

D R A F T

FOR DISCUSSION ONLY

AMENDMENTS TO UNIFORM DURABLE POWER OF ATTORNEY ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM LAWS

For Drafting Committee Meeting December 12-14, 2003

With Prefatory Note

Copyright © 2003

by

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM LAWS

The ideas, concepts and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been reviewed, debated or approved by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not reflect the views of the Conference and its Commissioners or the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal made by the National Conference of Commissioners on Uniform State Laws.

DRAFTING COMMITTEE ON AMENDMENTS TO UNIFORM DURABLE POWER OF ATTORNEY ACT

JOHN P. BURTON, P.O. Box 1357, Suite 101, 123 E. Marcy St., Santa Fe, NM 87501, *Chair*
FRANK W. DAYKIN, 2180 Thomas Jefferson Dr., Reno, NV 89509, *Committee on Style Liaison*

KENNETH W. ELLIOTT, 22nd Floor, City Place Building, 204 N. Robinson Ave., Oklahoma City, OK 73102, *Enactment Plan Coordinator*

DAVID M. ENGLISH, University of Missouri-Columbia School of Law, Missouri Ave. & Conley Ave., Columbia, MO 65211

THOMAS L. JONES, University of Alabama School of Law, University Station, P.O. Box 865557, Tuscaloosa, AL 35486-0050

NATHANIEL STERLING, Law Revision Commission, Suite D-1, 4000 Middlefield Rd., Palo Alto, CA 94303

RICHARD V. WELLMAN, University of Georgia School of Law, Athens, GA 30602

STEVE WILBORN, 718 Shelby St., Unit 2, Frankfort, KY 40601

LINDA S. WHITTON, Valparaiso University School of Law, Wesemann Hall, 656 S. Greenwich, Valparaiso, IN 46383, *Reporter*

EX OFFICIO

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Rd., Room 3056, Norman, OK 73019, *President*

MARTHA T. STARKEY, Suite 850, 30 S. Meridian St., Indianapolis, IN 46204, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

WILLIAM P. LAPIANA, New York Law School, 57 Worth St., New York, NY 10013, *Advisor*

ABIGAIL KAMPMANN, 153 Treeline, Suite 320, San Antonio, TX 78209-1880, *Real Property, Probate and Trust Law Section Advisor*

CHARLIE SABATINO, ABA Commissioner on Law and Aging, 740 Fifteenth St., Washington, DC 20005, *ABA Commission on Law and Aging Advisor*

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Alabama School of Law, Box 870382, Tuscaloosa, AL 35487-0382, *Executive Director*

WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

211 E. Ontario Street, Suite 1300

Chicago, Illinois 60611

312/915-0195

www.nccusl.org

AMENDMENTS TO UNIFORM DURABLE POWER OF ATTORNEY ACT

TABLE OF CONTENTS

PREFATORY NOTE	1
----------------------	---

ARTICLE 1

GENERAL PROVISIONS AND DEFINITIONS

SECTION 101. SHORT TITLE	5
SECTION 102. DEFINITIONS	5
SECTION 103. KNOWLEDGE	6
SECTION 104. TWO OR MORE AGENTS	7
SECTION 105. SUCCESSOR AGENTS	8
SECTION 106. [NOMINATION OF GUARDIAN;] RELATION OF ATTORNEY-IN-FACT [AGENT] TO COURT-APPOINTED FIDUCIARY	8
SECTION 107. DISSOLUTION OR ANNULMENT OF PRINCIPAL'S MARRIAGE TO AGENT	9
SECTION 108. ACTIVATION OF CONTINGENT POWERS	9
SECTION 109. DURABLE POWER OF ATTORNEY NOT AFFECTED BY INCAPACITY OR LAPSE OF TIME	9
SECTION 110. COMPENSATION OF AGENT	10
SECTION 111. COMMON LAW OF AGENCY; PRINCIPLES OF EQUITY	10

ARTICLE 2

CREATION OF DURABLE POWER OF ATTORNEY

SECTION 201. EXECUTION	11
SECTION 202. RECORDING	11
SECTION 203. DURABLE POWER OF ATTORNEY EXECUTED IN FOREIGN JURISDICTION	11

ARTICLE 3

POWERS

SECTION 301. EXPRESS AUTHORITY REQUIRED; PRESERVATION OF ESTATE PLAN	12
SECTION 302. INCORPORATION OF POWERS; SIMILAR OR OVERLAPPING POWERS; MODIFICATION	12
SECTION 303. CONSTRUCTION OF POWERS GENERALLY	13

