FIDUCIARY RESPONSIBILITY, LIABILITY, AND THE DURABLE POWER OF ATTORNEY: A BEGINNING CONVERSATION

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ELDER LAW COURSE AND GUARDIANSHIP PROGRAM
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2000

Chapter 5

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EDUCATION

Doctor of Jurisprudence, St. Mary's University, San Antonio, Texas, 1986  
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ADMISSION TO COURTS

U.S. Supreme Court  
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LEGAL EXPERIENCE

Ms. Thompson’s practice involves the preparation of wills, trusts and other estate planning documents. She does  
long term care and Medicaid planning for her clients, and further she represents clients in probate matters, estate  
administration, and alternatives to administration.

PROFESSIONAL AFFILIATIONS AND ACTIVITIES

National Academy of Elder Law Attorneys (Dir., Texas Chapter 1998-present)  
Travis County Bar Association (Chair Elect, Estate Planning and Probate Section 2000)  
State Bar College, State Bar of Texas  
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COMMUNITY AND CIVIC ACTIVITIES

The Financial Abuse Cessation Team (FACT) 2000  
Family Eldercare, Inc. (President, Bd. of Dir. 1996-1997)  
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FIDUCIARY RESPONSIBILITY, LIABILITY, AND THE DURABLE POWER OF ATTORNEY: A BEGINNING CONVERSATION

I. SCOPE OF OUTLINE
This outline discusses the basic rules that govern a durable power of attorney, the extent of fiduciary responsibility of an agent or attorney in fact to the principal, the danger of abuse inherent in the creation of the document, and strategies to avoid abuse and subsequent liability to the attorney who produces the document. Forms are provided in the Appendix to facilitate the attorney in addressing some of the issues advanced in this outline.

II. FIDUCIARY RESPONSIBILITY GENERALLY
A. Fiduciary.
The term is derived from Roman Law, and means a person holding the character of a trustee, having duty, created by his undertaking, to act primarily for another’s benefit in matters connected with such undertaking.

B. Common Law Duties.
In acting on behalf of a principal, an agent or attorney in fact is subject to common law duties which generally apply to all fiduciary relationships. He is under a duty to act only within his authority, solely for his principal’s benefit and only as long as his authority has not been terminated.

Duty of Loyalty. The common law duty of loyalty prevents the agent or attorney in fact from self-dealing or otherwise promoting his own interests to the detriment of the principal.

Duty to Segregate Assets. An agent or attorney in fact, like a guardian or trustee is under a duty to segregate and not to commingle the principal’s property with his or another’s.

Duty to Account. He also is under a duty to account to the principal for all property of the principal which comes into his possession, keeping accurate records and accounts.

Duty to Act Prudently. The common law duty to act and acting prudently while his authority continues.

III. FINANCIAL EXPLOITATION AND ABUSE OF FIDUCIARY RESPONSIBILITY
Financial exploitation can compromise victims’ independence and security, destroy legacies, and lead to depression, hopelessness, or even suicide; the impact is particularly great on the elderly, who are often unable to replace lost assets through work, saving, or investing.

B. Criminal Conduct vs. Mismanagement.
Criminal conduct vs. mismanagement or unethical, but not unlawful, conduct has been a difficult distinction for the authorities to make. Law enforcement personnel have often viewed financial crimes involving civil instruments (e.g. the misuse of a power of attorney to access a victim’s assets) as strictly civil matters even when the conduct also constitutes criminal behavior. Consequently, they may advise victims to seek out civil attorneys who can sue for recoveries as an alternative to criminal action.

C. Financial Crimes.
Civil attorneys have often failed to recognize the criminal nature of cases they handle. Financial crimes include the misuse of powers of attorney and illegal transfers of property. Perpetrators include family members, predatory individuals, and unscrupulous businesses.

D. Caregiving Relationship.
Caregivers often have access to financial information, documents, and valuables. The intimacy, proximity, and dependency that the caregiving relationship engenders place unscrupulous caregivers in disturbingly opportune positions to exercise coercion, subtle influence, or outright control.

E. “License to Steal.”
Many elders do not realize the extent of the authority they are assigning to the chosen agent. Statutory Durable Powers of Attorney provide a simple, inexpensive tool for financial management and planning for the future. Like other devices that were created to provide protection, powers of attorney can also become “licenses to steal” if the
authority is given to, or taken by, untrustworthy individuals.

