

FOR DISCUSSION ONLY

**AMENDMENTS TO
DURABLE POWER OF ATTORNEY ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM LAWS

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With Reporter's Notes

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DRAFTING COMMITTEE TO REVISE THE UNIFORM DURABLE POWER OF ATTORNEY ACT

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Introduction

The Advisory Committee Reports to the Joint Editorial Board for Uniform Trusts and Estates Acts identified a number of issues for consideration in revision of the Uniform Durable Power of Attorney Act. For convenience, these issues are identified in comments preceding the article or section where they might appear in a revised Act. Alternatives for committee consideration are provided based on the results of the Advisory Committee study.

1 **REVISED UNIFORM DURABLE POWER OF ATTORNEY ACT**

2
3 **ARTICLE 1**

4
5 **DEFINITIONS**

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7 *Comment: The original UDPAA does not contain a definitions section. Where relevant to*
8 *consistency issues, reference is made to the Uniform Probate Code, the Uniform Guardianship*
9 *and Protective Proceedings Act, the Uniform Custodial Trust Act, and the Uniform Statutory*
10 *Form Power of Attorney.*

11
12 **SECTION 101. Definitions .** In this Act:

13 (1) “Agent” means the person designated to act for the principal under a durable power of
14 attorney.

15 (2) “Person” means an individual at least eighteen (18) years of age, a corporation, trust,
16 limited liability company, or partnership.

17 (3) “Incapacitated” means

18 *(The Uniform Custodial Trust Act defines incapacitated as: “lacking the ability to manage*
19 *property and business affairs effectively by reason of mental illness, mental deficiency, physical*
20 *illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a*
21 *foreign power, disappearance, minority, or other disabling cause.” The Uniform Guardianship*
22 *and Protective Proceedings Act defines “incapacitated person” as: “an individual who, for*
23 *reasons other than being a minor, is unable to receive and evaluate information or make or*
24 *communicate decisions to such an extent that the individual lacks the ability to meet essential*
25 *requirements for physical health, safety, or self-care, even with appropriate technological*
26 *assistance.”)*

27
28 (4) “Divorce or Annulment” means

29 *(The Uniform Probate Code defines “divorce or annulment” as “any divorce or annulment, or*
30 *any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a*
31 *surviving spouse within the meaning of Section 2-802. A decree of separation that does not*
32 *terminate the status of husband and wife is not a divorce for purposes of this section.”)*
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ARTICLE 2

CREATION OF DURABLE POWER OF ATTORNEY

Comment: Of the forty-eight U.S. jurisdictions that incorporated Sections 1 and 2 of the UDPAA into their statutes, twenty-four omitted the "lapse of time" language from Section 1 and thirty-eight omitted from Section 2 the last sentence containing lapse of time language. Although the term "attorney in fact" is used in most durable power of attorney legislation, twenty-six jurisdictions also use the term "agent." The term "agent" is favored by the Uniform Statutory Form Power of Attorney Act. The Prefatory Note states, "After the introductory phrase, the term "agent" is used throughout the Act in place of the longer and less familiar, "attorney-in-fact." Suggested revisions to the first two sections of the UDPAA are limited to deletion of the "lapse of time" language and replacement of the term "attorney in fact" with "agent". The descriptive captions are also revised to more accurately reflect the role of the sections within the expanded revised Act.

SECTION 201. [Definition] CREATION]. A durable power of attorney is a power of attorney by which a principal designates another his ~~attorney in fact~~ [agent] 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 202. [DURABLE POWER OF ATTORNEY NOT AFFECTED BY ~~Lapse of Time, DISABILITY OR INCAPACITY.~~ All acts done by an ~~attorney in fact~~ [agent] pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled. ~~Unless the instrument states a time of termination, the power is exercisable notwithstanding the lapse of time since the execution of the instrument.~~ [UDPAA § 2]

1 **SECTION 203. EXECUTION REQUIREMENTS.**

2
3 *Comment: The UDPAA does not contain an execution requirements provision. The Uniform*
4 *Statutory Form Power of Attorney Act requires the principal's signature with notary*
5 *acknowledgment. Twenty-seven jurisdictions have included execution specifications in either*
6 *their narrative or short form durable powers statutes. Execution requirements vary. In addition*
7 *to the principal's signature, most jurisdictions require a notary acknowledgment and some*
8 *require one or two additional witnesses.*
9

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11 **SECTION 204. RECORDING.**

12
13 *Comment: The UDPAA does not address recording of a power of attorney. The following are*
14 *two representative provisions from jurisdictions that do:*
15

16 A durable power of attorney does not have to be recorded to be valid and binding between
17 the principal and the attorney in fact or between the principal and third persons, except to the
18 extent that recording may be required for transactions affecting real estate. . . . (MO)
19

20 (a) Except as provided in subsection (b), an attorney in fact may act under a power of
21 attorney without recording the power of attorney with the county recorder.

22 (b) An attorney in fact shall record the power of attorney authorizing the execution of a
23 document that must be recorded before presenting the document for recording. (IN)
24
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26 **SECTION 205. DURABLE POWER OF ATTORNEY EXECUTED IN A FOREIGN**
27 **JURISDICTION.**

28 *Comment: Twelve jurisdictions currently include an express provision in their durable power of*
29 *attorney statutes to provide recognition of the validity of instruments drafted in other*
30 *jurisdictions. Ninety-seven percent of survey respondents favored including a portability*
31 *provision within a uniform act. Thirty-eight percent favored a provision which would accord*
32 *validity to any POA that was validly executed under the laws of another state. Sixty-two percent*
33 *would modify such a provision by the limitation that an out-of-jurisdiction POA could not*
34 *authorize actions that would be in contravention of the laws of the state where enforcement is*
35 *sought. The following illustrate each approach.*
36

37 (a) *Valid if Valid Where Executed*
38

39 Reciprocity. Nothing in this subchapter limits the enforceability of a power of attorney or
40 similar instrument executed in another state or jurisdiction in compliance with the law of that
41 state or jurisdiction. (VT)
42

43 Validity of power; execution under certain laws. Sec. 2. A power of attorney is valid if the
44 power of attorney was valid at the time the power of attorney was executed under any of the
45 following:

- 46 (1) This article.
47 (2) IC 30-2-11.
48 (3) Common law.
49 (4) The law of another state or foreign country. (IN)
50

1 ***(b) Valid Within Limitations***
2

3 Validity. A power of attorney executed in another state or jurisdiction and in conformity with
4 the laws of that state or jurisdiction shall be considered valid in this Commonwealth except to the
5 extent that the power of attorney executed in another state or jurisdiction would allow an agent to
6 make a decision inconsistent with the laws of this Commonwealth. *(PA)*
7

8 Durable power of attorney executed in another state; validity. A durable power of attorney
9 executed in another state or jurisdiction in compliance with the law of that state or jurisdiction or
10 the law of this state is valid and enforceable in this state to the same extent as a durable power of
11 attorney executed in this state, regardless of whether the principal is a domiciliary of this state.
12 *(CA)*
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ARTICLE 3

GENERAL PROVISIONS

Comment: The Advisory Committee study revealed two contexts in which conflicts and potential conflicts in state legislation may occur—one, in subject areas where states are enacting provisions to deal with specific topics and those provisions diverge in approach, and two, where the UDPAA is silent and states are “filling in the blanks.” The following “General Provisions” are either topics about which states have enacted statutes where the UDPAA is silent or topics about which the Committee survey indicated over 70% consensus on how divergent approaches should be resolved.