SECTION 304. REAL PROPERTY	14
SECTION 305. TANGIBLE PERSONAL PROPERTY	16
SECTION 306. STOCKS AND BONDS	17
SECTION 307. COMMODITIES AND OPTIONS	17
SECTION 308. BANKING AND OTHER FINANCIAL INSTITUTIONS	18
SECTION 309. OPERATION OF BUSINESS	19
SECTION 310. INSURANCE AND ANNUITIES	21
SECTION 311. ESTATES, TRUSTS, AND OTHER BENEFICIARY RELATIONSHIPS ...	23
SECTION 312. GIFTS	24
SECTION 313. CLAIMS AND LITIGATION	24
SECTION 314. PERSONAL AND FAMILY MAINTENANCE	26
SECTION 315. BENEFITS FROM SOCIAL SECURITY, MEDICARE, MEDICAID, OR OTHER GOVERNMENTAL PROGRAMS, OR MILITARY SERVICE	27
SECTION 316. RETIREMENT PLANS	28
SECTION 317. TAXES	29
SECTION 318. EXISTING INTERESTS; FOREIGN INTERESTS	29

ARTICLE 4 CONDUCT OF AGENT

SECTION 401. DUTIES	30
SECTION 402. EXONERATION	31
SECTION 403. JUDICIAL REVIEW	31
SECTION 404. AGENT'S LIABILITY	31
SECTION 405. AGENT RESIGNATION; NOTICE	31

ARTICLE 5 RELIANCE OF OTHER PERSONS AND LIABILITY

SECTION 501. PRESUMPTION OF VALIDITY	33
SECTION 502. LIABILITY FOR REFUSAL TO ACCEPT AGENT'S AUTHORITY	33

ARTICLE 6 TERMINATION

SECTION 601. DURABLE POWER OF ATTORNEY NOT REVOKED UNTIL NOTICE ..	35
--	----

ARTICLE 7 SHORT FORM DURABLE POWER OF ATTORNEY

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;

- 1 (3) Gift making authority should be expressly stated rather than implied;
2 (4) Statute should set forth a default standard for agent fiduciary duties;
3 (5) Principal should be permitted to alter the default fiduciary standard;
4 (6) Statute should require notice by agent when no longer willing or able to act;
5 (7) Statute should include safeguards against abuse by agent;
6 (8) Statute should include a remedies and sanctions provision for abuse by agent;
7 (9) Reliance by other persons should be protected by a statutory presumption that the
8 durable power of attorney is valid; and
9 (10) Statute should include a remedies or sanctions provision for refusal of other persons to
10 honor a durable power of attorney.
11

12 The following provides an overview of the proposed revisions and how they address the
13 concerns raised by the JEB study.
14

15 **Article 1** 16 **General Provisions and Definitions** 17

18 Section 1 of the 1987 Act contained a general definition of a durable power of attorney.
19 This section has been replaced in its entirety by the definitions contained in the proposed Section
20 102. These definitions are drafted to be consistent with the definitions in other Uniform Acts for
21 the terms “incapacitated,” “person,” “record,” and “State.” Of note is the change in emphasis
22 from “disability” as a basis for surrogate decision making to the concept of “incapacity.” The
23 definition for “incapacitated” is taken from the Uniform Guardianship and Protective
24 Proceedings Act as amended in 1997. The term “agent” is also used as a replacement for the
25 term “attorney in fact.” This usage follows the Uniform Statutory Form Power of Attorney Act
26 and seeks to resolve reported confusion among the lay public concerning the term “attorney in
27 fact.” Section 103 tracks the Uniform Trust Code definition of “knowledge,” a concept that is
28 often determinative of when a durable power of attorney is effectively revoked. Sections 104 and
29 105 address the concepts of multiple and successor agents, and Section 106 provides guidance on
30 the relationship of the agent to a later court-appointed fiduciary. The 1987 Act provided that a
31 later-appointed fiduciary had the same power to revoke or amend the durable power of attorney
32 that the principal would have had prior to incapacity. The proposed revisions remove this power
33 from the fiduciary in favor of judicial determination of whether the previously executed durable
34 power of attorney should continue undisturbed or be limited, suspended, or terminated. This
35 approach is consistent with the Uniform Guardianship and Protective Proceedings Act and
36 deference for the previously expressed preferences of the principal. Section 107 provides that an
37 agent’s authority is terminated upon dissolution or annulment of the principal’s marriage to the
38 agent unless otherwise specified in the durable power of attorney. Section 108 requires a
39 principal to designate what person or persons have the authority to determine when contingent
40 powers are triggered and requires an affidavit from the persons designated to activate the durable
41 power of attorney. Section 109 is a slightly modified version of Section 2 of the 1987 Act, which
42 addresses the binding effect of an agent’s action upon the principal as well as the non-time
43 limited quality of a durable power of attorney. Section 110 addresses agent compensation, and

