

D R A F T
FOR DISCUSSION

AMENDMENTS TO UNIFORM DURABLE POWER OF ATTORNEY ACT

NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS

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AMENDMENTS TO UNIFORM DURABLE POWER OF ATTORNEY ACT

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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AMENDMENTS TO UNIFORM DURABLE POWER OF ATTORNEY ACT

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AMENDMENTS TO UNIFORM DURABLE POWER OF ATTORNEY ACT

Prefatory Note

The proposed revisions to the Uniform Durable Power of Attorney Act were precipitated by a study conducted for the Joint Editorial Board for Uniform Trusts and Estates Acts. Although the original Uniform Durable Power of Attorney Act, last amended in 1987 ("the 1987 Act"), was eventually followed by 48 jurisdictions, either through official adoption or by adoption of substantially similar provisions, growing evidence suggested that this initial uniformity was eroding. A comparative review of all state durable power legislation confirmed significant areas of developing divergence. The study reported that only 13 states remain pure Uniform Act states, and that while 18 jurisdictions have retained the 1987 Act's core sections, they have added a number of provisions to address specific topics on which the 1987 Act is silent. The remaining 20 states have adopted numerous detailed provisions either instead of, or in addition to, the 1987 Act provisions.

Of particular note, the JEB study revealed growing state divergence in the following areas:

- (1) authority of multiple agents;
- (2) authority of a later-appointed fiduciary or guardian;
- (3) impact of dissolution or annulment of principal's marriage to the agent;
- (4) activation of contingent powers;
- (5) authority to make gifts; and
- (6) standards for agent conduct and liability.

A trend was also noted with respect to state enactment of similar provisions to deal with areas on which the 1987 Act is silent. These areas include:

- (1) successor agents;
- (2) execution requirements;
- (3) portability provisions;
- (4) sanctions for refusal of other persons to accept an agent's authority; and
- (5) agent powers which have the potential to alter a principal's estate plan, such as the authority to change or create beneficiary designations and survivorship interests, and the authority to create, amend, or revoke a trust.

In order to ascertain whether there was true divergence of opinion about many of these areas, or only the lack of a uniform model, the JEB authorized a national survey to which 371 respondents from all jurisdictions except seven replied. Based on this survey, there was over 70 percent consensus on the following topics not currently addressed by the 1987 Act:

- (1) Statute should require a confirming affidavit to activate contingent powers;
- (2) Divorce or annulment should revoke spouse-agent's authority;
- (3) Statute should include a portability provision;
- (3) Gift making authority should be expressly stated rather than implied;
- (4) Statute should set forth a default standard for agent fiduciary duties;
- (5) Principal should be permitted to alter the default fiduciary standard;
- (6) Statute should require notice by agent when no longer willing or able to act;
- (7) Statute should include safeguards against abuse by agent;
- (8) Statute should include a remedies and sanctions provision for abuse by agent;
- (9) Reliance by other persons should be protected by a statutory presumption that the durable power of attorney is valid; and

(10) Statute should include a remedies or sanctions provision for refusal of other persons to honor a durable power of attorney.

The following provides an overview of the proposed revisions and how they address the concerns raised by the JEB study.

Article 1

General Provisions and Definitions

Section 1 of the 1987 Act contained a general definition of a durable power of attorney. This section has been replaced in its entirety by the definitions contained in the proposed Section 102. These definitions are drafted to be consistent with the definitions in other Uniform Acts for the terms “incapacitated,” “person,” “record,” and “State.” Of note is the change in emphasis from “disability” as a basis for surrogate decision making to the concept of “incapacity.” The definition for “incapacitated” is taken from the Uniform Guardianship and Protective Proceedings Act as amended in 1997. The term “agent” is also used as a replacement for the term “attorney in fact.” This usage follows the Uniform Statutory Form Power of Attorney Act and seeks to resolve reported confusion among the lay public concerning the term “attorney in fact.” Section 103 tracks the Uniform Trust Code definition of “knowledge,” a concept that is often determinative of when a durable power of attorney is effectively revoked. Sections 104 and 105 address the concepts of multiple and successor agents, and Section 106 provides guidance on the relationship of the agent to a later court-appointed fiduciary. The 1987 Act provided that a later-appointed fiduciary had the same power to revoke or amend the durable power of attorney that the principal would have had prior to incapacity. The proposed revisions remove this power from the fiduciary in favor of judicial determination of whether the previously executed durable power of attorney should continue undisturbed or be limited, suspended, or terminated. This approach is consistent with the Uniform Guardianship and Protective Proceedings Act and deference for the previously expressed preferences of the principal. Section 107 provides that an agent’s authority is terminated upon dissolution or annulment of the principal’s marriage to the agent unless otherwise specified in the durable power of attorney. Section 108 requires a principal to designate what person or persons have the authority to determine when contingent powers are triggered and requires an affidavit from the persons designated to activate the durable power of attorney. Section 109 is a slightly modified version of Section 2 of the 1987 Act, which addresses the binding effect of an agent’s action upon the principal as well as the non-time limited quality of a durable power of attorney. Section 110 addresses agent compensation, and Section 111 clarifies that the common law principles of agency and the principles of equity supplement the Act.

Article 2

Creation of a Durable Power of Attorney

Article 2 addresses three areas which were not addressed in the 1987 Act, but about which a growing number of jurisdictions have enacted provisions. Section 201 requires the principal’s signature and an acknowledgment before a notary public for effective execution of a durable power of attorney. This is the minimum requirement of most jurisdictions that have enacted execution provisions. A number of jurisdictions also require one or two additional witnesses. Section 202 clarifies that recording is not necessary for validity of a durable power of attorney. Section 203 provides a general portability provision which honors durable powers properly executed in other jurisdictions.