F. Attorney’s Responsibility.

Attorneys who practice in the area of elder law, long term care, and estate planning, need to be aware of all of the above considerations. As we look once again at the Durable Power of Attorney document, perhaps our discussion will reveal actions which we can take in our practices to protect our clients and ourselves from unscrupulous or simply uneducated attorneys-in-fact. Their education and the safety of our client’s assets is our responsibility to the degree that we can provide this education and these safeguards. It is also to our benefit to avoid the potential liability of a runaway agent under our client’s power of attorney.

IV. ELEMENTS OF THE DURABLE POWER OF ATTORNEY

A. Definition.

A "Durable Power of Attorney" is defined as a written instrument that has the following elements: Texas Probate Code § 482.

1. Agency Designation.

The document designates another person as attorney in fact or agent.

2. Signature.

It is signed by an adult principal.

3. Specific Language.

It contains the words "This power of attorney is not affected by subsequent disability or incapacity of the principal," or "This power of attorney becomes effective on the disability or incapacity of the principal," Comerica Bank-Texas v. Texas Commerce Bank, 2 S.W.3d 723 (Tex. App.—Texarkana 1999, pet. denied) or similar words showing the principal's intent that the authority conferred on the attorney in fact or agent shall be exercised notwithstanding the principal's subsequent disability or incapacity.

4. Notary.

The document is acknowledged by the principal before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of this state or any other state.

B. Incapacity of Principal.

A principal’s subsequent incapacity, after the document has been executed, does not affect a properly written and executed durable power of attorney. All acts done by an attorney in fact or 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 the principal's successors in interest as if the principal were not disabled or incapacitated. Texas Probate Code § 484.

C. Limitation of Duration Must Be Stated in the Document.

Unless stated in the document itself, there is no limitation of duration for a durable power of attorney. Texas Probate Code § 483.

D. Termination of Power.

Clients need to be advised that once properly written and executed, the durable power of attorney remains valid until the happening of one of the following contingencies:

1. Death of the Principal.

As we know, “the power dies with the principal.”

2. Qualification of a Guardian of the Estate.

If, after execution of a durable power of attorney, a court of the principal's domicile appoints a guardian of the estate of the principal, the powers of the attorney in fact or agent terminate on the qualification of the guardian of the estate, and the attorney in fact or agent shall deliver to the guardian of the estate all assets of the estate of the ward in the attorney's or agent's possession and shall account to the guardian of the estate as the attorney or agent would to the principal had the principal terminated his powers. Texas Probate Code § 485.

3. Termination of Powers by Principal.

As long as the principal retains his capacity, he can terminate the agency under his Power of Attorney at any time.

4. Termination as to Former Spouse At Principal's Divorce or Marriage Annulment.

If 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

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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. Texas Probate Code § 485A.

E. When Action in Good Faith, Actual Knowledge Required to Revoke Power.

Texas Probate Code § 486. Under all circumstances, “actual knowledge” is required to revoke an agency under a power of attorney.

1. Actual Knowledge Necessary to Revoke.

The revocation by, the death of, or the qualification of a guardian of the estate of a principal who has executed a durable power of attorney does not revoke or terminate the agency as to the attorney in fact, agent, or other person who, without actual knowledge of the termination of the power by revocation, by the principal's death, or by the qualification of a guardian of the estate of the principal, acts in good faith under or in reliance on the power.

2. No Revocation as to Anyone Else.

The divorce of a principal from a person who has been appointed the principal's attorney in fact or agent before the date on which the divorce is granted or the annulment of the marriage of the principal and a person who has been appointed the principal's attorney in fact or agent before the date the annulment is granted does not revoke or terminate the agency as to a person other than the principal's former spouse if the person acts in good faith under or in reliance on the power.

3. Successors in Interest Bound.

Any action taken under this section, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

F. Affidavit of Lack of Knowledge or Termination of Power; Recording; Good-Faith Reliance

Texas Probate Code § 487.

1. Affidavit as to Lack of Knowledge.

As to acts undertaken in good-faith reliance on the durable power of attorney, an affidavit executed by the attorney in fact or agent under a durable power of attorney stating that the attorney in fact or agent did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation, by the principal's death, by the principal's divorce or the annulment of the marriage of the principal if the attorney in fact or agent was the principal's spouse, or by the qualification of a guardian of the estate of the principal is conclusive proof as between the attorney in fact or agent and a person other than the principal or the principal's personal representative dealing with the attorney in fact or agent of the nonrevocation or nontermination of the power at that time.