SECTION 301. MULTIPLE AGENTS; SUCCESSOR AGENTS.

Comment: Sixteen jurisdictions address the issue of multiple agents. Two prohibit co-agents; one requires that multiple agents act jointly; nine provide that the instrument can specify joint or several authority for multiple agents, but that in the absence of specification the multiple agents must act jointly; three provide that multiple agents may act independently in the absence of specification to the contrary; and one does not provide a default rule but states that the instrument can specify joint or several authority. In sum, the current majority position of these states is that the principal should have the choice of either requiring consensus decisions from multiple agents or permitting independent action, but in the absence of specific direction, the default rule should require joint action. The following examples illustrate three different statutory approaches to the question of multiple agents and two examples of successor agent provisions. Thirteen states have some type of provision dealing with successor agents.

(a) Multiple Agents

(1) Must act by unanimous action

§ 4202. Multiple attorneys-in-fact; action; vacancy; absence, illness or incapacity; liability

- (a) A principal may designate more than one attorney-in-fact in one or more powers of attorney.
(b) Authority granted to two or more attorneys-in-fact is exercisable only by their unanimous action.
(c) If a vacancy occurs, the remaining attorneys-in-fact may exercise the authority conferred as if they are the only attorneys-in-fact.
(d) If an attorney-in-fact is unavailable because of absence, illness, or other temporary incapacity, the other attorneys-in-fact, may exercise the authority under the power of attorney as if they are the only attorneys-in-fact, where necessary to accomplish the purposes of the power of attorney or to avoid irreparable injury to the principal's interests.
(e) An attorney-in-fact is not liable for the actions of other attorneys-in-fact, unless the attorney-in-fact participates in, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by another attorney-in-fact. (CA)

(2) Default – unless specified otherwise, multiple agents must act by majority.

(9) Multiple attorneys in fact; when joint action required. –

Unless the durable power of attorney provides otherwise:

- (a) If a durable power of attorney is vested jointly in two attorneys in fact by the same instrument,

1 concurrence of both is required on all acts in the exercise of the power.

2 (b) If a durable power of attorney is vested jointly in three or more attorneys in fact by the same
3 instrument, concurrence of a majority is required in all acts in the exercise of the power.

4 (c) An attorney in fact who has not concurred in the exercise of authority is not liable to the principal or
5 any other person for the consequences of the exercise. A dissenting attorney in fact is not liable for the
6 consequences of an act in which the attorney in fact joins at the direction of the majority of the joint
7 attorneys in fact if the attorney in fact expresses such dissent in writing to any of the other joint attorneys
8 in fact at or before the time of the joinder.

9 (d) If the attorney in fact has accepted appointment either expressly in writing or by acting under the
10 power, this section does not excuse the attorney in fact from liability for failure either to participate in
11 the administration of assets subject to the power or for failure to attempt to prevent a breach of fiduciary
12 obligations thereunder. *(FL)*

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14
15 *(3) Default – may act independently*

16
17 30-5-4-3. More than one attorney in fact; independent actions; failure or cessation of service

18
19 Sec. 3. (a) Except as otherwise stated in the power of attorney, if more than one (1) attorney in fact is
20 named, each attorney in fact may act independently of the other attorney in fact in the exercise of a
21 power or duty.

22
23 (b) Except as otherwise stated in the power of attorney,
24 if:

25 (1) more than one (1) attorney in fact is named; and

26 (2) one (1) attorney in fact fails to serve or ceases to serve;

27 the remaining attorney in fact may continue to act under the power of attorney without a successor
28 for the attorney in fact who failed to serve or ceased to serve. *(IN)*

29
30 *(b) Successor Agents*

31
32 § 4203. Successor attorneys-in-fact; liability

33
34 (a) A principal may designate one or more successor attorneys-in-fact to act if the authority of a
35 predecessor attorney-in-fact terminates.

36 (b) The principal may grant authority to another person, designated by name, by office, or by function,
37 including the initial and any successor attorneys-in-fact, to designate at any time one or more successor
38 attorneys-in-fact. * * *

39 (c) A successor attorney-in-fact is not liable for the actions of the predecessor attorney-in fact. *(CA)*

40
41
42 2. The principal in a durable power of attorney may revocably name one or more qualified persons as
43 successor attorneys in fact to exercise the authority granted in the power of attorney in the order named
44 in the event a prior named attorney in fact resigns, dies, becomes disabled or incapacitated, is not
45 qualified to act or refuses to act; and the principal in a durable power of attorney may revocably grant a
46 power to another person, designated by name, by office, or by function, including the initial and any
47 successor attorney in fact, whereby there may be revocably named at any time one or more successor
48 attorneys in fact.

49
50 3. A delegated or successor attorney in fact need not indicate his or her capacity as a delegated or
51 successor attorney in fact. *(MO)*

1
2 **SECTION 302. RELATION OF ~~Attorney in Fact~~ [AGENT] TO COURT-APPOINTED**
3 **FIDUCIARY[; GUARDIAN NOMINATION].**

4
5 *Comment: Twenty-three jurisdictions follow the UDPAA approach which provides that once*
6 *there is a court-appointed guardian or fiduciary, the attorney in fact is then accountable to both*
7 *the fiduciary and the principal; seventeen provide that after court appointment of a fiduciary the*
8 *attorney in fact is accountable only to that fiduciary; five terminate the attorney in fact's*
9 *authority upon court appointment of a fiduciary; and four specify that the attorney in fact's*
10 *authority actually supersedes that of a later-appointed fiduciary. Regarding a fiduciary's*
11 *authority to revoke a DPA, thirty-four jurisdictions follow the UDPAA approach that the*
12 *fiduciary has the same power the principal would have had to revoke the agent's authority and*
13 *six require that a court find sufficient basis for revoking the attorney in fact's authority.*
14 *Although the UDPAA approach is still the majority position, the growing trend places authority*
15 *in the court, rather than the fiduciary, to clarify or alter the scope of the agent's authority after*
16 *court-appointment of the fiduciary. The following suggested revision to Section 3 of the UDPAA*
17 *reflects that approach.*
18
19

20 (a) If, following execution of a durable power of attorney, a court of the principal's
21 domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the
22 management of all of the principal's property or all of his property except specified exclusions,
23 the ~~attorney in fact~~ [agent] is accountable to the fiduciary as well as to the principal. ~~The~~
24 ~~fiduciary has the same power to revoke or amend the power of attorney that the principal would~~
25 ~~have had if he were not disabled or incapacitated.~~ [Upon motion filed in connection with a
26 petition for appointment of a conservator, guardian of the estate, or other fiduciary, or on petition
27 of a conservator, guardian or other fiduciary once appointed, the court shall consider whether the
28 authority of an agent designated under a previously executed power of attorney should continue
29 undisturbed or be limited, suspended or terminated. The court may issue an order limiting,
30 suspending or terminating the power of attorney only upon determining that to do so would be in
31 the best interests of the principal.]