Article 3 Powers

Article 3 provides an innovation which blends the general approach of the 1987 Act with the drafting convenience of the Uniform Statutory Form Power of Attorney Act. The 1987 Act did not provide examples or definitions of the powers that a principal might convey to an agent. The Uniform Statutory Form Power of Attorney Act sets forth detailed descriptions of powers that are incorporated by reference using the short labels in the form. Proposed Section 302 gives the drafting attorney who wishes to construct a unique durable power of attorney the convenience of incorporating by reference selected powers from those set forth in Sections 304 through 317. Section 302 also states that any of these powers may be modified in the durable power of attorney. Section 301 addresses a number of concerns raised in the JEB study by specifying the powers that must be expressly authorized in a durable power of attorney to be effective. Of particular note is Section 301 (a)(6) which requires an express grant of authority if the principal wishes to empower the agent to create in the agent or a person to whom the agent owes a legal duty of support the right to receive any property, benefit or contract right in which the principal has an interest. Section 301(b) also requires an agent who is authorized to exercise powers enumerated in subsection (a) to take the principal's estate plan into account when exercising such powers. Sections 303 through 318 are taken from the Uniform Statutory Form Power of Attorney Act with the exception of Section 312, Gift Transactions, which was not included in the Uniform Statutory Form Power of Attorney Act. Proposed modifications indicated with bracketed language have been made where necessary to reconcile the original sections of the Uniform Statutory Form Power of Attorney Act with proposed new Section 301. Section 309, Business Operating Transactions, has been modified to include interests the principal may have in limited liability companies, and Section 314(4) was added in response to issues raised by HIPAA. For those who wish to use a statutory short form durable power of attorney, Article 7 will contain a statutory short form which will incorporate many of the characteristics of the Uniform Statutory Short Form Power of Attorney Act. The Drafting Committee will consider a proposed form at the Fall 2003 drafting meeting.

Article 4 Conduct of Agent

Article 4 addresses standards for agent conduct and the bases for agent liability under a durable power of attorney. The 1987 Act was silent on these issues. Section 401 states that an agent is a fiduciary with a general duty of reasonable care and enumerates the agent's basic duties. This section also attempts to reconcile the unique circumstances which often arise in a durable power of attorney relationship between relatives or close friends. While a fiduciary is to avoid conflicts of interest that would impair the agent's ability to act in the principal's best interest, it is recognized that an agent may have inherent conflicts that do not necessarily prevent the agent from acting with reasonable care for the benefit of the principal. Section 402 permits a principal to reduce an agent's standard for liability to bad faith. Section 403 clarifies the classes of persons who have standing to request judicial review of an agent's conduct, and Section 404 addresses agent liability. Section 405 provides for agent resignation upon giving appropriate notice.

Article 5 Reliance of Other Persons and Liability

The provisions of Article 5 are proposed in response to the overwhelming feedback received by the JEB on the problem of persons who refuse to accept the authority of an agent under a durable power of attorney. Section 501 provides assurance to other persons through a statutory presumption of durable power validity, but in exchange, Section 502 (a) imposes liability for

refusal to accept an agent's authority. Section 502 (b) provides limited bases upon which a person may refuse to accept an agent's authority without incurring liability.

Article 6
Termination

Article 6 proposes only minor modifications for consistency purposes to Section 4 of the 1987 Act.

Article 7
Short Form Durable Power of Attorney

Article 7 will contain the proposed revised short form durable power of attorney.

AMENDMENTS TO UNIFORM DURABLE POWER OF ATTORNEY ACT

ARTICLE 1

GENERAL PROVISIONS AND DEFINITIONS

~~[Definition]. A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument. [UDPAA § 1]~~

SECTION 101. SHORT TITLE. This [Act] may be cited as the Uniform Durable Power of Attorney Act.

SECTION 102. DEFINITIONS. In this [Act]:

(1) "Agent" means the person designated to act as an attorney in fact for the principal under a durable power of attorney.

(2) "Durable power of attorney" means a record by which an individual, the principal, conveys to another person, the agent, authority that is not revoked by the incapacity of the principal; the agent's authority under a durable power of attorney may become effective immediately or upon a future date or event

(3) "Incapacitated" means inability to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions even with the use of appropriate technological assistance, or because the individual is missing, detained, or unable

1 to return to the United States.

2 (4) “Person” means an individual, corporation, business trust, estate, trust, partnership,
3 limited liability company, association, joint venture, governmental agency, public corporation, or
4 any other legal or commercial entity.

5 (5) “Record” means information that is inscribed on a tangible medium or that is stored in
6 an electronic or other medium and is retrievable in perceivable form.

7 (6) “State” means a State of the United States, the District of Columbia, Puerto Rico, and
8 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
9 the United States. The term includes an Indian tribe or band recognized by federal law or
10 formally acknowledged by a State.

11
12 **SECTION 103. KNOWLEDGE.**

13 (a) Subject to subsection (b), a person has knowledge of a fact if the person:

14 (1) has actual knowledge of it;

15 (2) has received a notice or notification of it; or

16 (3) from all the facts and circumstances known to the person at the time in question,
17 has reason to know it.

18 (b) An organization that conducts activities through employees has notice or knowledge
19 of a fact involving a durable power of attorney only from the time the information was received
20 by an employee having responsibility to act with respect to the durable power of attorney, or
21 would have been brought to the employee’s attention if the organization had exercised reasonable
22 diligence. An organization exercises reasonable diligence if it maintains reasonable routines for
23 communicating significant information to employees having a responsibility to act with respect
24 to powers of attorney and there is reasonable compliance with the routines. Reasonable diligence
25 does not require an employee of the organization to communicate information unless the
26 communication is part of the individual’s regular duties or the individual knows a matter

1 involving the durable power of attorney would be materially affected by the information.

2
3 **SECTION 104. MULTIPLE AGENTS.**

4 (a) A principal may designate more than one agent in a durable power of attorney.

5 (b) Unless the durable power of attorney provides otherwise, authority granted to two or
6 more agents is exercisable only by their unanimous consent.

