

GENERAL DURABLE POWER OF ATTORNEY

Reference

K.S.A. 58-650 to 58-665; 58-4809; 58-4810.

Comment

The Judicial Council is providing this form power of attorney as required by K.S.A. 58-652(g). A power of attorney authorizes another person (your attorney in fact) to make decisions and take actions concerning your money and property for you (the principal). **If you have questions about the power of attorney or the authority you are granting to your attorney in fact, you should seek legal advice before signing this form.**

You can contact the **Kansas Bar Association** (1-800-928-3111), **Kansas Legal Services** (913-621-0200) or an attorney of your choosing.

Under Kansas law, a power of attorney may be either durable or nondurable. A durable power of attorney will remain in effect even if the principal becomes disabled or incapacitated (Option A), and it can be written to take effect only when the principal becomes disabled or incapacitated, also known as a “springing” durable power of attorney (Option B). A nondurable power of attorney is no longer effective if the principal becomes disabled or incapacitated. (Option C).

The form power of attorney prepared by the Judicial Council is drafted as a durable power of attorney that becomes effective immediately and remains in effect even if the principal becomes disabled or incapacitated (Option A), because that is the structure most people use when drafting a power of attorney. However, alternative language for Options B and C is included below.

Option B - If the principal wants to create a “springing” durable power of attorney, the following language should be substituted for paragraphs (2) and (3) of the form:

(2) 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.

(3) Notwithstanding any other provisions in this document, this power of attorney shall become effective only upon the disability of the principal. The rights, powers and authorities of my attorney in fact shall commence only upon my disability and shall remain in full force until such disability is terminated. Disability shall be the condition as defined in K.S.A. 58-651(c). Such condition shall be conclusively determined by a written declaration of my attending physician.

In addition, if the durable power of attorney is springing, the following or substantially similar language relating to medical records should be included:

I intend for my attorney in fact to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164.

I authorize any physician, healthcare professional, dentist, health plan, hospital, clinic, laboratory, pharmacy or other covered health care provider, any insurance company and the Medical Information Bureau, Inc., or other health care clearinghouse that has provided treatment or services to me or that has paid for or is seeking payment from me for such services to give, disclose and release to my agent, without restrictions, all of my individually identifiable health information and medical records regarding any past, present or future medical or mental health condition, including but not limited to information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness and drug and alcohol abuse.

The authority given my attorney in fact shall supersede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information. The authority given my attorney in fact has no expiration date and shall expire only in the event that I revoke such authority in writing and deliver it to my health care provider.

Option C – If the principal wants to create a nondurable power of attorney, the word “durable” should be stricken from the title of the form, and the following language should be substituted for paragraph (2):

This power of attorney is not durable, and the authority of my attorney in fact shall be suspended during any period that I am disabled to the extent that I am unable to receive or evaluate information or to communicate decisions with respect to the subject of the power of attorney.

Paragraph (4) begins with the statutory language from K.S.A. 58-654 which delegates general powers to the attorney in fact to act on the principal’s behalf with respect to all lawful subjects and purposes. This is all that is required. However, additional paragraphs specifically enumerating specific powers are included in the form because some drafters may prefer such enumeration.

The granting of the optional additional powers contained in paragraph (6) are important decisions. The Committee suggests a thorough discussion of these powers with counsel as to their tax, estate planning and other consequences. The principal should initial next to each specific power, indicating whether that power is included or excluded. If neither line is initialed, the presumption will be that the power is excluded.

If a successor attorney in fact is designated (see bracketed language in paragraph 1) and the principal does not want the successor attorney in fact to have the same optional additional powers as the original attorney in fact, an additional section should be added, in which the principal indicates whether each optional additional power is included or excluded as to the successor attorney in fact.

If the optional additional power to consent on behalf of the principal to the sale, gift, transfer, mortgage or other alienation of the principal’s homestead in section (6)(j) is chosen, the subsection entitled “Consent of Spouse” is required by K.S.A. 58-654(f)(10) and must be included. If this optional power is not included, the “Consent of Spouse” subsection need not be included.

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. The subsection entitled “Acceptance of Authority and Agreement to Act” provides for such express written agreement to act; however, it is optional.

If a person appoints more than one attorney in fact, the power of attorney should state whether such attorneys in fact must act jointly or may act independently. If the power of attorney does not specify, then K.S.A. 58-653 requires attorneys in fact to act jointly.