2. Affidavit of Agent as to Incapacity.

As to acts undertaken in good-faith reliance on the durable power of attorney, an affidavit executed by the attorney in fact or agent under a durable power of attorney stating that the principal is disabled or incapacitated, as defined by the power, is conclusive proof as between the attorney in fact or agent and a person other than the principal or the principal's personal representative dealing with the attorney in fact or agent of the disability or incapacity of the principal at that time.

3. Affidavit May Be Recorded.

If the exercise of the power of attorney requires execution and delivery of any instrument that is to be recorded, an affidavit executed under Subsection (1) or (2) of this section, when authenticated for record, may also be recorded.

4. Not Effective as to Other Provisions.

This does not affect any provision in a durable power of attorney for its termination by expiration of time or occurrence of an event other than express revocation.

5. Third Party Not Liable to Principal.

When a durable power of attorney is used, a third party who relies in good faith on the acts of an attorney in fact or agent within the scope of the power of attorney is not liable to the principal. Texas Probate Code § 487.

G. Third Party Must Have Actual Notice.

Unless otherwise provided in the document, a revocation of a durable power of attorney is not effective as to a third party relying on the power of attorney until the third party receives actual notice of the revocation. Texas Probate Code § 488.
H. Recording for Real Property Transactions.
A durable power of attorney for a real property transaction requiring the execution and delivery of an instrument that is to be recorded, including a release, assignment, satisfaction, mortgage, security agreement, deed of trust, encumbrance, deed of conveyance, oil, gas, or other mineral lease, memorandum of a lease, lien, or other claim or right to real property, shall be recorded in the office of the county clerk of the county in which the property is located. Texas Probate Code § 489.

I. Statutory Durable Power of Attorney.
Appendix A is a "statutory durable power of attorney." A person may use a statutory durable power of attorney to grant an attorney in fact or agent powers with respect to a person's property and financial matters. A power of attorney in substantially the same form has the meaning and effect prescribed by Chapter XII of the Texas Probate Code. Texas Probate Code § 490.

1. Validity.
The validity of a power of attorney as meeting the requirements of a statutory durable power of attorney is not affected by the fact that one or more of the categories of optional powers listed in the form are struck or the form includes specific limitations on or additions to the attorney in fact's or agent's powers.

2. Legal Sufficiency.
A statutory durable power of attorney is legally sufficient if the wording of the form complies substantially with Appendix A, the form is properly completed, and the signature of the principal is acknowledged.

V. CONSTRUCTION OF POWERS
A. Construction of Powers: Generally.
Texas Probate Code § 491. The principal, by executing a statutory durable power of attorney that confers authority with respect to any class of transactions, empowers the attorney in fact or agent for that class of transactions to:
1) demand, receive, and obtain by litigation, action, or otherwise any money or other thing of value to which the principal is, may become, or may claim to be entitled;
2) conserve, invest, disburse, or use any money or other thing of value received on behalf of the principal for the purposes intended;
3) contract in any manner with any person, on terms agreeable to the attorney in fact or agent, to accomplish a purpose of a transaction and perform, rescind, reform, release, or modify the contract or another contract made by or on behalf of the principal;
4) execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or other instrument the agent considers desirable to accomplish a purpose of a transaction;
5) prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in an action or litigation relating to the claim;
6) seek on the principal's behalf the assistance of a court to carry out an act authorized by the power of attorney;
7) engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant;
8) keep appropriate records of each transaction, including an accounting of receipts and disbursements;
9) prepare, execute, and file a record, report, or other document the attorney in fact or agent considers necessary or desirable to safeguard or promote the principal's interest under a statute or governmental regulation;
10) reimburse the attorney in fact or agent for expenditures made in exercising the powers granted by the durable power of attorney; and
11) in general, do any other lawful act that the principal may do with respect to a transaction.