7 (c) If an agent is unavailable because of absence, illness, or other temporary incapacity,
8 the other agents may exercise the authority under the durable power of attorney as if they were
9 the only agents where prompt action is required to accomplish the purposes of the durable power
10 of attorney or to avoid irreparable injury to the principal's interests.

11 (d) If a vacancy occurs in one of more of the agent designations under a durable power of
12 attorney, the remaining agents may exercise the authority conferred as if they were the only
13 agents.

14 (e) An agent is not liable for the actions of other agents unless the agent participates in,
15 knowingly acquiesces in, or conceals a breach of fiduciary duty committed by another agent.
16

17 **SECTION 105. SUCCESSOR AGENTS.**

18 (a) A principal may designate one or more successor agents to act in the event the initial
19 or predecessor agent resigns, dies, becomes disabled or incapacitated, is not qualified to act or
20 refuses to act. A principal may also grant authority to another person, designated by name, by
21 office, or by function, including the initial and any successor agents, to designate one or more
22 successor agents.

23 (b) Unless the durable power of attorney provides otherwise, a successor agent has the
24 same authority granted to the initial agent.

25 (c) A successor agent is not liable for the actions of a predecessor agent.
26

1 **SECTION 106. [GUARDIAN NOMINATION;] RELATION OF ATTORNEY-IN**
2 **FACT [AGENT] TO COURT-APPOINTED FIDUCIARY.**

3 (a) A principal may nominate, by a durable power of attorney, the conservator, guardian
4 of ~~his~~ [the] estate, or guardian of ~~his~~ [the] person for consideration by the court if protective
5 proceedings for the principal's person or estate are thereafter commenced. The court shall make
6 its appointment in accordance with the principal's most recent nomination in a durable power of
7 attorney except for good cause or disqualification.

8 (b) If, following execution of a durable power of attorney, a court ~~of the principal's~~
9 domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the
10 management of all of the principal's property or all of ~~his~~ [the] property except specified
11 exclusions, the ~~attorney-in-fact~~ [agent] is accountable to the fiduciary as well as to the principal.
12 ~~The fiduciary has the same power to revoke or amend the power of attorney that the principal~~
13 ~~would have had if he were not disabled or incapacitated.~~ [Upon motion filed in connection with
14 a petition for appointment of a conservator, guardian of the estate, or other fiduciary, or on
15 petition of a conservator, guardian or other fiduciary once appointed, the court shall consider
16 whether the authority of an agent designated under a previously executed durable power of
17 attorney should continue undisturbed or be limited, suspended or terminated. The court may
18 issue an order limiting, suspending or terminating the durable power of attorney only upon
19 determining that to do so would be in the best interests of the principal.]

20
21 **SECTION 107. DISSOLUTION OR ANNULMENT OF PRINCIPAL'S MARRIAGE**
22 **TO AGENT.** Unless the durable power of attorney provides otherwise, authority granted to the
23 spouse under a durable power of attorney is revoked if the marriage of the principal is dissolved
24 or annulled.

25
26 **SECTION 108. ACTIVATION OF CONTINGENT POWERS.** If the principal has

1 specified that the durable power of attorney will become effective upon the occurrence of a future
2 event or contingency, the principal shall designate one or more persons who have the authority to
3 determine conclusively that the specified event or contingency has occurred. The durable power
4 of attorney becomes effective when the person or persons designated by the principal execute an
5 affidavit that the specified event or contingency has occurred. Other persons may rely on the
6 written declaration of the person or persons designated by the principal without liability to the
7 principal or to any other person regardless of whether the specified event or contingency has
8 actually occurred.

9
10 **SECTION 109. DURABLE POWER OF ATTORNEY NOT AFFECTED BY LAPSE**
11 **OF TIME, ~~DISABILITY OR INCAPACITY~~.** All acts done by an ~~attorney in fact~~ [agent]
12 pursuant to a durable power of attorney [, including acts done] during any period of ~~disability or~~
13 incapacity of the principal[,] have the same effect and inure to the benefit of and bind the
14 principal and ~~his~~ [the principal's] successors in interest as if [done by] the principal [with
15 capacity.] ~~were competent and not disabled~~. Unless the instrument states a time of termination,
16 the [authority of the agent] ~~power~~ is exercisable notwithstanding the lapse of time since the
17 execution of the instrument.

18
19 **SECTION 110. COMPENSATION OF AGENT.** If the terms of the durable power of
20 attorney do not specify an agent's compensation, the agent is entitled to compensation that is
21 reasonable under the circumstances.

22
23 **SECTION 111. COMMON LAW OF AGENCY; PRINCIPLES OF EQUITY.**
24 The common law of agency and principles of equity supplement this [Act], except to the extent
25 modified by this [Act] or another statute of this State.

ARTICLE 2

CREATION OF A DURABLE POWER OF ATTORNEY

SECTION 201. EXECUTION REQUIREMENTS. A durable power of attorney must be signed by the principal, or by some other person in the principal's presence and at the principal's express direction, and acknowledged before a notary public.

SECTION 202. RECORDING. A durable power of attorney need not be recorded to be valid.

SECTION 203. DURABLE POWER OF ATTORNEY EXECUTED IN A FOREIGN JURISDICTION. A durable power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this State is valid in this State.

1 **ARTICLE 3**

2 **POWERS**

3
4 **SECTION 301. EXPRESS AUTHORITY REQUIRED; PRESERVATION OF**
5 **ESTATE PLAN.**

6 (a) A durable power of attorney may not be construed to convey authority to an agent to
7 perform any of the following acts unless expressly authorized in the durable power of attorney:

8 (1) create, modify, or revoke a trust;

9 (2) fund with the principal's property a trust not created by the principal or a person
10 authorized to create a trust on behalf of the principal;

11 (3) make or revoke a gift of the principal's property in trust or otherwise;

12 (4) create or change survivorship interests in the principal's property or in property in
13 which the principal may have an interest;

14 (5) designate or change the designation of beneficiaries to receive any property, benefit,
15 or contract right on the principal's death; or

16 (6) create in the agent or a person to whom the agent owes a legal duty of support the
17 right to receive property, a benefit, or contract right in which the principal has an interest.