32 (b) A principal may nominate, by a durable power of attorney, the conservator, guardian
33 of his estate, or guardian of his person for consideration by the court if protective proceedings for
34 the principal's person or estate are thereafter commenced. The court shall make its appointment
35 in accordance with the principal's most recent nomination in a durable power of attorney except

for good cause or disqualification. [UDPAA § 3]

**SECTION 303. DISSOLUTION OR ANNULMENT OF PRINCIPAL'S MARRIAGE
TO AGENT.**

Comment: Twelve states provide for revocation of a spouse-agent's authority upon divorce, and four actually provide for revocation upon the filing of the petition. Five also revoke authority upon legal separation. Of those surveyed by the Advisory Committee, 84% responded that a spouse-agent's authority should be revoked upon a decree of divorce or annulment, 73% responded that revocation should occur upon the filing of the petition for divorce or annulment, and 69% responded that revocation should also occur upon legal separation. One consideration raised was the situation where dissolution occurs for other than reasons of disharmony (e.g., where one spouse is gravely ill or suffers dementia). The recommendation was that the principal have the discretion in the POA to override automatic revocation. The following statutory excerpts provide examples of all of the foregoing approaches.

(a) Agency revoked on Filing of Petition or Legal Separation

Any authority granted to the spouse under a durable power of attorney shall be revoked if the marriage of the principal is dissolved or annulled, or if the parties are legally separated or a party to divorce proceedings. *(AL)*

If a court enters a judgment of dissolution of marriage or legal separation between the principal and his or her spouse after the agency is signed, the spouse shall be deemed to have died at the time of the judgment for all purposes of the agency. *(IL)*

Filing a complaint in divorce. – If a principal designates his spouse as his agent and thereafter either the principal or his spouse files an action in divorce, the designation of the spouse as agent shall be revoked as of the time the action was filed, unless it appears from the power of attorney that the designation was intended to survive such an event. *(PA)*

(1) An appointment of a principal's spouse as attorney in fact, including appointment as successor or coattorney in fact, under a power of attorney shall be revoked upon entry of a decree of dissolution or legal separation or declaration of invalidity of the marriage of the principal and the attorney in fact, unless the power of attorney or the decree provides otherwise. The effect of this revocation shall be as if the spouse resigned as attorney in fact, or if named as successor attorney in fact, renounced the appointment, as of the date of entry of the decree or declaration, and the power of attorney shall otherwise remain in effect with respect to appointments of other persons as attorney in fact for the principal or procedures prescribed in the power of attorney to appoint other persons, and any terms relating to service by persons as attorney in fact. *(WA)*

A durable power of attorney terminates on the earliest to occur of the death of the principal, the expiration of a date of termination specified in the power of attorney, or, in the case of a power of attorney to the spouse of the principal, upon the commencement of proceedings for dissolution, separation, or annulment of the principal's marriage *(MN)*

(b) Agency Revoked on Dissolution or Annulment Decree

§ 4154. Dissolution or annulment or principal's marriage to attorney-in-fact; revocation; revival

(a) If after executing a power of attorney the principal's marriage to the attorney-in-fact is dissolved or annulled, the principal's designation of the former spouse as an attorney-in-fact is revoked.
(b) If the attorney-in-fact's authority is revoked solely by subdivision (a), it is revived by the principal's remarriage to the attorney in fact. (CA)

§485A. Effect of Principal's Divorce or Marriage Annulment if Former Spouse is Attorney in Fact or Agent

If, after execution of a durable power of attorney, the principal is divorced from a person who has been appointed the principal's attorney in fact or agent or the principal's marriage to a person who has been appointed the principal's attorney in fact or agent is annulled, the powers of the attorney in fact or agent granted to the principal's former spouse shall terminate on the date on which the divorce or annulment of marriage is granted by a court, unless otherwise expressly provided by the durable power of attorney. (TX)

SECTION 304. ACTIVATION OF CONTINGENT POWERS.

Comment: All jurisdictions except four specifically authorize contingent or "springing" powers in their durable power of attorney statutes; seven require a confirming affidavit by the agent that the power is activated. While other states do not require an affidavit to activate the power, many permit third parties to rely on an agent's affidavit as proof that the contingency has occurred. Eighty-one percent of those surveyed responded that the statute should permit an agent affidavit to provide assurance to third parties. Seventy-four percent indicated that an affidavit should be mandatory to activate the power. As among health care professionals, the agent, or some other individual designated in the POA, respondents were divided over who should serve as the affiant.

Sample provisions:

(a) Affidavit Required to Activate Power

(a) In a springing power of attorney, the principal may designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney-in-fact or another person to perform this function, either alone or jointly with other persons.

(b) A springing power of attorney containing the designation described in subdivision (a) becomes effective when the person or persons designated in the power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred; and any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred. (CA)

(b) Affidavit not Mandatory; Third Parties Entitled to Rely

A. The grant of power or authority conferred by a power of attorney or other writing in which any principal shall vest any power or authority in an attorney in fact or other agent shall, if such writing expressly so provides, be effective only upon (i) a specified future date, (ii) the occurrence of a specified future event or (iii) the existence of a specified condition which may occur in the future.

1 B. In the absence of actual knowledge to the contrary, any person to whom such writing
2 is presented shall be entitled to rely on an affidavit, executed by the attorney in fact or agent,
3 setting forth that such event has occurred or condition exists. (VA)
4

5 (c) *Default Mechanism for Determining Incapacity*
6

7 If the power of attorney is to become effective upon the disability or incapacity of the
8 principal, the principal may specify the conditions under which the power is to become effective
9 and may designate the person, persons, or institution responsible for making the determination of
10 disability or incapacity. If the principal fails to so specify, the power shall become effective upon
11 a written determination by two (2) physicians that the principal is unable, by reason of physical
12 or mental disability, to prudently manage or care for the principal's person or property, which
13 written determination shall be conclusive proof of the attorney in fact's power to act pursuant to
14 the power of attorney. The two (2) physicians making the determination shall be licensed to
15 practice medicine.

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ARTICLE 4

POWERS

Comment: The UDPAA contains no specific description of the authority that can be delegated under a power of attorney. However, the Uniform Statutory Short Form Power of Attorney does include extensive descriptions of powers associated with the authority to engage in the specific transactions listed on the form. These powers are set forth in this Article 4, but rather than provide a form power of attorney, Section 401 gives the principal the option of either incorporating by reference the statutory descriptions or specifically modifying the statutory powers by express language in the power of attorney. Several additions have been made to the descriptions as they appear in the Uniform Statutory Short Form Power of Attorney. Language has been added to Section 408, Business Operating Transactions, to include business operations related to limited liability companies, and Sections 411 and 412 have been added to include authority for Gift Transactions and Fiduciary Transactions. Commentary has also been included with Section 409, Insurance Transactions, and Section 410, Estate, Trust, and Other Beneficiary Transactions, to address issues raised by the Advisory Committee study.

SECTION 401. INCORPORATION OF POWERS; SIMILAR OR OVERLAPPING POWERS; MODIFICATION.

(a) An agent has a power granted under this article if the power of attorney incorporates the power by:

(1) referring to the descriptive captions in sections 403 through 417 of this article; or

(2) citing to a specific section of sections 403 through 417 of this article.