B. Construction of Powers: Real Property Transactions.
Texas Probate Code § 492. In a statutory durable power of attorney, the language conferring authority with respect to real property transactions empowers the attorney in fact or agent without further reference to a specific description of the real property to:
1) accept as a gift or as security for a loan or reject, demand, buy, lease, receive, or otherwise acquire an interest in real property or a right incident to real property;
2) sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition, consent to partitioning, subdivide, apply for zoning, rezoning, or other governmental permits, plat or consent to platting, develop, grant options
concerning, lease or sublet, or otherwise dispose of an estate or interest in real property or a right incident to real property;

3) release, assign, satisfy, and enforce by litigation, action, or otherwise a mortgage, deed of trust, encumbrance, lien, or other claim to real property that exists or is claimed to exist;

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

(a) insure against a casualty, liability, or loss;
(b) obtain or regain possession or protect the interest or right by litigation, action, or otherwise;
(c) pay, compromise, or contest taxes or assessments or apply for and receive refunds in connection with them;
(d) purchase supplies, hire assistance or labor, or make repairs or alterations in the real property; and
(e) manage and supervise an interest in real property, including the mineral estate, by, for example, entering into a lease for oil, gas, and mineral purposes, making contracts for development of the mineral estate, or making pooling and unitization agreements;

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

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

(a) insuring against casualty, liability, or loss;
(b) obtaining or regaining possession or protecting the property or interest by litigation, action, or otherwise;
(c) paying, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;
(d) moving from place to place;
(e) storing for hire or on a gratuitous bailment; and
(f) using, altering, and making repairs or alterations.


Texas Probate Code § 493. In a statutory durable power of attorney, the language conferring general authority with respect to tangible personal property transactions empowers the attorney in fact or agent to:

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

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

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

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

(a) insuring against casualty, liability, or loss;
(b) obtaining or regaining possession or protecting the property or interest by litigation, action, or otherwise;
(c) paying, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;
(d) moving from place to place;
(e) storing for hire or on a gratuitous bailment; and
(f) using, altering, and making repairs or alterations.

D. Construction of Powers: Stock and Bond Transactions.

Texas Probate Code § 494. In a statutory durable power of attorney, the language conferring authority with respect to stock and bond transactions empowers the attorney in fact or agent to buy, sell, and exchange stocks, bonds, mutual funds, and all other types of securities and financial instruments other than 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.

E. Construction of Powers: Commodity and Option Transactions.

Texas Probate Code § 495. In a statutory durable power of attorney, the language conferring authority with respect to commodity and option transactions empowers the attorney in fact or 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 options exchange and establish, continue, modify, or terminate option accounts with a broker.

F. Construction of Powers: Banking and Other Financial Institution Transactions.

Texas Probate Code § 496. In a statutory durable power of attorney, the language conferring authority with respect to banking and other financial institution transactions empowers the attorney in fact or agent to:
1) continue, modify, or terminate an account or other banking arrangement made by or on behalf of the principal;
2) establish, modify, or 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 attorney in fact or agent;
3) hire a safe deposit box or space in a vault;
4) contract to procure other services available from a financial institution as the attorney in fact or agent considers desirable;
5) withdraw by check, order, or otherwise money or property of the principal deposited with or left in the custody of a financial institution;
6) receive bank statements, vouchers, notices, or similar documents from a financial institution and act with respect to them;
7) enter a safe deposit box or vault and withdraw or add to the contents;
8) borrow money at an interest rate agreeable to the attorney in fact or agent and pledge as security real or personal property of the principal necessary to borrow, pay, renew, or extend the time of payment of a debt of the principal;
9) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, bills of exchange, checks, drafts, or other negotiable or nonnegotiable paper of the principal, or payable to the principal or the principal's order, to receive the cash or other proceeds of those transactions, to accept a draft drawn by a person on the principal, and to pay the principal when due;
10) receive for the principal and act on 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.