18 (b) If expressly authorized to exercise any of the acts enumerated in subsection (a), the
19 agent shall take the principal's estate plan into account to the extent known to the agent and shall
20 attempt to preserve the plan, but the agent is not liable to any plan beneficiary under this section
21 unless the agent acts in bad faith.

22
23 **SECTION 302. INCORPORATION OF POWERS; SIMILAR OR OVERLAPPING**
24 **POWERS; MODIFICATION.**

25 (a) An agent has an express power granted under this article if the durable power of
26 attorney incorporates the power by:

1 (1) referring to the descriptive captions in sections 304 through 317 of this article; or

2 (2) citing to a specific section of sections 304 through 317 of this article.

3 (b) Reference in a durable power of attorney to the descriptive captions in sections 304
4 through 317 of this article shall be construed as though the entire section is set out in full in the
5 durable power of attorney.

6 (c) If powers are similar or overlap, the broadest power controls.

7 (d) A durable power of attorney may modify any power incorporated by reference.

8
9 **SECTION 303. CONSTRUCTION OF POWERS GENERALLY.** By executing a
10 durable power of attorney with respect to a subject listed in Sections 304 through 317, the
11 principal, except as limited or extended by the principal in the durable power of attorney,
12 empowers the agent, for that subject to:

13 (1) demand, receive, and obtain by litigation or otherwise, money or other thing of value
14 to which the principal is, may become, or claims to be entitled; and conserve, invest, disburse, or
15 use anything so received for the purposes intended;

16 (2) contract in any manner with any person, on terms agreeable to the agent, to
17 accomplish a purpose of a transaction, and perform, rescind, reform, release, or modify the
18 contract or another contract made by or on behalf of the principal;

19 (3) execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice,
20 check, release, or other instrument the agent considers desirable to accomplish a purpose of a
21 transaction;

22 (4) prosecute, defend, submit to arbitration, settle, and propose or accept a compromise
23 with respect to, a claim existing in favor of or against the principal or intervene in litigation
24 relating to the claim;

25 (5) seek on the principal's behalf the assistance of a court to carry out an act authorized
26 by the durable power of attorney;

1 (6) engage, compensate, and discharge an attorney, accountant, expert witness, or other
2 assistant;

3 (7) keep appropriate records of each transaction, including an accounting of receipts and
4 disbursements;

5 (8) prepare, execute, and file a record, report, or other document the agent considers
6 desirable to safeguard or promote the principal's interest under a statute or governmental
7 regulation;

8 (9) reimburse the agent for expenditures properly made by the agent in exercising the
9 powers granted by the durable power of attorney; and

10 (10) in general, do any other lawful act with respect to the subject.

11
12 **SECTION 304. REAL PROPERTY TRANSACTIONS.** Language granting power with
13 respect to real property transactions empowers the agent to:

14 (1) accept as a gift or as security for a loan, reject, demand, buy, lease, receive, or
15 otherwise acquire, an interest in real property or a right incident to real property;

16 (2) sell, exchange, convey with or without covenants, quitclaim, release, surrender,
17 mortgage, encumber, partition, consent to partitioning, subdivide, apply for zoning, rezoning, or
18 other governmental permits, plat or consent to platting, develop, grant options concerning, lease,
19 sublease, or otherwise dispose of, an interest in real property or a right incident to real property;

20 (3) release, assign, satisfy, and enforce by litigation or otherwise, a mortgage, deed of
21 trust, encumbrance, lien, or other claim to real property which exists or is asserted;

22 (4) do any act of management or of conservation with respect to an interest in real
23 property, or a right incident to real property, owned, or claimed to be owned, by the principal,
24 including:

25 (i) insuring against a casualty, liability, or loss;

26 (ii) obtaining or regaining possession, or protecting the interest or right, by litigation

1 or otherwise;

2 (iii) paying, compromising, or contesting taxes or assessments, or applying for and
3 receiving refunds in connection with them; and

4 (iv) purchasing supplies, hiring assistance or labor, and making repairs or alterations
5 in the real property;

6 (5) use, develop, alter, replace, remove, erect, or install structures or other improvements
7 upon real property in or incident to which the principal has, or claims to have, an interest or right;

8 (6) participate in a reorganization with respect to real property or a legal entity that owns
9 an interest in or right incident to real property and receive and hold shares of stock or obligations
10 received in a plan of reorganization, and act with respect to them, including:

11 (i) selling or otherwise disposing of them;

12 (ii) exercising or selling an option, conversion, or similar right with respect to them;

13 and

14 (iii) voting them in person or by proxy;

15 (7) change the form of title of an interest in or right incident to real property[; however,
16 general authority with respect to real property transactions does not include authority to create or
17 change survivorship interests in the principal's property or in property in which the principal may
18 have an interest unless specifically provided in the durable power of attorney.]

19 (8) dedicate to public use, with or without consideration, easements or other real property
20 in which the principal has, or claims to have, an interest.