1 Section 111 clarifies that the common law principles of agency and the principles of equity
2 supplement the Act.

3 4 **Article 2** 5 **Creation of a Durable Power of Attorney** 6

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

15 16 **Article 3** 17 **Powers** 18

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

1 Uniform Statutory Short Form Power of Attorney Act. The Drafting Committee will consider a
2 proposed form at the Fall 2003 drafting meeting.
3

4 **Article 4** 5 **Conduct of Agent** 6

7 Article 4 addresses standards for agent conduct and the bases for agent liability under a
8 durable power of attorney. The 1987 Act was silent on these issues. Section 401 states that an
9 agent is a fiduciary with a general duty of reasonable care and enumerates the agent's basic
10 duties. This section also attempts to reconcile the unique circumstances which often arise in a
11 durable power of attorney relationship between relatives or close friends. While a fiduciary is to
12 avoid conflicts of interest that would impair the agent's ability to act in the principal's best
13 interest, it is recognized that an agent may have inherent conflicts that do not necessarily prevent
14 the agent from acting with reasonable care for the benefit of the principal. Section 402 permits a
15 principal to reduce an agent's standard for liability to bad faith. Section 403 clarifies the classes
16 of persons who have standing to request judicial review of an agent's conduct, and Section 404
17 addresses agent liability. Section 405 provides for agent resignation upon giving appropriate
18 notice.
19

20 **Article 5** 21 **Reliance of Other Persons and Liability** 22

23 The provisions of Article 5 are proposed in response to the overwhelming feedback
24 received by the JEB on the problem of persons who refuse to accept the authority of an agent
25 under a durable power of attorney. Section 501 provides assurance to other persons through a
26 statutory presumption of durable power validity, but in exchange, Section 502 (a) imposes
27 liability for refusal to accept an agent's authority. Section 502 (b) provides limited bases upon
28 which a person may refuse to accept an agent's authority without incurring liability.
29

30 **Article 6** 31 **Termination** 32

33 Article 6 proposes only minor modifications for consistency purposes to Section 4 of the
34 1987 Act.
35

36 **Article 7** 37 **Short Form Durable Power of Attorney** 38

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

1 **AMENDMENTS TO UNIFORM DURABLE POWER OF ATTORNEY ACT**

2
3
4 **ARTICLE 1**

5
6 **GENERAL PROVISIONS AND DEFINITIONS**

7
8 ~~**[Definition].** A durable power of attorney is a power of attorney by which a principal~~
9 ~~designates another his attorney in fact in writing and the writing contains the words "This power~~
10 ~~of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of~~
11 ~~time," or "This power of attorney shall become effective upon the disability or incapacity of the~~
12 ~~principal," or similar words showing the intent of the principal that the authority conferred shall~~
13 ~~be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it~~
14 ~~states a time of termination, notwithstanding the lapse of time since the execution of the~~
15 ~~instrument. [UDPAA § 1]~~

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

18 **SECTION 102. DEFINITIONS.** In this [act]:

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

21 (2) "Durable power of attorney" means a record by which the principal grants to the
22 agent authority that is not revoked by the incapacity of the principal; the agent's authority under a
23 durable power of attorney may become effective immediately or upon a future date or event.

24 (3) "Incapacity" means inability to manage property and business affairs because of an
25 impairment in the ability to receive and evaluate information or make decisions even with the use

1 of appropriate technological assistance, or because the individual is missing, detained, or unable
2 to return to the United States.

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

6 (5) “Principal” means the individual who grants a durable power of attorney.

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

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

13 **SECTION 103. KNOWLEDGE.**

14 (a) Subject to subsection (b), a person has knowledge of a fact involving a durable power
15 of attorney if the person:

16 (1) has actual knowledge of it;

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

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

20 (b) An organization that conducts activities through employees has notice or knowledge
21 of a fact involving a durable power of attorney only from the time the information:

22 (1) was received by an employee having responsibility to act with respect to the

1 durable power of attorney; or

2 (2) would have been brought to the employee's attention if the organization had
3 exercised reasonable diligence. An organization exercises reasonable diligence if it maintains
4 reasonable routines for communicating significant information to employees having a
5 responsibility to act with respect to durable powers of attorney and there is reasonable
6 compliance with the routines. Reasonable diligence does not require an employee of the
7 organization to communicate such information unless the communication is part of the
8 employee's regular duties or the employee knows a matter involving the durable power of
9 attorney would be materially affected by the information.

10 **SECTION 104. TWO OR MORE AGENTS.**

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

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

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

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

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

1 **SECTION 105. SUCCESSOR AGENTS.**

2 (a) A principal may designate one or more successor agents to act if the initial or
3 predecessor agent resigns, dies, becomes disabled or incapacitated, is not qualified to act, or
4 refuses to act. A principal may also grant authority to another person, designated by name, by
5 office, or by function, including the initial and any successor agent, to designate one or more
6 successor agents.

7 (b) Unless the durable power of attorney provides otherwise, a successor agent has the
8 same authority as that granted to the initial agent.

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

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

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

17 (b) If, following execution of a durable power of attorney, a court of the principal's
18 ~~domicile~~ appoints a conservator, guardian of the estate, or other fiduciary charged with the
19 management of all of the principal's property or all of his [the] property except specified
20 exclusions, the ~~attorney in fact~~ [agent] is accountable to the fiduciary as well as to the principal.
21 ~~The fiduciary has the same power to revoke or amend the power of attorney that the principal~~
22 ~~would have had if he were not disabled or incapacitated.~~ [Upon motion filed in connection with

1 a petition for appointment of a conservator, guardian of the estate, or other fiduciary, or on
2 petition of a conservator, guardian or other fiduciary once appointed, the court shall consider
3 whether the authority of an agent designated under a previously executed durable power of
4 attorney should continue undisturbed or be limited, suspended or terminated. The court may
5 issue an order limiting, suspending, or terminating the durable power of attorney only upon
6 determining that to do so would be in the best interest of the principal.]

7 **SECTION 107. DISSOLUTION OR ANNULMENT OF PRINCIPAL'S**

8 **MARRIAGE TO AGENT.** Unless the durable power of attorney provides otherwise, authority
9 granted to the principal's spouse in a durable power of attorney is revoked if the marriage to the
10 principal is dissolved or annulled.

11 **SECTION 108. ACTIVATION OF CONTINGENT POWERS.** If the durable power
12 of attorney will become effective upon the occurrence of a future event or contingency, the
13 principal shall designate one or more persons who have the authority to determine conclusively
14 that the specified event or contingency has occurred. The durable power of attorney is effective
15 when the person or persons designated by the principal execute a written declaration that the
16 specified event or contingency has occurred. Other persons may rely on the written declaration
17 of the person or persons designated by the principal without liability to the principal or to any
18 other person whether or not the specified event or contingency has actually occurred.

19 **SECTION 109. DURABLE POWER OF ATTORNEY NOT AFFECTED BY**
20 **INCAPACITY OR LAPSE OF TIME.** All acts done by an ~~attorney-in-fact~~ [agent] pursuant to
21 a durable power of attorney [, including acts done] during any period of ~~disability or incapacity~~ of
22 the principal[,] have the same effect and inure to the benefit of and bind the principal and ~~his~~ [the

principal's]successors in interest as if [done by] the principal [having capacity.] ~~were competent and not disabled.~~ Unless the durable power of attorney states a time of termination, the [authority of the agent] ~~power~~ is exercisable notwithstanding the lapse of time.

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

SECTION 111. COMMON LAW OF AGENCY; PRINCIPLES OF EQUITY.

The common law of agency and principles of equity supplement this [act], except to the extent modified by this [act] or another statute of this state.