In Texas Probate Code § 497. a statutory durable power of attorney, the language conferring authority with respect to business operating transactions empowers the attorney in fact or agent to:
1) operate, buy, sell, enlarge, reduce, or terminate a business interest;
2) to the extent that an agent is permitted by law to act for a principal and subject to the terms of the partnership agreement:
(a) perform a duty or discharge a liability or exercise a right, power, privilege, or option that the principal has, may have, or claims to have under a partnership agreement, whether or not the principal is a general or limited partner;
(b) enforce the terms of a partnership agreement by litigation, action, or otherwise; and
(c) defend, submit to arbitration, settle, or compromise litigation or an action to which the principal is a party because of membership in the partnership;
3) exercise in person or by proxy or enforce by litigation, action, or otherwise a right, power, privilege, or option the principal has or claims to have as the holder of a bond, share, or other instrument of similar character and defend, submit to arbitration, settle, or compromise a legal proceeding to which the principal is a
party because of a bond, share, or similar instrument;
4) with respect to a business owned solely by the principal:
   (a) continue, modify, renegotiate, extend, and terminate a contract made with an individual or a legal entity, firm, association, or corporation by or on behalf of the principal with respect to the business before execution of the power of attorney;
   (b) determine:
      • the location of its operation;
      • the nature and extent of its business;
      • the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation;
      • the amount and types of insurance carried; and
      • the mode of engaging, compensating, and dealing with its accountants, attorneys, and other agents and employees;
   (c) change the name or form of organization under which the business is operated and enter into a partnership agreement with other persons or organize a corporation to take over all or part of the operation of the business; and
   (d) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the business and control and disburse the money in the operation of the business;
5) put additional capital into a business in which the principal has an interest;
6) join in a plan of reorganization, consolidation, or merger of the business;
7) sell or liquidate a business or part of it at the time and on the terms that the attorney in fact or agent considers desirable;
8) establish the value of a business under a buy-out agreement to which the principal is a party;
9) prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to a business that are required by a governmental agency, department, or instrumentality or that the attorney in fact or agent considers desirable and make related payments; and
10) pay, compromise, or contest taxes or assessments and do any other act that the attorney in fact or agent considers desirable to protect the principal from illegal or unnecessary taxation, fines, penalties, or assessments with respect to a business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

Texas Probate Code § 498. In a statutory durable power of attorney, the language conferring authority with respect to insurance and annuity transactions empowers the attorney in fact or agent to:
1) continue, pay the premium or assessment on, modify, rescind, release, or terminate a contract procured by or on behalf of the principal that insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;
2) procure new, different, or additional contracts of insurance and annuities for the principal or the principal's spouse, children, and other dependents and select the amount, type of insurance or annuity, and mode of payment;
3) pay the premium or assessment on or modify, rescind, release, or terminate a contract of insurance or annuity procured by the attorney in fact or agent;
4) designate the beneficiary of the contract, except that an attorney in fact or agent may be named a beneficiary of the contract or an extension, renewal, or substitute for the contract only to the extent the attorney in fact or agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney;
5) apply for and receive a loan on the security of the contract of insurance or annuity;
6) surrender and receive the cash surrender value;
7) exercise an election;
8) change the manner of paying premiums;
9) change or convert the type of insurance contract or annuity with respect to which the principal has or claims to have a power described in this section;
10) change the beneficiary of a contract of insurance or annuity, except that the attorney in fact or agent may be designated a beneficiary only to the extent authorized by Subdivision (4) of this section;
11) apply for and procure government aid to guarantee or pay premiums of a contract of insurance on the life of the principal;
12) collect, sell, assign, hypothecate, borrow on, or pledge the interest of the principal in a contract of insurance or annuity; and
13) pay from proceeds or otherwise, compromise or contest, or apply for refunds in connection with a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing because of the tax or assessment.

I. Construction of Powers: Estate, Trust, and Other Beneficiary Transactions.

Texas Probate Code § 499. In a statutory durable power of attorney, the language conferring authority with respect to estate, trust, and other beneficiary transactions empowers the attorney in fact or 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, action, or otherwise money or any other thing of value to which the principal is, may become, or claims to be entitled because of the fund;
3) initiate, participate in, or oppose a legal or judicial proceeding 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, or oppose a legal or judicial proceeding to remove, substitute, or surcharge a fiduciary;
5) conserve, invest, disburse, or use anything received for an authorized purpose; and
6) transfer all or part of 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.


Texas Probate Code § 500. In a statutory durable power of attorney, the language conferring general authority with respect to claims and litigation empowers the attorney in fact or agent to:
1) assert and prosecute before a court or administrative agency a claim, a claim for relief, a counterclaim, or an offset or defend against an individual, a legal entity, or a government, including suits to recover property or other thing of value, to recover damages sustained by the principal, to eliminate or modify tax liability, or to seek an injunction, specific performance, or other relief;
2) bring an action to determine adverse claims, intervene in an action or litigation, and act as amicus curiae;
3) in connection with an action or litigation, procure an attachment, garnishment, libel, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree;
4) in connection with an action or litigation, perform any lawful act the principal could perform, including acceptance of tender, offer of judgment, admission of facts, submission of a controversy on an agreed statement of facts, consent to examination before trial, and binding of the principal in litigation;
5) submit to arbitration, settle, and propose or accept a compromise with respect to a claim or litigation;
6) waive the issuance and service of process on the principal, accept service of process, appear for the principal, designate persons on whom process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, or receive and execute and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;
7) act for the principal with respect to bankruptcy or insolvency proceedings, whether voluntary or involuntary, concerning the principal or some other person, with respect to a reorganization proceeding or a receivership or application for the appointment of a receiver or trustee that affects an interest of the
principal in real or personal property or other thing of value; and
8) pay a judgment against the principal or a settlement made in connection with a claim or litigation and receive and conserve money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

