Speaker of the House.

Chief Clerk of the House.

APPROVED _____

Governor.