21
22 **SECTION 305. TANGIBLE PERSONAL PROPERTY TRANSACTIONS.** Language
23 granting power with respect to tangible personal property transactions empowers the agent to:

24 (1) accept as a gift or as security for a loan, reject, demand, buy, receive, or otherwise
25 acquire ownership or possession of tangible personal property or an interest in tangible personal
26 property;

1 (2) sell, exchange, convey with or without covenants, release, surrender, mortgage,
2 encumber, pledge, hypothecate, create a security interest in, pawn, grant options concerning,
3 lease, sublease to others, or otherwise dispose of tangible personal property or an interest in
4 tangible personal property;

5 (3) release, assign, satisfy, or enforce by litigation or otherwise, a mortgage, security
6 interest, encumbrance, lien, or other claim on behalf of the principal, with respect to tangible
7 personal property or an interest in tangible personal property; and

8 (4) do an act of management or conservation with respect to tangible personal property or
9 an interest in tangible personal property on behalf of the principal, including:

10 (i) insuring against casualty, liability, or loss;

11 (ii) obtaining or regaining possession, or protecting the property or interest, by
12 litigation or otherwise;

13 (iii) paying, compromising, or contesting taxes or assessments or applying for and
14 receiving refunds in connection with taxes or assessments;

15 (iv) moving from place to place;

16 (v) storing for hire or on a gratuitous bailment; and

17 (vi) using, altering, and making repairs or alterations.

18 [(5) change the form of title of an interest in or right incident to tangible personal property;
19 however, general authority with respect to tangible personal property transactions does not
20 include authority to create or change survivorship interests in the principal's property or in
21 property in which the principal may have an interest unless specifically provided in the durable
22 power of attorney.]

23
24 **SECTION 306. STOCK AND BOND TRANSACTIONS.** Language granting power with
25 respect to stock and bond transactions empowers the agent to buy, sell, and exchange stocks,
26 bonds, mutual funds, and all other types of securities and financial instruments except

1 commodity futures contracts and call and put options on stocks and stock indexes, receive
2 certificates and other evidences of ownership with respect to securities, exercise voting rights
3 with respect to securities in person or by proxy, enter into voting trusts, and consent to
4 limitations on the right to vote.

5
6 **SECTION 307. COMMODITY AND OPTION TRANSACTIONS.** Language granting
7 power with respect to commodity and option transactions empowers the agent to buy, sell,
8 exchange, assign, settle, and exercise commodity futures contracts and call and put options on
9 stocks and stock indexes traded on a regulated option exchange, and establish, continue, modify,
10 and terminate option accounts with a broker.

11
12 **SECTION 308. BANKING AND OTHER FINANCIAL INSTITUTION**
13 **TRANSACTIONS.** Language granting power with respect to banking and other financial
14 institution transactions, empowers the agent to:

15 (1) continue, modify, and terminate an account or other banking arrangement made by or
16 on behalf of the principal;

17 (2) establish, modify, and terminate an account or other banking arrangement with a bank,
18 trust company, savings and loan association, credit union, thrift company, brokerage firm, or
19 other financial institution selected by the agent;

20 (3) hire a safe deposit box or space in a vault;

21 (4) contract to procure other services available from a financial institution as the agent
22 considers desirable;

23 (5) withdraw by check, order, or otherwise money or property of the principal deposited
24 with or left in the custody of a financial institution;

25 (6) receive bank statements, vouchers, notices, and similar documents from a financial
26 institution and act with respect to them;

1 (7) enter a safe deposit box or vault and withdraw or add to the contents;

2 (8) borrow money at an interest rate agreeable to the agent and pledge as security personal
3 property of the principal necessary in order to borrow, pay, renew, or extend the time of payment
4 of a debt of the principal;

5 (9) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes,
6 checks, drafts, and other negotiable or nonnegotiable paper of the principal, or payable to the
7 principal or the principal=s order, receive the cash or other proceeds of those transactions, accept
8 a draft drawn by a person upon the principal, and pay it when due;

9 (10) receive for the principal and act upon a sight draft, warehouse receipt, or other
10 negotiable or nonnegotiable instrument;

11 (11) apply for and receive letters of credit, credit cards, and traveler=s checks from a
12 financial institution, and give an indemnity or other agreement in connection with letters of
13 credit; and

14 (12) consent to an extension of the time of payment with respect to commercial paper or a
15 financial transaction with a financial institution.

16
17 **SECTION 309. BUSINESS OPERATING TRANSACTIONS.** Language granting power
18 with respect to business operating transactions, empowers the agent to:

19 (1) operate, buy, sell, enlarge, reduce, and terminate a business interest;

20 (2) to the extent that an agent is permitted by law to act for a principal and subject to the
21 terms of ~~the~~ [a] partnership agreement [or operating agreement] to:

22 (i) perform a duty or discharge a liability and exercise a right, power, privilege, or
23 option that the principal has, may have, or claims to have, under a partnership agreement [or
24 operating agreement], whether or not the principal is a partner [in a partnership or member of a
25 limited liability company];

26 (ii) enforce the terms of a partnership agreement [or operating agreement] by

1 litigation or otherwise; and

2 (iii) defend, submit to arbitration, settle, or compromise litigation to which the
3 principal is a party because of membership in ~~the~~ [a] partnership [or limited liability company];

4 (3) exercise in person or by proxy, or enforce by litigation or otherwise, a right, power,
5 privilege, or option the principal has or claims to have as the holder of a bond, share, or other
6 instrument of similar character and defend, submit to arbitration, settle, or compromise litigation
7 to which the principal is a party because of a bond, share, or similar instrument;

8 (4) with respect to a business owned solely by the principal:

9 (i) continue, modify, renegotiate, extend, and terminate a contract made with an
10 individual or a legal entity, firm, association, or corporation by or on behalf of the principal with
11 respect to the business before execution of the durable power of attorney;

12 (ii) determine:

13 (A) the location of its operation;

14 (B) the nature and extent of its business;

15 (C) the methods of manufacturing, selling, merchandising, financing, accounting,
16 and advertising employed in its operation;

17 (D) the amount and types of insurance carried;

18 (E) the mode of engaging, compensating, and dealing with its accountants,
19 attorneys, and other agents and employees;

20 (iii) change the name or form of organization under which the business is operated
21 and enter into a partnership agreement [or operating agreement] with other persons or organize a
22 corporation to take over all or part of the operation of the business; and