(b) Reference in a power of attorney to the descriptive captions in sections 403 through 417 of this article shall be construed as though the entire section is set out in full in the power of attorney.

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

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

SECTION 402. CONSTRUCTION OF POWERS GENERALLY. By executing a power of attorney with respect to a subject listed in Sections 403 through 417, the principal, except as limited or extended by the principal in the power of attorney, empowers the agent, for that subject to:

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

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

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

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

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

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

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

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

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

24 (10) in general, do any other lawful act with respect to the subject.
25

26 **SECTION 403. REAL PROPERTY TRANSACTIONS.** Language granting power with

1 respect to real property transactions empowers the agent to:

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

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

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

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

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

14 (ii) obtaining or regaining possession, or protecting the interest or right, by litigation
15 or otherwise;

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

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

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

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

25 (i) selling or otherwise disposing of them;

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

1 and

- 2 (iii) voting them in person or by proxy;
- 3 (7) change the form of title of an interest in or right incident to real property;
- 4 (8) dedicate to public use, with or without consideration, easements or other real property
- 5 in which the principal has, or claims to have, an interest.

6

7 **SECTION 404. TANGIBLE PERSONAL PROPERTY TRANSACTIONS.** Language

8 granting power with respect to tangible personal property transactions empowers the agent to:

9 (1) accept as a gift or as security for a loan, reject, demand, buy, receive, or otherwise

10 acquire ownership or possession of tangible personal property or an interest in tangible personal

11 property;

12 (2) sell, exchange, convey with or without covenants, release, surrender, mortgage,

13 encumber, pledge, hypothecate, create a security interest in, pawn, grant options concerning,

14 lease, sublease to others, or otherwise dispose of tangible personal property or an interest in

15 tangible personal property;

16 (3) release, assign, satisfy, or enforce by litigation or otherwise, a mortgage, security

17 interest, encumbrance, lien, or other claim on behalf of the principal, with respect to tangible

18 personal property or an interest in tangible personal property; and

19 (4) do an act of management or conservation with respect to tangible personal property or

20 an interest in tangible personal property on behalf of the principal, including:

- 21 (i) insuring against casualty, liability, or loss;
- 22 (ii) obtaining or regaining possession, or protecting the property or interest, by
- 23 litigation or otherwise;
- 24 (iii) paying, compromising, or contesting taxes or assessments or applying for and
- 25 receiving refunds in connection with taxes or assessments;
- 26 (iv) moving from place to place;

- (v) storing for hire or on a gratuitous bailment; and
(vi) using, altering, and making repairs or alterations.

SECTION 405. STOCK AND BOND TRANSACTIONS. Language granting power with respect to stock and bond transactions empowers the agent to buy, sell, and exchange stocks, bonds, mutual funds, and all other types of securities and financial instruments except commodity futures contracts and call and put options on stocks and stock indexes, receive certificates and other evidences of ownership with respect to securities, exercise voting rights with respect to securities in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

SECTION 406. COMMODITY AND OPTION TRANSACTIONS. Language granting power with respect to commodity and option transactions empowers the agent to buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call and put options on stocks and stock indexes traded on a regulated option exchange, and establish, continue, modify, and terminate option accounts with a broker.

SECTION 407. BANKING AND OTHER FINANCIAL INSTITUTION TRANSACTIONS. Language granting power with respect to banking and other financial institution transactions, empowers the agent to:

- (1) continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal;
- (2) establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the agent;
- (3) hire a safe deposit box or space in a vault;

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

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

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

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

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

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

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

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

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

22
23 **SECTION 408. BUSINESS OPERATING TRANSACTIONS.** Language granting power
24 with respect to business operating transactions, empowers the agent to:

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

26 (2) to the extent that an agent is permitted by law to act for a principal and subject to the

1 terms of ~~the~~ [a] partnership agreement [*or operating agreement*] to:

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

6 (ii) enforce the terms of a partnership agreement [*or operating agreement*] by
7 litigation or otherwise; and

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

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

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

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

18 (ii) determine:

19 (A) the location of its operation;

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

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

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

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

26 (iii) change the name or form of organization under which the business is operated

1 and enter into a partnership agreement [*or operating agreement*] with other persons or organize a
2 corporation to take over all or part of the operation of the business; and

3 (iv) demand and receive money due or claimed by the principal or on the
4 principal's behalf in the operation of the business, and control and disburse the money in the
5 operation of the business;

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

7 (6) join in a plan of reorganization, consolidation, or merger of the business;

8 (7) sell or liquidate a business or part of it at the time and upon the terms the agent
9 considers desirable;

10 (8) establish the value of a business under a buy-out agreement to which the principal is a
11 party;

12 (9) prepare, sign, file, and deliver reports, compilations of information, returns, or other
13 papers with respect to a business which are required by a governmental agency or instrumentality
14 or which the agent considers desirable, and make related payments; and

15 (10) pay, compromise, or contest taxes or assessments and do any other act which the
16 agent considers desirable to protect the principal from illegal or unnecessary taxation, fines,
17 penalties, or assessments with respect to a business, including attempts to recover, in any manner
18 permitted by law, money paid before or after the execution of the power of attorney.

19
20 **SECTION 409. INSURANCE TRANSACTIONS.** Language granting power with respect
21 to insurance and annuity transactions empowers the agent to:

22 (1) continue, pay the premium or assessment on, modify, rescind, release, or terminate a
23 contract procured by or on behalf of the principal which insures or provides an annuity to either
24 the principal or another person, whether or not the principal is a beneficiary under the contract;

25 (2) procure new, different, and additional contracts of insurance and annuities for the
26 principal and the principal's spouse, children, and other dependents; and select the amount, type

1 of insurance or annuity, and mode of payment;

2 (3) pay the premium or assessment on, modify, rescind, release, or terminate a contract of
3 insurance or annuity procured by the agent;

4 (4) designate the beneficiary of the contract, but an agent may be named a beneficiary of
5 the contract, or an extension, renewal, or substitute for it, only to the extent the agent was named
6 as a beneficiary under a contract procured by the principal before executing the power of
7 attorney;

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

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

10 (7) exercise an election;

11 (8) change the manner of paying premiums;

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

14 (10) change the beneficiary of a contract of insurance or annuity, but the agent may not be
15 designated a beneficiary except to the extent permitted by paragraph (4);

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

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

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

23
24 *Comment: The foregoing provisions are taken, without modification, from the Uniform Statutory*
25 *Form Power of Attorney Act. The authority of an agent to deal with insurance transactions on*
26 *behalf of the principal is one of the more controversial powers. Some jurisdictions limit the*
27 *circumstances in which an agent can be a named beneficiary (cf. Section 409 (4)). Others will*
28 *not imply from a broad grant of authority the power to deal with insurance transactions, and*
29 *require a specific grant of authority by express language. The following samples illustrate some*
30 *of the more common statutory approaches.*