In 2017, Kansas enacted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), K.S.A. 58-4801 *et seq.* The RUFADAA provides a mechanism for an attorney in fact to obtain access to a principal’s digital assets from a custodian that is maintaining or storing those digital assets. Under the RUFADAA, a general grant of authority in a power of attorney is sufficient to provide the attorney in fact with authority over all of the principal’s digital assets, including a catalogue of the principal’s electronic communications but not the content of those communications. K.S.A. 58-4810. The RUFADAA distinguishes between the content of electronic communications, which includes the subject line and text of email, text messages, and other private messages, and the catalogue of electronic communications, which includes the list of senders, recipients, and the date and time of the message. K.S.A. 58-4802. An attorney in fact may access the content of electronic communications only if the power of attorney explicitly grants such authority. K.S.A. 58-4809. The optional additional power in paragraph (6)(m) is intended to authorize such access.

GENERAL DURABLE POWER OF ATTORNEY

(1) I, _____ (principal), of _____ (street address), _____ (city), _____ (state), appoint _____ (attorney in fact) of _____ (city), _____ (state), as my attorney in fact under the Kansas Power of Attorney Act, K.S.A. 58-650 to K.S.A. 58-665. In the event of the subsequent disability, death or disqualification of the attorney in fact I have designated, I appoint _____ (name) of _____ (city), _____ (state).

(2) 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.

(3) This durable power of attorney shall become effective immediately.

GENERAL GRANT OF AUTHORITY

(4) General powers are granted to my attorney in fact and my attorney in fact is granted the power to act with respect to all lawful subjects and purposes and my attorney in fact's authority shall extend to and include each and every action or power which an adult who is not disabled may carry out through an agent specifically authorized in the premises, with respect to any and all matters whatsoever, except as provided in paragraph (7).

(5) The general authority granted and assumed by the attorney in fact shall include, but not be limited to the following acts:

(a) To ask, demand, sue for, recover, collect and receive any and all such sums of money, debts, deposits, certificates of deposit, accounts, legacies, bequests, interest dividends, annuities, and demands whatsoever as now or shall hereafter become due, owing payable or belonging to me, including any proceedings under the Bankruptcy Act or similar statutes;

(b) To write checks on any of my checking accounts, deposit and withdraw moneys from savings accounts, sign or endorse checks of any nature payable to me, assign or transfer stock certificates, and certificates of deposit and enter any safety deposit box leased in my name or my name and others if I would otherwise be permitted access to such box;

(c) To maintain, repair, improve, manage, insure, rent, lease, sell, convey, mortgage, in any way or manner deal with all or any part of any real or personal property whatsoever, tangible or intangible, or any interest, including joint interest in such property, that I now own or may later acquire, for me, on my behalf, in my name and under such terms and conditions and such other covenants as my attorney in fact may deem proper and in my name to make, execute, acknowledge good and sufficient deeds of conveyance or other instrument or instruments necessary to effect such sale, conveyance or agreement;

(d) To conduct, engage in, and transact any and all lawful business of whatsoever nature or kind for me, on my behalf, and in my name;

(e) To transfer any interests in property I may own to a revocable or living trust created by me, which trust benefits me during my life;

(f) To participate or not participate, as my attorney in fact may determine, in any program, plan or activity dealing with agricultural land or practices sponsored by or under the supervision or direction of the United States Department of Agriculture (USDA), Farm Service Agency (FSA), Commodity Credit Corporation (CCC) or Federal Crop Insurance Corporation (FCIC) or any similar or successor organization or entity;

(g) To exercise or perform any act, power, duty, right or obligation whatsoever that I now have or may later acquire the legal right, power, or capacity to exercise or perform, in connection with, arising from, or relating to any person, item, transaction thing, business property, real or personal, tangible or intangible, or matter whatsoever;

(h) To resign any position I may hold as a director, officer, fiduciary or in any other capacity;

(i) To execute Federal or state income tax returns, gift tax returns or any other returns or forms, documents or agreements relating thereto or otherwise dealing with the IRS or any state agency involved in the collection or payment of any taxes;

(j) To open or maintain accounts with financial institutions and to buy, sell, endorse, transfer, hypothecate and borrow against any shares of stocks, bonds or other securities and to vote as my proxy any such shares;

(k) To make any and all arrangements deemed appropriate and in my best interest for my personal care, support maintenance, living arrangements and medical care, including admission to a hospital, retirement home or facility, extended care facility, nursing home, hospital or any other convalescent or medical care unless I have otherwise appointed another person as my attorney in fact for health care decisions, in which event such other appointment shall take precedence over this direction;

(l) To execute a power of attorney required by any governmental agency or other legal entity on my behalf naming my attorney in fact as the attorney in fact authorized to enter into any transaction with such group or legal entity;

(m) To exercise authority over digital assets on behalf of the principal including a catalogue of electronic communications sent or received by the principal but not the content of electronic communications unless specifically authorized as an optional additional power.

All acts done by my attorney in fact shall inure to my benefit and shall likewise bind me and my successors in interest.