23 (iv) demand and receive money due or claimed by the principal or on the principal=s
24 behalf in the operation of the business, and control and disburse the money in the operation of the
25 business;

26 (5) put additional capital into a business in which the principal has an interest;

- 1 (6) join in a plan of reorganization, consolidation, or merger of the business;
- 2 (7) sell or liquidate a business or part of it at the time and upon the terms the agent
- 3 considers desirable;
- 4 (8) establish the value of a business under a buy-out agreement to which the principal is a
- 5 party;
- 6 (9) prepare, sign, file, and deliver reports, compilations of information, returns, or other
- 7 papers with respect to a business which are required by a governmental agency or instrumentality
- 8 or which the agent considers desirable, and make related payments; and
- 9 (10) pay, compromise, or contest taxes or assessments and do any other act which the
- 10 agent considers desirable to protect the principal from illegal or unnecessary taxation, fines,
- 11 penalties, or assessments with respect to a business, including attempts to recover, in any manner
- 12 permitted by law, money paid before or after the execution of the durable power of attorney.
- 13

14 **SECTION 310. INSURANCE AND ANNUITY TRANSACTIONS.** Language granting

15 power with respect to insurance and annuity transactions empowers the agent to:

16 (1) continue, pay the premium or assessment on, modify, rescind, release, or terminate a

17 contract procured by or on behalf of the principal which insures or provides an annuity to either

18 the principal or another person, whether or not the principal is a beneficiary under the contract;

19 (2) procure new, different, and additional contracts of insurance and annuities for the

20 principal and the principal's spouse, children, and other dependents; and select the amount, type

21 of insurance or annuity, and mode of payment;

22 (3) pay the premium or assessment on, modify, rescind, release, or terminate a contract of

23 insurance or annuity procured by the agent;

24 (4) designate the beneficiary of the contract, but [unless otherwise provided in the durable

25 power of attorney], an agent [or a person to whom the agent owes a legal duty of support] may be

26 named a beneficiary of the contract, or an extension, renewal, or substitute for it, only to the

1 extent the agent [or person to whom the agent owes a legal duty of support] was named as a
2 beneficiary under a contract procured by the principal before executing the durable power of
3 attorney.

4 (5) apply for and receive a loan on the security of the contract of insurance or annuity;

5 (6) surrender and receive the cash surrender value;

6 (7) exercise an election;

7 (8) change the manner of paying premiums;

8 (9) change or convert the type of insurance contract or annuity, with respect to which the
9 principal has or claims to have a power described in this section;

10 (10) change the beneficiary of a contract of insurance or annuity, but the agent [or a
11 person to whom the agent owes a legal duty of support] may not be designated a beneficiary
12 except to the extent permitted by paragraph (4);

13 (11) apply for and procure government aid to guarantee or pay premiums of a contract of
14 insurance on the life of the principal;

15 (12) collect, sell, assign, hypothecate, borrow upon, or pledge the interest of the principal
16 in a contract of insurance or annuity; and

17 (13) pay from proceeds or otherwise, compromise or contest, and apply for refunds in
18 connection with, a tax or assessment levied by a taxing authority with respect to a contract of
19 insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.
20

21 **SECTION 311. ESTATE, TRUST, AND OTHER BENEFICIARY TRANSACTIONS.**

22 [(a) Subject to subsection (b),] language granting power with respect to estate, trust, and
23 other beneficiary transactions, empowers the agent to act for the principal in all matters that
24 affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund
25 from which the principal is, may become, or claims to be entitled, as a beneficiary, to a share or
26 payment, including to:

1 (1) accept, reject, disclaim, receive, receipt for, sell, assign, release, pledge, exchange,
2 or consent to a reduction in or modification of a share in or payment from the fund;

3 (2) demand or obtain by litigation or otherwise money or other thing of value to
4 which the principal is, may become, or claims to be entitled by reason of the fund;

5 (3) initiate, participate in, and oppose litigation to ascertain the meaning, validity, or
6 effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest
7 of the principal;

8 (4) initiate, participate in, and oppose litigation to remove, substitute, or surcharge a
9 fiduciary;

10 (5) conserve, invest, disburse, and use anything received for an authorized purpose;
11 and

12 (6) transfer an interest of the principal in real property, stocks, bonds, accounts with
13 financial institutions, insurance, and other property, to the trustee of a revocable trust created by
14 the principal as settlor.

15 [(b) Unless otherwise provided in the durable power of attorney, language granting power
16 with respect to estate, trust, and other beneficiary transactions does not include authority to
17 create, modify, or revoke a trust, or fund with the principal's property a trust not created by the
18 principal or a person authorized to create a trust on behalf of the principal.]

19
20 **SECTION 312. GIFT TRANSACTIONS.** Subject to Section 301, and unless otherwise
21 provided in the durable power of attorney, language granting power with respect to gift
22 transactions empowers the agent to make gifts of any of the principal's property to individuals or
23 organizations within the limits of the annual exclusion under Section 2503(b) of the United
24 States Internal Revenue Code, or corresponding future provisions of federal tax law, as the agent
25 shall determine to be in the principal's best interest based on all relevant factors, including
26 without limitation:

- 1 (1) the value and nature of the principal's property;
- 2 (2) the principal's foreseeable obligations and maintenance needs;
- 3 (3) minimization of income, estate, inheritance, generational-skipping transfer or gift
- 4 taxes;
- 5 (4) eligibility for public benefits or assistance under a statute or governmental regulation;
- 6 and
- 7 (5) the principal's personal history of making or joining in the making of lifetime gifts.