Texas Probate Code § 501. In a statutory durable power of attorney, the language conferring authority with respect to personal and family maintenance empowers the attorney in fact or agent to:
1) perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse and children, and other individuals customarily or legally entitled to be supported by the principal, including providing living quarters by purchase, lease, or other contract, or paying the operating costs, including interest, amortization payments, repairs, and taxes on premises owned by the principal and occupied by those individuals;
2) provide for the individuals described by Subdivision (1) of this section normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, and other current living costs;
3) pay necessary medical, dental, and surgical care, hospitalization, and custodial care for the individuals described by Subdivision (1) of this section;
4) continue any provision made by the principal, for the individuals described by Subdivision (1) of this section, for automobiles or other means of transportation, including registering, licensing, insuring, and replacing the automobiles or other means of transportation;
5) maintain or open charge accounts for the convenience of the individuals described by Subdivision (1) of this section and open new accounts the attorney in fact or 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.

L. Construction of Power: Benefits From Certain Governmental Programs or Civil or Military Service.
Texas Probate Code § 502. In a statutory durable power of attorney, the language conferring authority with respect to benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service empowers the attorney in fact or agent to:
1) execute vouchers in the name of the principal for allowances and reimbursements payable by the United States, a foreign government, or a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described by Section 501(1) of this code, and for shipment of their household effects;
2) take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;
3) prepare, file, and prosecute a claim of the principal to a benefit or assistance, financial or otherwise, to which the principal claims to be entitled under a statute or governmental regulation;
4) prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any benefits the principal may be entitled to receive; and
5) receive the financial proceeds of a claim of the type described in this section and conserve, invest, disburse, or use anything received for a lawful purpose.

M. Construction of Power: Retirement Plan Transactions.
Texas Probate Code § 503. In a statutory durable power of attorney, the language conferring authority with respect to retirement plan transactions empowers the attorney in fact or agent to do any lawful act the principal may do with respect to a transaction relating to a retirement plan, including to:
1) apply for service or disability retirement benefits;
2) select payment options under any retirement plan in which the principal participates, including plans for self-employed individuals;
3) designate or change the designation of a beneficiary or benefits payable by a retirement plan, except that an attorney in fact or agent may be named a beneficiary only to the extent the attorney in fact or agent was a named beneficiary under the retirement plan before the durable power of attorney was executed;

4) make voluntary contributions to retirement plans if authorized by the plan;

5) exercise the investment powers available under any self-directed retirement plan;

6) make “rollovers” of plan benefits into other retirement plans;

7) borrow from, sell assets to, and purchase assets from retirement plans if authorized by the plan;

8) waive the right of the principal to be a beneficiary of a joint or survivor annuity if the principal is a spouse who is not employed;

9) receive, endorse, and cash payments from a retirement plan;

10) waive the right of the principal to receive all or a portion of benefits payable by a retirement plan; and

11) request and receive information relating to the principal from retirement plan records.

“Retirement plan” means:

1) an employee pension benefit plan as defined by Section 1002, Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. Section 1002), without regard to the provisions of Section (2)(B) of that section;

2) a plan that does not meet the definition of an employee benefit plan under ERISA because the plan does not cover common law employees;

3) a plan that is similar to an employee benefit plan under ERISA, regardless of whether it is covered by Title I of ERISA, including a plan that provides death benefits to the beneficiary of employees; and

4) an individual retirement account or annuity or a self-employed pension plan or similar plan or account.


Texas Probate Code § 504. In a statutory durable power of attorney, the language conferring authority with respect to tax matters empowers the attorney in fact or agent to:

1) prepare, sign, and file federal, state, local, and foreign income, gift, payroll, Federal Insurance Contributions Act, and other tax returns, claims for refunds, requests for extension of time, petitions for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under Section 2032A, Internal Revenue Code of 1986 (26 U.S.C. Section 2032A), closing agreements, and any power of attorney form required by the Internal Revenue Service or other taxing authority with respect to a tax year on which the statute of limitations has not run and 25 tax years following that tax year;

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.