1 *Insurance Transactions – Authority to Designate Beneficiary*

2
3 *(a) Agent must be an enumerated relative to qualify*

4
5 Insurance Transactions. – To exercise or perform any act, power, duty, right or obligation whatsoever in
6 regard to any contract of life, accident, health, disability or liability insurance or any combination of such
7 insurance procured by or on behalf of the principal prior to execution; and to procure new, different or
8 additional contracts of insurance for the principal and to designate the beneficiary of any such contract of
9 insurance, provided, however, that the agent himself cannot be such beneficiary unless the agent is
10 spouse, child, grandchild, parent, brother or sister of the principal. (NC)

11
12 (3) In general, exercise all powers with respect to insurance that the principal could if present; however,
13 the agent cannot designate himself beneficiary of a life insurance policy unless the agent is the spouse,
14 child, grandchild, parent, brother or sister of the principal. (PA)

15
16 *(b) POA must contain express language*

17
18 11.94.050. Attorney or agent granted principal's powers – Powers to be specifically provided for –
19 Transfer of resources by principal's attorney or agent

20 (1) Although a designated attorney in fact or agent has all powers of absolute ownership of the principal,
21 or the document has language to indicate that the attorney in fact or agent shall have all the powers the
22 principal would have if alive and competent, the attorney in fact or agent shall not have the power to
23 make, amend, alter, or revoke the principal's wills or codicils, and shall not have the power, unless
24 specifically provided otherwise in the document: To make, amend, alter, or revoke any of the principal's
25 life insurance, annuity, or similar contract beneficiary designations, employee benefit plan beneficiary
26 designations, trust agreements, registration of the principal's securities in beneficiary form, payable on
27 death or transfer on death beneficiary designations, designation of persons as joint tenants with right of
28 survivorship with the principal with respect to any of the principal's property, community property
29 agreements, or any other provisions for nonprobate transfer at death contained in nontestamentary
30 instruments described in RCW 11.02.091; to make any gifts of the property owned by the principal; to
31 make transfers of property to any trust (whether or not created by the principal) unless the trust benefits
32 the principal alone and does not have dispositive provisions which are different from those which would
33 have governed the property had it not been transferred into the trust, or to disclaim property.

34 (2) Nothing in subsection (1) of this section prohibits an attorney in fact or agent from making any
35 transfer of resources not prohibited under chapter 74.09 RCW when the transfer is for the purpose of
36 qualifying the principal for medical assistance or the limited casualty program for the medically needy.
37 (WA)

38
39 § 4264. Acts requiring express authorization in power of attorney

40
41 A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the
42 following acts unless expressly authorized in the power of attorney:

43
44 (b) Create, modify, or revoke a trust.

45 (c) Fund with the principal's property a trust not created by the principal or a person authorized to create
46 a trust on behalf of the principal.

47 (d) Make or revoke a gift of the principal's property in trust or otherwise.

48 (e) Exercise the right to make a disclaimer on behalf of the principal. This subdivision does not limit
49 the attorney-in-fact's authority to disclaim a detrimental transfer to the principal with the approval of the
50 court.

51 (f) Create or change survivorship interests in the principal's property or in property in which the
52 principal may have an interest.

(g) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.
(h) Make a loan to the attorney-in-fact. (CA).

SECTION 410. ESTATE, TRUST, AND OTHER BENEFICIARY TRANSACTIONS.

Language granting power with respect to estate, trust, and other beneficiary transactions, empowers the agent to act for the principal in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund from which the principal is, may become, or claims to be entitled, as a beneficiary, to a share or payment, including to:

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

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

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

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

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

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

Comment: The foregoing provisions of the Uniform Statutory Form Power of Attorney Act are silent concerning an agent's authority to modify or revoke a trust created by the principal. A growing number of states require express authority to confer the power of revocation or modification.

Sample provisions:

§ 4465. Trusts; power to modify or revoke

1 A statutory form power of attorney under this part does not empower the agent to modify or revoke a
2 trust created by the principal unless that power is expressly granted by the power of attorney. If a
3 statutory form power of attorney under this part empowers the agent to modify or revoke a trust created
4 by the principal, the trust may only be modified or revoked by the agent as provided in the trust
5 instrument. (CA)

6 7 45/2-9. Preservation of estate plan and trusts

8
9 § 2-9. Preservation of estate plan and trusts. In exercising powers granted under the agency,
10 including powers of amendment or revocation and powers to expend or withdraw property passing by
11 trust, contract or beneficiary designation at the principal's death (such as, without limitation, specifically
12 bequeathed property, joint accounts, life insurance, trusts and retirement plans), the agent shall take the
13 principal's estate plan into account insofar as it is known to the agent and shall attempt to preserve the
14 plan, but the agent shall not be liable to any plan beneficiary under this Section unless the agent acts in
15 bad faith. An agent may not revoke or amend a trust revocable or amendable by the principal or require
16 the trustee of any trust for the benefit of the principal to pay income or principal to the agent without
17 specific authority and specific reference to the trust in the agency. The agent shall have access to and the
18 right to copy (but not to hold) the principal's will, trusts and other personal papers and records to the
19 extent the agent deems relevant for purposes of this Section. (IL)

20 21 22 **SECTION 411. GIFT TRANSACTIONS.**

23
24 Comment: The Uniform Statutory Form Power of Attorney Act does not contain a provision for
25 gift transactions. Twenty jurisdictions specifically address agent authority to make gifts, and all
26 but two of these jurisdictions provide for statutory default limitations on the authority. Statutory
27 limitations vary considerably, but in general, states are divided into two divergent groups—one
28 that requires the power of attorney to include specific authorization of gift making authority, and
29 the other that implies gift making authority if the agent is given broad authority without specific
30 limitations. Seventy-three percent of the survey respondents favored the position that no gift
31 making authority is conferred unless specifically expressed in the power of attorney. Sixty-seven
32 percent favored statutory default limitations on gift making authority, but there was an even split
33 concerning the question of whether the statute should limit the class of permissible gift
34 recipients.

35
36 The following are examples of the various statutory approaches to gift making authority:

37 38 (1) Implied from General Authority

39 40 (a) No default limits on recipients or amount

41
42 34-6-110. Gifts under power of attorney. – (a) If any power of attorney or other writing:

43 (1) Authorizes an attorney-in-fact or other agent to do, execute or perform any act that the principal
44 might or could do; or

45 (2) Evidences the principal's intent to give the attorney-in-fact or agent full power to handle the
46 principal's affairs or to deal with the principal's property; then the attorney-in-fact or agent shall have
47 the power and authority to make gifts, in any amount, of any of the principal's property, to any
48 individuals, or to organizations described in §§ 170(c) and 2522(a) of the Internal Revenue Code or
49 corresponding future provisions of the federal tax law, or both, in accordance with the principal's
50 personal history of making or joining in the making of lifetime gifts. This section shall not in any way
51 limit the right or power of any principal, by express words in the power of attorney or other writing, to
52 authorize, or limit the authority of, any attorney-in-fact or other agent to make gifts of the principal's

property.

(b) If the provisions of subsection (a) do not apply, an attorney-in-fact or other agent acting under a durable general power of attorney or other writing may petition a court of the principal's domicile for authority to make gifts of the principal's property to the extent not inconsistent with the express terms of the power of attorney or other writing. The court shall determine the amounts, recipients and proportions of any gifts of the principal's property after considering all relevant factors including, without limitation:

- (1) The value and nature of the assets of the principal's estate;
- (2) The principal's foreseeable obligations and maintenance needs;
- (3) The principal's existing estate plan; and
- (4) The gift and estate tax effects of the gifts.

