

Approved by the Judicial Council December 3, 2010

**REPORT OF THE PROBATE LAW ADVISORY COMMITTEE
ON 2010 HOUSE BILL 2568**

BACKGROUND

2010 House Bill 2568 concerning the Kansas Power of Attorney Act and relating to durable powers of attorney was a bill requested by the Attorney General's Office and introduced in the House Judiciary Committee. HB 2568 required power of attorney documents to include additional language and conditions. A hearing was held on the bill, but it died in committee. House Judiciary Chair Lance Kinzer requested that the Judicial Council study HB 2568. The Council agreed to undertake the study and referred the bill to the Judicial Council's Probate Law Advisory Committee.

The Probate Law Advisory Committee (PLAC) considered the bill at four meetings and Deputy Attorney General Loren Snell (who testified in support of the bill before the House Judiciary Committee) met with the Committee at each meeting. The Committee also reviewed Mr. Snell's testimony of February 9, 2010, in support of the bill and the testimony of Joe Molina on behalf of the Kansas Bar Association.

Mr. Snell informed the Committee that, in his position as Director of the Medicaid Fraud and Abuse Division of the Kansas Attorney General's Office, his primary mission is the pursuit of those who commit fraud against the Kansas Medicaid Program. However, he said the Division is also charged with investigating and prosecuting physical abuse, financial exploitation and neglect perpetrated against patients in residential care facilities operated by the State.

Mr. Snell reported that since 2005, the Medicaid Fraud and Abuse Division has opened active investigations in 32 cases involving suspected financial exploitation through the use of durable powers of attorney, with 20 of these cases being reported in the past two years. Mr. Snell stated that there are many cases outside the jurisdiction of his office or that go unreported. According to statistics provided by the Abuse, Neglect and Exploitation Unit of the Kansas Attorney General's Office, more than 53% of the adult case filings from 2009 (or more than 230 cases) involved financial exploitation and fiduciary abuse. While not all of these cases involved a durable power of attorney, the total number of cases were a 6% increase over the previous year.

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Mr. Snell proposed HB 2568 in response to the problems he has observed in the durable power of attorney area. He acknowledges that the proposal will not do away with all financial exploitation in the area, but does believe it will result in more awareness, openness, guidance and transparency in the durable power of attorney area and will make some cases easier to prosecute.

As proposed by Mr. Snell, HB 2568 contained certain provisions:

- (1) The principal would be required to attest at signing that he or she understands the extent of the powers being granted to the attorney in fact.

(2) The attorney in fact would be required to attest to his or her knowledge of the powers being conferred.

(3) Similar to a will, the power of attorney would be required to be witnessed by two persons (not related to the principal) who witnessed the document's signing and can attest to the principal's competence. Mr. Snell believes these requirements will increase the parties' understanding of the authority being conferred by the durable power of attorney, and would provide independent, disinterested witnesses to the execution, thereby decreasing the possibility of improper dealings from the beginning.

(4) An amendment stating that failure to act in accordance with a durable power of attorney may result in criminal prosecution is a critical component of the legislation. Mr. Snell stated that there is a common misperception that exploitation committed by an attorney in fact, acting under color of a durable power of attorney, is a civil matter, not a criminal act. While this is not true, because the perception exists, the statement puts the public on notice and reminds prosecutors that these are not simply civil matters.

(5) Recording of the durable power of attorney. Mr. Snell stated recording the instrument is consistent with the concept of openness and transparency. Recording puts the world on notice and lets the attorney in fact know that the world is aware. Mr. Snell said 21 states require that durable powers of attorney be recorded.

(6) Require the attorney in fact to maintain records of all transactions and prohibit the commingling of funds and impose costs for recovering the funds.

COMMITTEE RECOMMENDATIONS

After discussing HB 2568, the Probate Law Advisory Committee made the following decisions with respect to the proposals contained in HB 2568.

(1) The Committee agreed to require that every durable power of attorney executed after the effective date of the proposed legislation include a "Notice to Person Executing Durable Power of Attorney" in 14 point type describing the document and powers delegated by the document.

(2) The Committee agreed with the concept that the attorney in fact be required to attest to his or her knowledge of the powers being conferred.

(3) The Committee did not agree to the concept that a durable power of attorney be witnessed by two persons, similar to a will.

(4) The Committee agreed to include a statement that certain acts done by the attorney in fact that are not strictly for the benefit of the principal may result in criminal prosecution. Also, in the criminal law area, Mr. Snell proposed the crime of destruction or concealment of

records and an amendment to K.S.A. 21-3437 relating to mistreatment of a dependent adult. The Committee supports Mr. Snell's decision to seek the above described changes in the criminal code, but advised him to seek legislation to do so in a separate bill.

(5) The Committee did not agree with the proposal to record durable powers of attorney and it was agreed that the concept would be removed from the legislation recommended by the Committee. The Committee acknowledged that its members and Mr. Snell have had different experiences with durable powers of attorneys. Mr. Snell sees only situations in which there is fraud, or at least the possibility of fraud. The experience of the members of the Committee is that durable powers of attorneys are inexpensive estate planning tools that fill a need and function quite well. Because of the overall positive experience the Committee members have had with durable powers of attorney and the many issues raised with registering durable powers of attorney, the Committee did not include the requirement durable powers of attorney be recorded in its proposed legislation.

(6) The Committee agreed with the proposal that K.S.A. 58-656 be amended to require the attorney in fact to keep more complete records of all transactions, to prohibit commingling of funds and impose costs for recovering the funds.

CONCLUSION

The Committee agreed to introduce amendments to sections K.S.A. 58-651, 58-652, 58-656 and 58-664 of the Kansas Power of Attorney Act.