OPTIONAL ADDITIONAL POWERS

(6) I grant my attorney in fact the authority to take the following actions but only to the extent that I have affirmatively expressed my intentions by initialing on the line designated "include" in front of the description of the power conveyed. If I have initialed the line designated "exclude" or if I have left both lines blank, then I do not intend to grant my attorney in fact the authority to take the action described.

- | | Include | Exclude | |
|-----|--------------------------|--------------------------|--|
| (a) | <input type="checkbox"/> | <input type="checkbox"/> | To execute, amend or revoke any trust agreement. |
| (b) | <input type="checkbox"/> | <input type="checkbox"/> | To fund with my assets any trust not created by me. |
| (c) | <input type="checkbox"/> | <input type="checkbox"/> | To make or revoke a gift of my property in trust or otherwise. |
| (d) | <input type="checkbox"/> | <input type="checkbox"/> | To disclaim a gift or devise of property to or for my benefit. |

- (e) To create or change survivorship interests in my property or in property in which I may have an interest.
- (f) To designate or change the designation of beneficiaries to receive any property, benefit or contract right upon my death.
- (g) To give or withhold consent to an autopsy or postmortem examination.
- (h) To make or decline to make a gift of my body parts under an anatomical gift act.
- (i) To nominate a guardian or conservator for me, and the attorney in fact may nominate himself or herself.
- (j) To give consent on my behalf to the sale, gift, transfer, mortgage or other alienation of my homestead or interest in my homestead. The street address of the homestead is:

 _____, _____

and the legal description of the homestead is:

Nothing in this document shall be construed as a limitation or abridgement of the right of my spouse to consent or withhold consent to the alienation of the spouse's homestead or any rights in the homestead, under Article 15, section 9 of the Kansas Constitution.

- (k) To designate one or more substitute or successor or additional attorneys in fact.
- (l) To delegate any or all powers contained in this document.
- (m) To exercise authority over the content of electronic communications sent or received by me pursuant to K.S.A. 58-4809.
- (n) To pay reasonable expenses incurred for my funeral and burial or other disposition of my body.

POWERS PROHIBITED

(7) As provided in K.S.A. 58-654(g) my attorney in fact shall not have the power or authority to do any of the following acts:

- (a) To make, publish, declare, amend or revoke my will;
- (b) Make, execute, modify or revoke a living will or "do not resuscitate" order or a durable power of attorney for health care decisions;
- (c) To require me, against my will, to take any action or to refrain from taking any action;
- (d) To carry out any action I have specifically forbidden while not under any disability or incapacity.

ACCOUNTING

(8) (Initial the following optional directives desired by the principal)

- I direct as soon as practicable after my death that my attorney in fact shall provide an accounting to my personal representative or trustee in such manner and for such period as requested by the personal representative or trustee.
- I direct as soon as practicable after my disability that my attorney in fact shall provide an accounting to _____.
- I waive the necessity of my attorney in fact providing an accounting to me or any other person during my lifetime or upon my death.
- (Here insert any other direction relating to accounting.)

_____.

This instrument is executed, delivered and shall be governed by the Kansas Power of Attorney Act, and amendments thereto and all questions as to its validity, powers of the attorney in fact and construction shall be likewise so governed.

Principal

Date

State of Kansas
County of _____

This instrument was acknowledged before me on _____, _____,
by _____.

Notarial Officer

Title

(SEAL)
My Appointment Expires:

CONSENT OF SPOUSE
(Optional unless attorney in fact is granted power over the homestead under paragraph (6)(j))

_____, spouse of the above named Principal, consents to the provisions of the durable power of attorney of _____ which provides the attorney in fact may give consent on behalf of the principal to the sale, gift, transfer, mortgage or other alienation of the principal's homestead or interest in the homestead. In addition, I consent that the attorney in fact may alienate the interest, in whole or in part, of the principal in the homestead described in the durable power of attorney and further, I agree that the consent of the attorney in fact will constitute the consent of the principal required by Article 15, Section 9, of the Kansas Constitution.

Spouse

State of Kansas
County of _____

This instrument was acknowledged before me on _____, _____,
by _____.

Notarial Officer

Title

(SEAL)
My Appointment Expires:

**ACCEPTANCE OF AUTHORITY AND AGREEMENT TO ACT
(Optional)**

Now on this _____ day of _____, 20____, _____, attorney in fact, accepts the authority granted in this document and agrees to act in the best interest of the above named principal in carrying out the duties and responsibilities set forth in this document until such time as said authority is terminated by the principal or by operation of law, whichever occurs first.

Attorney in fact

State of Kansas
County of _____

This instrument was acknowledged before me on _____, _____,
by _____.

Notarial Officer

Title

(SEAL)
My Appointment Expires: