

SESSION OF 2015

SUPPLEMENTAL NOTE ON SENATE BILL NO. 57

As Recommended by Senate Committee on
Judiciary

Brief*

SB 57 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 attorney in fact would be required to sign and date the durable power of attorney, reflecting certain acknowledgments, before taking any action on behalf of the principal, but the attorney in fact need not sign at the same time as the principal.

The bill would clarify that an attorney in fact has a fiduciary duty to the principal to exercise power in the principal's best interest. Any acts contrary to this requirement and not specifically permitted by the durable power of 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. A power of attorney executed by a person without capacity would be invalid.

*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>

The bill would replace the existing attorney in fact record-keeping requirements with a requirement to maintain adequate records as necessary to disclose fully the nature of the receipts, disbursements, and transactions for five years after the date on which such occurred. Failure to maintain adequate records would 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 is found to have commingled funds or assets of the principal with funds or assets of the attorney in fact contrary to the best interest of the principal, 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" and "capacity" 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, 2015, 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 the Kansas Judicial Council. A similar bill was introduced during the 2014 Session (2014 SB 355) and passed the Senate but died in the House Committee on Judiciary before being referred to the Judicial Council for study. This bill is based on legislation proposed by the Judicial Council's Probate Law Advisory Committee following that study.

Proponents of the bill appearing before the Senate Committee included representatives from the Office of the Attorney General, Kansas Advocates for Better Care, and LeadingAge Kansas. Written testimony in support of the bill was submitted by the Kansas Judicial Council. No opponent or neutral testimony was submitted to the Committee.

According to the fiscal note prepared by the Division of the Budget, the Office of Judicial Administration indicates the bill may require time spent by courts to determine issues arising from compliance with the bill's requirements, but the fiscal effect on expenditures by the Judicial Branch cannot be determined until the courts have had an opportunity to operate with the provisions of the bill in place.