(c) This section is declaratory of existing law in the state of Tennessee; provided, that this section shall not be construed as authorizing the refund of any taxes imposed by title 67, chapter 8. (TN)

(b) Amount limited to annual exclusion; default standard for exercise of authority; principal can override default limits

(a) If any power of attorney or other writing either authorizes an attorney in fact or other agent to do, execute, or perform any act that the principal might or could do, or evidences the principal's intent to give the attorney in fact or agent full power to handle the principal's affairs or deal with the principal's property, the attorney in fact or agent shall have the power and authority to make gifts of any of the principal's property to any individuals, including the attorney in fact or agent, within the limits of the annual exclusion as provided by Section 2503(b) of Title 26 of the United States Code, and taking into account the availability of Section 2513 of Title 26 of the United States Code, as the same may from time to time be amended, or to organizations described in Sections 170(c) and 2522(a) of Title 26 of the United States Code, or corresponding future provisions of federal tax law, or both, as the attorney in fact or agent shall determine: (1) to be in the principal's best interest; (2) to be in the best interest of the principal's estate; or (3) that will reduce the estate tax payable on the principal's death; and is in accordance with the principal's personal history of making or joining in the making of lifetime gifts.

(b) Subsection (a) shall not in any way impair the right or power of any principal, by express words in the power of attorney or other writing, to further authorize, expand, or limit the authority of any attorney in fact or other agent to make gifts of the principal's property. (AL)

(2) Express Authority

(a) Limits on recipients and amounts; Principal can override

Sec. 9. (a) Language conferring general authority with respect to gift transactions means the principal authorizes the attorney in fact to do the following:

- (1) Make gifts to organizations, charitable or otherwise, to which the principal has made gifts, and satisfy pledges made to organizations by the principal.
- (2) Make gifts on behalf of the principal to the principal's spouse, children, and other descendants or the spouse of a child or other descendant, either outright or in trust, for purposes the attorney in fact considers to be in the best interest of the principal, including the minimization of income, estate, inheritance, or gift taxes. The attorney in fact or a person that the attorney in fact has a legal obligation to support may not be the recipient of gifts in one (1) year that total more than ten thousand dollars (\$10,000) in aggregate value to the recipient.

(IN & MN)

(b) No gift to agent or person to whom agent has a legal obligation of support unless specifically authorized

(h) In a statutory form power of attorney, the language conferring general authority with respect to gift transactions shall be construed to mean that, as to a gift that is made outright, in trust, in custodial account, or otherwise, in which the principal is interested, whether the object of the gift is located in the state or elsewhere, the principal authorizes the agent to

(1) make gifts from any or all of the principal's real and personal property, and in the kinds or shares that the agent considers prudent for any purpose, except that the agent or a person whom the agent has a legal obligation to support when the gift is in full or partial satisfaction of that obligation may not be the beneficiary of the gift unless the principal specifically provides under subdivision (o) of the statutory form power of attorney that the agent or the person whom the agent has a legal obligation to support may be the beneficiary of the gift if authorized; *(AK)*

(c) detailed definition; best interest standard; express authority required to override \$10,000 limit

§ 5-1502M. Construction—certain gift transactions

In a statutory short form power of attorney, the language conferring general authority with respect to “making gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate \$10,000 to any person in any year” must be construed to mean that the principal authorizes the agent:

1. To make gifts on behalf of the principal to the principal's spouse, children and other descendants, and parents, including the agent, either outright or to a trust for the sole benefit of one or more of said persons, whether an existing trust or a trust which the agent is hereby authorized to create, only for purposes which the agent reasonably deems to be in the best interest of the principal, specifically including minimization of income, estate, inheritance, generational -skipping transfer or gift taxes, provided that no person may be the recipient of gifts in any one calendar year which, in the aggregate, exceed \$10,000, unless the statutory short form power of attorney contains additional language pursuant to section 5-1503 of the general obligations law authorizing gifts in excess of said amount or gifts to other beneficiaries;

2. To consent, pursuant to Section 2513(a) of the United States Internal Revenue Code, to the splitting of gifts made by the principal's spouse to the principal's children and other descendants in any amount, and to the splitting of gifts made by the principal's spouse to any other persons in amounts not exceeding the aggregate annual gift tax exclusions for both spouses under Section 2503(b) of said Code (or cognate provisions of any successor statute);

3. To satisfy pledges made to organizations, whether charitable or otherwise, by the principal; *(NY)*

SECTION 412. FIDUCIARY TRANSACTIONS.

Comment: The Uniform Statutory Form Power of Attorney does not contain a provision for fiduciary transactions. The following provision from Indiana's durable power of attorney statute is an example of an authorizing provision for fiduciary transactions. Following the Indiana provision is a Florida statute listing fiduciary transactions among prohibited powers.

Fiduciary transactions permitted:

Language granting power with respect to fiduciary transactions empowers the agent to do the following if the principal has the authority to delegate:

1 (1) apply for and procure, in the name of the principal, letters of administration, letters
2 testamentary, letters of guardianship, or any other type of judicial or administrative authority to
3 act as a fiduciary.
4

5 (2) represent and act for the principal in all ways and in all matters affecting a fund
6 with respect to which the principal is a fiduciary.
7

8 (3) initiate, participate in, and oppose a proceeding, judicial or otherwise, for the
9 removal, substitution, or surcharge of a fiduciary, conserve, invest, or disburse anything received
10 for the purposes of the fund for which it is received, and reimburse the agent for expenditures
11 properly made by the agent in the execution of powers conferred on the agent. *(IN)*
12

13 *Fiduciary transactions prohibited:*
14

15 Notwithstanding the provisions of this section, an attorney in fact may not:
16

- 17 1. Perform duties under a contract that requires the exercise of personal services of the principal;
- 18 2. Make any affidavit as to the personal knowledge of the principal;
- 19 3. Vote in any public election on behalf of the principal;
- 20 4. Execute or revoke any will or codicil for the principal;
- 21 5. Create, amend, modify, or revoke any document or other disposition effective at the principal's death
22 or transfer assets to an existing trust created by the principal unless expressly authorized by the power of
23 attorney; or
24
- 25 6. Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.
26 *(FL)*
27
28
29

30 **SECTION 413. CLAIMS AND LITIGATION.** Language granting power with respect to
claims and litigation empowers the agent to:

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

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

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

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

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

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

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

17 (8) pay a judgment against the principal or a settlement made in connection with litigation
18 and receive and conserve money, or other thing of value paid in settlement of or as proceeds of a
19 claim or litigation.
20

21 **SECTION 414. PERSONAL AND FAMILY MAINTENANCE.** Language granting
22 power with respect to personal and family maintenance, empowers the agent to:

23 (1) do the acts necessary to maintain the customary standard of living of the principal, the
24 principal's spouse, children, and other individuals customarily or legally entitled to be supported
25 by the principal, including providing living quarters by purchase, lease, or other contract, or
26 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;