8
9 **SECTION 313. CLAIMS AND LITIGATION.** Language granting power with respect to
10 claims and litigation empowers the agent to:

11 (1) assert and prosecute before a court or administrative agency a claim, a [claim for
12 relief] [cause of action], counterclaim, offset, and defend against an individual, a legal entity, or
13 government, including suits to recover property or other thing of value, to recover damages
14 sustained by the principal, to eliminate or modify tax liability, or to seek an injunction, specific
15 performance, or other relief;

16 (2) bring an action to determine adverse claims, intervene in litigation, and act as amicus
17 curiae;

18 (3) in connection with litigation, procure an attachment, garnishment, libel, order of
19 arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to
20 effect or satisfy a judgment, order, or decree;

21 (4) in connection with litigation, perform any lawful act, including acceptance of tender,
22 offer of judgment, admission of facts, submission of a controversy on an agreed statement of
23 facts, consent to examination before trial, and binding the principal in litigation;

24 (5) submit to arbitration, settle, and propose or accept a compromise with respect to a
25 claim or litigation;

26 (6) waive the issuance and service of process upon the principal, accept service of

process, appear for the principal, designate persons upon whom process directed to the principal may be served, execute and file or deliver stipulations on the principal=s behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive and execute and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;

(7) act for the principal with respect to bankruptcy or insolvency proceedings, whether voluntary or involuntary, concerning the principal or some other person, with respect to a reorganization proceeding, or a receivership or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value; and

(8) pay a judgment against the principal or a settlement made in connection with litigation and receive and conserve money, or other thing of value paid in settlement of or as proceeds of a claim or litigation.

SECTION 314. PERSONAL AND FAMILY MAINTENANCE. Language granting power with respect to personal and family maintenance, empowers the agent to:

(1) do the acts necessary to maintain the customary standard of living of the principal, the principal=s spouse, children, and other individuals customarily or legally entitled to be supported by the principal, including providing living quarters by purchase, lease, or other contract, or paying the operating costs, including interest, amortization payments, repairs, and taxes on premises owned by the principal and occupied by those individuals;

(2) provide for the individuals described in paragraph (1) normal domestic help; usual vacations and travel expenses; and funds for shelter, clothing, food, appropriate education, and other current living costs;

(3) pay for the individuals described in paragraph (1) necessary medical, dental, and surgical care, hospitalization, and custodial care;

1 [(4) act as the principal's personal representative pursuant to sections 1171 through 1179
2 of the Social Security Act as added by sections 262 and 264 of Public Law 104-191 and
3 applicable regulations in making decisions related to the past, present, or future payment for the
4 provision of health care consented to by the principal or the principal's health care agent
5 authorized under the law of this State;]

6 (5) continue any provision made by the principal, for the individuals described in
7 paragraph (1), for automobiles or other means of transportation, including registering, licensing,
8 insuring, and replacing them;

9 (6) maintain or open charge accounts for the convenience of the individuals described in
10 paragraph (1) and open new accounts the agent considers desirable to accomplish a lawful
11 purpose; and

12 (7) continue payments incidental to the membership or affiliation of the principal in a
13 church, club, society, order, or other organization or to continue contributions to those
14 organizations.

15
16 **SECTION 315. BENEFITS FROM SOCIAL SECURITY, MEDICARE, MEDICAID,**
17 **OR OTHER GOVERNMENTAL PROGRAMS, OR MILITARY SERVICE.** Language
18 granting power with respect to benefits from social security, medicare, medicaid or other
19 governmental programs, or civil or military service, empowers the agent to:

20 (1) execute vouchers in the name of the principal for allowances and reimbursements
21 payable by the United States or a foreign government or by a state or subdivision of a state to the
22 principal, including allowances and reimbursements for transportation of the individuals
23 described in Section 314(1), and for shipment of their household effects;

24 (2) take possession and order the removal and shipment of property of the principal from
25 a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or
26 private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket,

1 certificate, or other instrument for that purpose;

2 (3) prepare, file, and prosecute a claim of the principal to a benefit or assistance, financial
3 or otherwise, to which the principal claims to be entitled, under a statute or governmental
4 regulation;

5 (4) prosecute, defend, submit to arbitration, settle, and propose or accept a compromise
6 with respect to any benefits the principal may be entitled to receive; and

7 (5) receive the financial proceeds of a claim of the type described in this section,
8 conserve, invest, disburse, or use anything received for a lawful purpose.

9
10 **SECTION 316. RETIREMENT PLAN TRANSACTIONS.** [Subject to Section 301, and
11 unless otherwise provided in the durable power of attorney,] language granting power with
12 respect to retirement plan transactions empowers the agent to:

13 (1) select payment options under any retirement plan in which the principal participates,
14 including plans for self-employed individuals;

15 (2) designate beneficiaries under those plans and change existing designations;

16 (3) make voluntary contributions to those plans;

17 (4) exercise the investment powers available under any self-directed retirement plan;

18 (5) make “rollovers” of plan benefits into other retirement plans;

19 (6) if authorized by the plan, borrow from, sell assets to, and purchase assets from the
20 plan; and

21 (7) waive the right of the principal to be a beneficiary of a joint or survivor annuity if the
22 principal is a spouse who is not employed.

23
24 **SECTION 317. TAX MATTERS.** Language granting power with respect to tax matters
25 empowers the agent to:

26 (1) prepare, sign, and file federal, state, local, and foreign income, gift, payroll, Federal

1 Insurance Contributions Act returns, and other tax returns, claims for refunds, requests for
2 extension of time, petitions regarding tax matters, and any other tax-related documents, including
3 receipts, offers, waivers, consents (including consents and agreements under Internal Revenue
4 Code Section 2032A or any successor section), closing agreements, and any power of attorney
5 required by the Internal Revenue Service or other taxing authority with respect to a tax year upon
6 which the statute of limitations has not run and the following 25 tax years;

7 (2) pay taxes due, collect refunds, post bonds, receive confidential information, and
8 contest deficiencies determined by the Internal Revenue Service or other taxing authority;

9 (3) exercise any election available to the principal under federal, state, local, or foreign
10 tax law; and

11 (4) act for the principal in all tax matters for all periods before the Internal Revenue
12 Service, and any other taxing authority.

13
14 **SECTION 318. EXISTING INTERESTS; FOREIGN INTERESTS.** The powers
15 described in Sections 304 through 317 are exercisable equally with respect to an interest the
16 principal has when the durable power of attorney is executed or acquires later, whether or not the
17 property is located in this State, and whether or not the powers are exercised or the durable power
18 of attorney is executed in this State.

ARTICLE 4
CONDUCT OF AGENT

SECTION 401. DUTIES.

(a) Once an agent accepts the designation under a durable power of attorney or undertakes to exercise authority conveyed by the principal, a fiduciary relationship is created, and except as otherwise provided in the durable power of attorney, the agent is under a duty to act with reasonable care for the benefit of the principal.

(b) The agent's fiduciary obligation includes the duty to:

(1) act in the best interest of the principal;

(2) avoid conflicts of interest that would impair the agent's ability to act in the principal's best interest;

(3) keep a complete record of all receipts, disbursements, and transactions conducted on behalf of the principal; and

(4) take no action beyond the scope of the authority granted by the durable power of attorney.

(c) Notwithstanding subsection (b)(2), an agent who acts with reasonable care for the benefit of the principal is not liable solely because the agent also benefits from the act or has individual or conflicting interests in relation to the property or affairs of the principal.

(d) Except as otherwise provided in the durable power of attorney, the agent is not required to render a report of transactions conducted on behalf of the principal unless requested by the principal, a guardian, conservator, or other fiduciary appointed for the principal, by court order, or, upon the death of the principal, the personal representative or successor in interest of the principal's estate.

SECTION 402. EXONERATION PROVISION. The principal may provide in the

1 durable power of attorney that the agent is liable only if the agent acts in bad faith. This
2 exoneration is binding on the principal and the principal's successors.

3
4 **SECTION 403. JUDICIAL REVIEW OF AGENT CONDUCT.** Upon petition by an
5 interested person, the court may construe a durable power of attorney and review the agent's
6 conduct under the applicable fiduciary standards. Persons who may petition the court include:

- 7 (1) the principal;
8 (2) the principal's spouse, parent or child;
9 (3) any person who would qualify as an intestate successor of the principal;
10 (4) any person named in the principal's will or as a beneficiary of a trust created by or for
11 the principal;
12 (5) any governmental agency with regulatory authority to protect the welfare of the
13 principal;
14 (6) any other person who demonstrates sufficient interest in the principal's welfare.

15
16 **SECTION 404. AGENT LIABILITY.** Except as otherwise provided in the durable power
17 of attorney, an agent who acts negligently, fraudulently or otherwise dishonestly and causes loss
18 or damage to the principal or the principal's successors in interest shall be liable to the principal
19 or the principal's successors in interest for the loss or damage, together with reasonable
20 attorney's fees, and punitive damages as allowed by law.

21
22 **SECTION 405. AGENT RESIGNATION; NOTICE.** An agent may resign by any of the
23 following means:

- 24 (1) If the principal has capacity, by giving notice to the principal.
25 (2) If a conservator or guardian has been appointed for the principal, by giving notice to
26 the conservator or guardian.

1 (3) If multiple or successor agents have been named, by giving notice to the remaining
2 agents and successors.

3 (4) If the principal is incapacitated and has neither a conservator or guardian, nor has
4 named additional or successor agents, by giving notice to the principal's caregiver or other
5 interested person.

1 **ARTICLE 5**

2 **RELIANCE OF OTHER PERSONS AND LIABILITY**

3
4 **SECTION 501. PRESUMPTION OF VALIDITY.** A durable power of attorney that
5 purports to be signed by the principal named in the durable power of attorney is presumed valid.
6 Another person may rely on the presumption of validity unless the person has knowledge that the
7 power was not validly executed.
8

9 **SECTION 502. LIABILITY FOR REFUSAL TO ACCEPT AGENT'S AUTHORITY.**

10 (a) Except as provided in subsection (b), a person who refuses to accept the authority of
11 the agent to exercise a power granted under the durable power of attorney is liable to the
12 principal and to the principal's heirs, assigns, and the personal representative or successor in
13 interest of the principal's estate in the same manner as the person would be liable had the person
14 refused to accept the authority of the principal to act on the principal's own behalf. The person
15 found liable for refusing to accept the authority of an agent is liable for damages and costs,
16 including reasonable attorney's fees.

17 (b) A person who refuses to accept the authority of an agent to exercise a power granted
18 under a durable power of attorney is not liable under subsection (a) if:

19 (1) the person has knowledge of the revocation of the durable power of attorney
20 before the exercise of the power;

21 (2) the duration of the durable power of attorney specified in the durable power of
22 attorney has expired;

23 (3) the person has knowledge of the death of the principal;

24 (4) the person reasonably believes that the durable power of attorney is not valid
25 under the law of this State and provides the agent with a written statement not more than ten (10)
26 business days after the refusal, describing the reason that the durable power of attorney is not

1 valid under the law of this State; or

2 (5) the person reasonably believes that the durable power of attorney does not grant
3 the agent authority to perform the transaction requested and provides the agent with a written
4 statement not more than ten (10) business days after the refusal, describing the reason the person
5 believes the durable power of attorney is deficient under the law of this State.

6 (c) This section does not negate the liability a person would have to the principal or the
7 agent under another form of power of attorney, under the common law, or otherwise.

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(a) The death of a principal who has executed a power of attorney, durable or otherwise, does not revoke or terminate the agency as to the ~~attorney-in-fact~~ [agent] or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The ~~disability or~~ incapacity of a principal who has previously executed a power of attorney that is not a durable power does not revoke or terminate the agency as to the ~~attorney in fact~~ [agent] or other person, who, without actual knowledge of the ~~disability or~~ incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and ~~his~~ the principal's successors in interest.

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ARTICLE 7
SHORT FORM DURABLE POWER OF ATTORNEY