1 **ARTICLE 2**

2 **CREATION OF DURABLE POWER OF ATTORNEY**

3
4 **SECTION 201. EXECUTION.** A durable power of attorney must be signed by the
5 principal, or by another person in the principal's presence and at the principal's express direction,
6 and be acknowledged by the principal before a notary public.
7

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

10 **SECTION 203. DURABLE POWER OF ATTORNEY EXECUTED IN FOREIGN**
11 **JURISDICTION.** A durable power of attorney executed in another state or jurisdiction in
12 compliance with the law of that state or jurisdiction or the law of this state is valid in this state.
13

1 **ARTICLE 3**

2 **POWERS**

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

5 (a) Unless expressly authorized in the durable power of attorney, a durable power of attorney
6 does not grant authority to an agent to:

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

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

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

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

13 (5) designate or change the designation of a beneficiary to receive any property, benefit, or
14 contractual right on the principal's death; or

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

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

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

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

3 (1) referring to a descriptive caption in Sections 304 through 317; or

4 (2) citing to a specific section of Sections 304 through 317.

5 (b) A reference in a durable power of attorney to a descriptive caption in Sections 304
6 through 317 must be construed as if the entire section were set out in full in the durable power of
7 attorney.

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

9 (d) A durable power of attorney may modify a power incorporated by reference.

10 **SECTION 303. CONSTRUCTION OF POWERS GENERALLY.** By executing a
11 durable power of attorney that incorporates by reference a power in Sections 304 through 317,
12 the principal, except as modified in the durable power of attorney, authorizes the agent with
13 respect to that power to:

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

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

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

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

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

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

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

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

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

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

16 **SECTION 304. REAL PROPERTY.** Language granting power with respect to
17 transactions concerning real property authorizes the agent to:

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

20 2) sell, exchange, convey with or without covenants, quitclaim, release, surrender,
21 mortgage, encumber, partition, consent to partitioning, subdivide, apply for zoning, rezoning, or
22 other governmental permits, plat or consent to platting, develop, grant options concerning, lease,

1 sublease, or otherwise dispose of, an interest in real property or a right incident to real property;

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

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

7 (A) insuring against a casualty, liability, or loss;

8 (B) obtaining or regaining possession, or protecting the interest or right, by litigation
9 or otherwise;

10 (C) paying, compromising, or contesting taxes or assessments, or applying for and
11 receiving refunds in connection with them; and

12 (D) purchasing supplies, hiring assistance or labor, and making repairs or alterations
13 in the real property;

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

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

19 (A) selling or otherwise disposing of them;

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

21 and

22 (C) voting them in person or by proxy;

1 (7) change the form of title of an interest in or right incident to real property [; however, a
2 general grant to the agent of power with respect to real property transactions does not include
3 authority to create or change survivorship interests in the principal's property or in property in
4 which the principal may have an interest unless expressly authorized in the durable power of
5 attorney; and]

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

8 **SECTION 305. TANGIBLE PERSONAL PROPERTY.** Language granting
9 power with respect to transactions concerning tangible personal property authorizes the agent to:

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

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

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

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

22 (A) insuring against casualty, liability, or loss;

1 (B) obtaining or regaining possession, or protecting the property or interest, by
2 litigation or otherwise;

3 (C) paying, compromising, or contesting taxes or assessments or applying for and
4 receiving refunds in connection with taxes or assessments;

5 (D) moving from place to place;

6 (E) storing for hire or on a gratuitous bailment; and

7 (F) using, altering, and making repairs or alterations; [and]

8 [(5) change the form of title of an interest in or right incident to tangible personal
9 property; however, a general grant to the agent of power with respect to tangible personal
10 property transactions does not include authority to create or change rights of survivorship in the
11 principal's property or in property in which the principal may have an interest unless expressly
12 authorized in the durable power of attorney.]

13 **SECTION 306. STOCKS AND BONDS.** Language granting power with respect to
14 transactions concerning stocks and bonds authorizes the agent to buy, sell, and exchange stocks,
15 bonds, mutual funds, and all other types of securities and financial instruments except
16 commodity futures contracts and call and put options on stocks and stock indexes, receive
17 certificates and other evidences of ownership with respect to securities, exercise voting rights
18 with respect to securities in person or by proxy, enter into voting trusts, and consent to
19 limitations on the right to vote.

20 **SECTION 307. COMMODITIES AND OPTIONS.** Language granting power with
21 respect to transactions concerning commodities and options authorizes the agent to buy, sell,
22 exchange, assign, settle, and exercise commodity futures contracts and call and put options on

1 stocks and stock indexes traded on a regulated option exchange, and establish, continue, modify,
2 and terminate option accounts with a broker.

3 **SECTION 308. BANKING AND OTHER FINANCIAL INSTITUTIONS.**

4 Language granting power with respect to transactions concerning banking and other financial
5 institutions authorizes the agent to:

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 309. OPERATION OF BUSINESS. Language granting power with respect to operating a business authorizes the agent to:

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

(2) act for a principal, subject to the terms of ~~the~~ [a] partnership agreement [or operating agreement], to:

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

(B) enforce the terms of the partnership agreement [or operating agreement] by litigation or otherwise; and

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

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

7 (4) with respect to a business controlled by the principal:

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

11 (B) determine:

12 (i) the location of its operation;

13 (ii) the nature and extent of its business;

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

16 (iv) the amount and types of insurance carried;

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

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

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

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

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

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

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

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

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

17 **SECTION 310. INSURANCE AND ANNUITIES.** Language granting power with
18 respect to insurance and annuities authorizes the agent to:

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

1 (2) procure new, different, and additional contracts of insurance and annuities for the
2 principal and the principal's spouse, children, and other dependents, and select the amount, type
3 of insurance or annuity, and mode of payment;

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

6 (4) designate the beneficiary of the contract, but [unless expressly authorized in the
7 durable power of attorney], an agent [or a person to whom the agent owes a legal duty of support]
8 may be named a beneficiary of the contract, or an extension, renewal, or substitute for it, only to
9 the extent the agent [or person to whom the agent owes a legal duty of support] was named as a
10 beneficiary under a contract procured by the principal before executing the durable power of
11 attorney.

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

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

14 (7) exercise an election;

15 (8) change the manner of paying premiums;

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

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

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

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

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

6 **SECTION 311. ESTATES, TRUSTS, AND OTHER BENEFICIARY**
7 **RELATIONSHIPS.**

8 [(a) Subject to subsection (b),] language granting power with respect to estates, trusts, and
9 other relationships in which the principal is a beneficiary, authorizes the agent to act for the
10 principal in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow,
11 custodianship, or other fund from which the principal is, may become, or claims to be entitled, as
12 a beneficiary, to a share or payment, including to:

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

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

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

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

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

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

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

8 **SECTION 312. GIFTS.** Subject to Section 301, and unless expressly authorized in the
9 durable power of attorney, language granting power with respect to gifts authorizes the agent to
10 make gifts of any of the principal's property to individuals or organizations within the limits of
11 the annual exclusion under Section 2503(b) of the United States Internal Revenue Code, or
12 corresponding future provisions of federal tax law, as the agent shall determine to be in the
13 principal's best interest based on all relevant factors, including:

- 14 (1) the value and nature of the principal's property;
15 (2) the principal's foreseeable obligations and need for maintenance;
16 (3) minimization of income, estate, inheritance, generation-skipping transfer or gift taxes;
17 (4) eligibility for public benefits or assistance under a statute or governmental regulation;
18 and
19 (5) the principal's personal history of making or joining in the making gifts while living.

20 **SECTION 313. CLAIMS AND LITIGATION.** Language granting power with respect
21 to claims and litigation authorizes the agent to:

1 (1) assert and prosecute before a court or administrative agency a claim, a [claim for
2 relief] [cause of action], counterclaim, offset, or defense against an individual, organization, or
3 government, including actions to recover property or other thing of value, to recover damages
4 sustained by the principal, to eliminate or modify tax liability, or to seek an injunction, specific
5 performance, or other relief;

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

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

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

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

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

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

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

8 **SECTION 314. PERSONAL AND FAMILY MAINTENANCE.** Language granting
9 power with respect to personal and family maintenance authorizes the agent to:

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

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

18 (3) pay on behalf of the individuals described in paragraph (1) expenses for necessary
19 medical, dental, and surgical care, hospitalization, and custodial care;

20 [(4) act as the principal's personal representative pursuant to sections 1171 through 1179
21 of the Social Security Act and applicable regulations, as added by sections 262 and 264 of Public
22 Law 104-191 or successor sections, in making decisions related to the past, present, or future

1 payment for the provision of health care consented to by the principal or the principal's health-
2 care agent authorized under the law of this state;]

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

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

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

12 **SECTION 315. BENEFITS FROM SOCIAL SECURITY, MEDICARE,**
13 **MEDICAID, OR OTHER GOVERNMENTAL PROGRAMS, OR MILITARY SERVICE.**

14 Language granting power with respect to benefits from social security, medicare, medicaid or
15 other governmental programs, or civil or military service, empowers the agent to:

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

20 (2) take possession and order the removal and shipment of property of the principal from
21 a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or
22 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 and
8 conserve, invest, disburse, or use anything so received for a lawful purpose.