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

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

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

SECTION 415. BENEFITS FROM SOCIAL SECURITY, MEDICARE, MEDICAID, OR OTHER GOVERNMENTAL PROGRAMS, OR MILITARY SERVICE. Language granting power with respect to benefits from social security, medicare, medicaid or other governmental programs, or civil or military service, empowers the agent to:

(1) execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in Section 13(1), and for shipment of their household effects;

(2) take possession and order the removal and shipment of property of the principal from

1 a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or
2 private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket,
3 certificate, or other instrument for that purpose;

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

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

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

11
12 **SECTION 416. RETIREMENT PLAN TRANSACTIONS.** Language granting power
13 with respect to retirement plan transactions empowers the agent to:

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

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

17 (3) make voluntary contributions to those plans;

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

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

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

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

24 *Comment: See earlier comments under Section 409. Insurance Transactions.*
25
26

27 **SECTION 417. TAX MATTERS.** Language granting power with respect to tax matters

empowers the agent to:

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

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

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

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

SECTION 418. EXISTING INTERESTS; FOREIGN INTERESTS. The powers described in Sections 403 through 417 are exercisable equally with respect to an interest the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this State, and whether or not the powers are exercised or the power of attorney is executed in this State.

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ARTICLE 5

DUTIES OF AGENT

Comment: Nineteen statutes address fiduciary standards of care for agents, but the substance of the statutes varies considerably—from minimal treatment which merely identifies the attorney in fact as a fiduciary to those requiring the same level of care as a trustee and specifying a list of duties. With respect to remedies for breach of the agent's duties, the statutory provisions range from silence to rather extreme civil penalties. Among the survey respondents, there was over 70% consensus on the following propositions related to agent duties and conduct:

- (1) Statute should set forth a default standard for agent fiduciary duties.*
- (2) Principal should be permitted to alter the default fiduciary standard.*
- (3) Statute should include safeguards against abuse by the agent.*
- (4) Statute should include a remedies and sanctions provision for abuse by agent.*
- (5) Statute should require notice by agent when no longer willing or able to act.*

The following are sample provisions for each topic:

- (1) Statute should set forth a default standard for agent fiduciary duties.*

(a) Due Care

Except as otherwise stated in the power of attorney, the attorney in fact shall use due care to act for the benefit of the principal under the terms of the power of attorney.

An attorney in fact shall exercise all powers granted under the power of attorney in a fiduciary capacity. *(IN)*

(b) Prudent Person dealing with Property of Another

(a) Except as provided in subdivisions (b) and (c), in dealing with property of the principal, an attorney-in-fact shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries.

(b) If an attorney-in-fact is not compensated, the attorney-in-fact is not liable for a loss to the principal's property unless the loss results from the attorney-in-fact's bad faith, intentional wrongdoing, or gross negligence.

(c) An attorney-in-fact who has special skills or expertise or was designated as an attorney-in-fact on the basis of representations of special skills or expertise shall observe the standard of care that would be observed by others with similar skills or expertise. *(CA)*

1 (c) *Good Faith; Honesty*

2 As between the principal and any attorney in fact or successor, if the attorney in fact or successor
3 undertakes to act, and if in respect to such act, the attorney in fact or successor acts in bad faith,
4 fraudulently or otherwise dishonestly, or if the attorney in fact or successor intentionally acts
5 after receiving actual notice that the power of attorney has been revoked or terminated, and
6 thereby causes damage or loss to the principal or to the principal's successors in interest, such
7 attorney in fact or successor shall be liable to the principal or to the principal's successors in
8 interest, or both, for such damages, together with reasonable attorney's fees, and punitive
9 damages as allowed by law. (MO)

10
11 (d) *Conflicts of Interest not Strictly Prohibited*

12 (a) An attorney-in-fact has a duty to act solely in the interest of the principal and to avoid
13 conflicts of interest.

14 (b) An attorney-in-fact is not in violation of the duty provided in subdivision (a) solely
15 because the attorney-in-fact also benefits from acting for the principal, has conflicting interests in
16 relation to the property, care, or affairs of the principal, or acts in an inconsistent manner
17 regarding the respective interests of the principal and the attorney-in-fact. (CA)

18
19 An attorney in fact who acts with due care for the benefit of the principal is not liable or
20 limited only because the attorney in fact:

21 (1) also benefits from the act;

22 (2) has individual or conflicting interests in relation to the property, care, or affairs of the
23 principal; or

24 (3) acts in a different manner with respect to the principal's and the attorney in fact's
25 individual interests. (IN)

26
27 (e) *Duties*

28 (a) The agent shall have a fiduciary duty to the principal. The fiduciary duty of the agent
29 requires that the agent, in the performance of his or her duties, shall:

30 (1) act in good faith and in the interest of the principal;

31 (2) refrain from self-dealing except as provided in the power of attorney pursuant to
32 subsection 3504(d) or (f) of this subchapter;

33 (3) avoid conflicts of interest which would impair the ability of the agent to act in the interest
34 of the principal;

35 (4) not commingle the funds of the principal with his or her own funds or the funds of third

1 parties, except in an attorney-client trust account in accordance with the rules governing such
2 accounts;

3 (5) exercise the degree of care that would be observed by a prudent person dealing with the
4 property and affairs of another person;

5 (6) if selected as agent with the expectation he or she has special skills or expertise, use those
6 skills on behalf of the principal, provided the terms of the power of attorney specify that the
7 agent is expected to use special skills and expertise, and provided, further, the agent
8 acknowledges in signing the power of attorney that he or she has been so selected;

9 (7) take no action beyond the scope of authority granted by the terms of the power of
10 attorney;

11 (8) take no action which violates any provision of this subchapter;

12 (9) keep records of all transactions taken under the power of attorney;

13 (10) provide accountings upon request of the principal or at such times or in such manner as
14 is specified by the terms of the power of attorney;

15 (11) follow the directions of the principal specifically forbidding an action notwithstanding
16 any provision of the power of attorney giving the agent authority to take such action; provided,
17 however, no third party who acts in reliance on the apparent authority of the agent under the
18 power of attorney shall be bound or limited by the directions of the principal to the agent not set
19 forth in the power of attorney unless such third party has actual notice of the instructions;

20 (12) comply with any lawful termination of the power of attorney as provided in section 3507
21 of this title.

22 (b) Nothing in this section shall be construed to limit other duties imposed on the agent by statute
23 or common law. (VT)

24
25 *(2) Principal should be permitted to alter the default fiduciary standard.*

26 The principal may provide in the power of attorney that the attorney in fact is liable only if the
27 attorney in fact acts in bad faith. This exoneration is binding on the principal and the principal's
28 successors in interest. (IN)

29
30 This section does not prohibit the principal, acting individually, and the person designated as the
31 attorney in fact from entering into a written agreement that sets forth their duties and liabilities as
32 between themselves and their successors, and which expands or limits the application of sections
33 404.700 to 404.735, with the exception of those acts enumerated in subsection 7 of section
34 404.710. (MO)

35
36 *(3) Statute should include safeguards against abuse by agent.*

37
38 *Comment: Typically the only statutory safeguards in place are provisions which provide*
39 *standing to third parties to petition the court for review of the agent's conduct. The list of*
40 *persons who have standing to file a petition with the court (in addition to the agent) usually*

1 *includes: principal; spouse, parent, or child of the principal; guardian of principal; anyone who*
2 *would qualify as an intestate successor to the principal; any person named in the principal's*
3 *will; a treating health care provider; the department of health and human services; and any*
4 *other interested person who demonstrates sufficient interest in the principal's welfare.*

5 *(4) Statute should include a remedies and sanctions provision for abuse by agent.*

6 A. Except as provided in subsection B of this section, an agent shall use the principal's money,
7 property or other assets only in the principal's best interest and the agent shall not use the
8 principal's money, property or other assets for the agent's benefit. An agent who violates this
9 subsection is subject to prosecution under title 13 and civil penalties pursuant to § 46-456. (AZ)

10 Nothing in sections 523.01 to 523.24 limits any rights the principal may have against the
11 attorney-in-fact for any fraudulent or negligent actions in executing affidavits or signing or acting
12 on behalf of the principal as an attorney-in-fact. An attorney-in-fact who knowingly executes a
13 false affidavit or, knowing that the conditions of section 523.18 are not satisfied, signs on behalf
14 of the principal is liable for treble the amount of damages suffered by the principal. (MN)

15 As between the principal and any attorney in fact or successor, if the attorney in fact or successor
16 undertakes to act, and if in respect to such act, the attorney in fact or successor acts in bad faith,
17 fraudulently or otherwise dishonestly, or if the attorney in fact or successor intentionally acts
18 after receiving actual notice that the power of attorney has been revoked or terminated, and
19 thereby causes damage or loss to the principal or to the principal's successors in interest, such
20 attorney in fact or successor shall be liable to the principal or to the principal's successors in
21 interest, or both, for such damages, together with reasonable attorney's fees, and punitive
22 damages as allowed by law. (MO)

23 *(5) Statute should require notice by agent when no longer willing or able to act.*

24 (a) An attorney-in-fact may resign by any of the following means:

25 (1) If the principal is competent, by giving notice to the principal.

26 (2) If a conservator has been appointed, by giving notice to the conservator.

27 (3) On written agreement of a successor who is designated in the power of attorney or pursuant to
28 the terms of the power of attorney to serve as attorney-in-fact.

29 (4) Pursuant to a court order.

30 (b) This section is not subject to limitation in the power of attorney. (CA)

31
32 If all attorneys-in-fact named in the instrument or substituted shall die, or cease to exist, or shall
33 become incapable of acting, and all methods for substitution provided in the instrument have
34 been exhausted, such power of attorney shall cease to be effective. Any substitution by a person
35 authorized to make it shall be in writing signed and acknowledged by such person. Notice of
36 every other substitution shall be in writing and acknowledged by the person substituted. No
37 substitution or notice subsequent to the principal's subsequent incapacity or mental
38 incompetence shall be effective until it has been recorded in the office of the register of deeds of
39 the county in which the power of attorney has been recorded. (NC)

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ARTICLE 6

THIRD PARTY RELIANCE AND LIABILITY

Comment: One of the most commonly cited problems with durable powers of attorney is obtaining and enforcing third party acceptance of the agent's authority. Sixty-three percent of Survey respondents reported experiencing occasional difficulty obtaining third party acceptance of an agent's authority. Ninety-four percent favored a statutory presumption of validity to protect third-party reliance, and 74% favored inclusion of a remedies and sanctions provision for failure of third parties to accept the agent's authority. The UDPAA is basically silent on this issue with the exception of a provision which entitles a third party to rely on an agent's affidavit that the power has not been revoked or terminated:

§ 5. [Proof of Continuance of Durable and Other Powers of Attorney by Affidavit].

As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney-in-fact [agent] under a power of attorney, durable or otherwise, stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

Other examples of statutory presumptions of validity include:

A written power of attorney that purports to be signed by the principal named in the power of attorney is presumed valid. A party may rely on the presumption of validity unless the party has actual knowledge that the power was not validly executed. (IN)

A third party who relies on the reasonable representations of an attorney-in-fact designated under AS 13.26.332—13.26.344 as to a matter relating to a power granted by a properly executed statutory form power of attorney does not incur a liability to the principal or the principal's heirs, assigns, or estate as a result of permitting the attorney-in-fact to exercise the authority granted by the power of attorney. (AK)

Sanctions for Third Party Refusal to Accept Agent's Authority

Sanctions are one of the most frequently discussed topics with respect to utilization of durable powers. Currently eight jurisdictions have provisions sanctioning third party liability for refusing to accept an agent's authority.

A third party shall honor the terms of a properly executed statutory form power of attorney. A third party who fails to honor a properly executed statutory form power of attorney may be liable in a civil action to the principal, the attorney-in-fact, or the principal's heirs, assigns, or estate for a civil penalty not to exceed \$1000, plus the actual damages, costs, and fees associated with the failure to comply with the statutory form power of attorney. The civil action shall be the exclusive remedy at law for damages. (AK)

In any judicial action under this section, including, but not limited to, the unreasonable refusal of a third party to allow an attorney in fact to act pursuant to the power, and challenges to the proper

1 exercise of authority by the attorney in fact, the prevailing party is entitled to damages and costs,
2 including reasonable attorney's fees. (FL)
3

4 (a) Except as provided in subsection (b), a person who, not more than three (3) business days
5 after receiving a power of attorney, refuses to accept the authority of an attorney in fact to
6 exercise a power granted under a power of attorney is liable to the principal and to the principal's
7 heirs, assigns, and the personal representative of the estate of the principal in the same manner as
8 the person would be liable had the person refused to accept the authority of the principal to act on
9 the principal's own behalf. In any action brought in court to either force the acceptance of the
10 authority of the attorney in fact or pursue damages as a result of the person's refusal to accept the
11 authority of an attorney in fact, the person found liable for refusing to accept the authority of an
12 attorney in fact shall pay the following:
13

14 (1) Three (3) times the amount of the actual damages.

15 (2) The attorney's fees of the person bringing the action to court.

16 (3) Prejudgment interest on the actual damages from the date the person refused to accept the
17 authority of the attorney in fact.
18

19 (b) A person refusing to accept the authority of an attorney in fact to exercise a power
20 granted under a power of attorney is not liable under subsection (a) if:
21

22 (1) the person has actual notice of the revocation of the power of attorney before the
23 exercise of the power;

24 (2) the duration of the power of attorney specified in the power of attorney has expired;

25 (3) the person has actual knowledge of the death of the principal;

26 (4) the person reasonably believes that the power of attorney is not valid under Indiana law
27 and provides the attorney in fact with a written statement not more than ten (10) business days
28 after the refusal, describing the reason that the power of attorney is not valid under Indiana law;
29 or

30 (5) the person reasonably believes that the power of attorney does not grant the attorney in fact
31 with authority to perform the transaction requested and provides the attorney in fact with a
32 written statement not more than ten (10) business days after the refusal, describing the reason the
33 person believes the power of attorney is deficient under Indiana law.
34

35 (c) This section does not negate the liability a person would have to the principal or the
36 attorney in fact under another form of power of attorney, under the common law, or otherwise.
37 (IN)

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SECTION 701. POWER OF ATTORNEY NOT REVOKED UNTIL NOTICE.

(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 successors in interest.

[UDPAA § 4]