9 **SECTION 316. RETIREMENT PLANS.** [Subject to Section 301, and unless
10 expressly authorized in the durable power of attorney,] language granting power with respect to
11 retirement plans authorizes the agent to:

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

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

15 (3) make voluntary contributions to those plans;

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

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

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

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

1 **SECTION 317. TAXES.** Language granting power with respect to tax matters
2 authorizes the agent to:
3 (1) prepare, sign, and file federal, state, local, and foreign income, gift, payroll, Federal
4 Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of
5 time, petitions regarding tax matters, and any other tax-related documents, including receipts,
6 offers, waivers, consents (including consents and agreements under Internal Revenue Code
7 Section 2032A or any successor section), closing agreements, and any power of attorney required
8 by the Internal Revenue Service or other taxing authority with respect to a tax year upon which
9 the statute of limitations has not run and the following 25 tax years;
10 (2) pay taxes due, collect refunds, post bonds, receive confidential information, and
11 contest deficiencies determined by the Internal Revenue Service or other taxing authority;
12 (3) exercise any election available to the principal under federal, state, local, or foreign
13 tax law; and
14 (4) act for the principal in all tax matters for all periods before the Internal Revenue
15 Service, and any other taxing authority.

16 **SECTION 318. EXISTING INTERESTS; FOREIGN INTERESTS.** The powers
17 described in Sections 304 through 317 are exercisable with respect to an interest the principal has
18 when the durable power of attorney is executed or an interest acquired after execution, whether
19 or not the property is located in this state, and whether or not the powers are exercised or the
20 durable power of attorney is executed in this state.
21

1 **ARTICLE 4**

2 **CONDUCT OF AGENT**

3 **SECTION 401. DUTIES.**

4 (a) An agent's acceptance of the designation under a durable power of attorney or
5 exercise of authority granted by the principal creates a fiduciary relationship and, except as
6 otherwise provided in the durable power of attorney, the agent is under a duty to act with
7 reasonable care for the benefit of the principal.

8 (b) An agent has the duty to:

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

10 (2) subject to Subsection (c), avoid conflicts of interest that would impair the agent's
11 ability to act in the best interest of the principal;

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

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

16 (c) An agent who acts with reasonable care for the benefit of the principal is not liable
17 solely because the agent also benefits from the act or has individual or conflicting interests in
18 relation to the property or affairs of the principal.

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

1 estate, or ordered by a court.

2 **SECTION 402. EXONERATION.** The principal may provide in the durable power of
3 attorney that the agent is liable only if the agent acts in bad faith. The exoneration is binding on
4 the principal and the principal's successors in interest.

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

8 (1) the principal;

9 (2) the principal's spouse, parent or child;

10 (3) any person who would qualify as an intestate successor of the principal;

11 (4) any person named as a beneficiary in the principal's will or as a beneficiary of a trust
12 created by or for the principal;

13 (5) any governmental agency having regulatory authority to protect the welfare of the
14 principal;

15 (6) any other person who demonstrates sufficient interest in the principal's welfare.

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

21 **SECTION 405. AGENT RESIGNATION; NOTICE.** An agent may resign by giving
22 notice to any of the following persons:

- 1 (1) the principal, if the principal has capacity;
- 2 (2) the conservator or guardian, if one has been appointed for the principal;
- 3 (3) the remaining agents and successor agents if more than one individual is named; or
- 4 (4) the principal's caregiver or other interested person, if the principal is incapacitated
- 5 and has neither a conservator or guardian, nor has named additional or successor agents.

1 **ARTICLE 5**

2 **RELIANCE OF OTHER PERSONS AND LIABILITY**

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

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

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

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

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

20 (2) the duration of the authority specified in the durable power of attorney has expired;

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

22 (4) the person reasonably believes that the durable power of attorney is not valid under

1 the law of this state and provides the agent with a written statement not more than 10 business
2 days after the refusal, describing the reason that the durable power of attorney is not valid under
3 the law of this state; or

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

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

1
2
3
4
5
6
7
8
9
0
1
2
3
4

SECTION 601. DURABLE 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~~ the principal's successors in interest.