O. Construction of Power: Existing Interest; Foreign Interests.

Texas Probate Code § 505. The powers described in Sections 492 through 504 of the Probate Code may be exercised equally with respect to an interest the principal has at the time the durable 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 durable power of attorney is executed in this state.

P. Construction of Power: Uniformity of Application and Construction.

Texas Probate Code § 506. This chapter shall be applied and construed to effect its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

VI. RECOMMENDATIONS TO PREVENT ABUSE/LIABILITY

A. Creation and Execution Strategies.

The following strategies are recommended to aid the practitioner in education of the principal and the agent in order to lessen the likelihood of abuse and its subsequent liability:

1) Professor Stanley M. Johanson recommends that client’s be given xerographic copies of the statutory construction of powers in Chapter XII of the Texas Probate Code at the initial
conference when the choice of an agent first is discussed. This recommendation if acted upon will serve to impress upon the client the magnitude and scope of the power.

2) Professor Johanson further recommends that a disclosure statement along the lines of the disclosure statement used in the Medical Power of Attorney (Tex. Health & Safety Code § 166.151) be signed by the client at time of execution of the Durable Power of Attorney. A suggested Disclosure Statement is presented in Appendix B. This statement will advise the client of a number of issues that need to be addressed, thereby putting the Principal again on notice regarding the gravity of the power and the inherent danger.

3) Glenn Karisch, partner in Barnes & Karisch, P.C., who created and oversees the outstanding website “texasprobate.com” makes a form available on his website. The form is to be given to clients for their signatures prior to the execution of the power of attorney, to clarify the responsibilities and duties of the agent as well as the importance to the principal that a trustworthy agent be chosen.

4) Timothy L. Takacs, CELA, Hendersonville, Tennessee, has drafted an Agency Agreement, included here as Appendix D, for the principal to give to potential agents for their agreement prior to their appointment as agent.

B. Legislative Strategies.
The following legislative strategies are offered as possibilities for addressing the problem:

1) Require uninterested witnesses and/or notarization when DPOAs are executed.
2) Require notaries to know the requisites for contractual capacity so that some uniform standard for determination of capacity could be required prior to a principal’s signing the document.
3) Require simple warning language on any commercially-available DPOA form.
4) Require that the elder executing the commercially-available form specifically agree to each grant of power instead of crossing out only the powers he/she doesn’t want to grant.
5) Require that each DPOA be filed in a public office.
6) Clearly specify how DPOAs can be revoked on the face of the document

7) Permit interested parties to petition a court to terminate a DPOA when abuse is suspected
8) Require notification of the elder whenever a transaction over a specified amount is completed or contemplated.
9) Create a public registry of those convicted of DPOA abuse.
10) Provide enhanced sentences for those convicted of criminally abusing DPOAs.
11) Require language on the face of the document defining “fiduciary liability.
12) Require a provision to be included in the document for mandatory accountings to be provided to designated interested parties.

C. Summary.
Abuse of Durable Powers of Attorney is widespread. Discussion must be begun between attorneys and other responsible parties to address the problem. The Durable Power of Attorney is an excellent tool to help incapacitated individuals with their financial affairs without the need for court ordered guardianships. However, the risks are great that the documents will be used as a tool for financial abuse. We must begin to review and brainstorm various safeguards that can be utilized to protect the use of these documents, thereby protecting our clients and ultimately ourselves.

VII. BIBLIOGRAPHY.

A. American Bar Association Commission on Legal Problems of the Elderly, Elder Abuse in the State Courts: Three Curricula for Judges and Court Staff (1997).
H. National Center on Elder Abuse, which is supported, in part, by a grant, No. 90-AP-2144, from the Administration on Aging, Department of Health and Human Services.


VIII. APPENDIX A

STATUTORY DURABLE POWER OF ATTORNEY FORM

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, __________ (insert your name and address), appoint __________ (insert the name and address of the person appointed) as my agent (attorney-in-fact) to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out below.

TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD.

Real property transactions;
Tangible personal property transactions;
Stock and bond transactions;
Commodity and option transactions;
Banking and other financial institution transactions;
Business operating transactions;
Insurance and annuity transactions;
Estate, trust, and other beneficiary transactions;
Claims and litigation;
Personal and family maintenance;
Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;
Retirement plan transactions;
Tax matters.

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY AND MY AGENT (ATTORNEY IN FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT.

SPECIAL INSTRUCTIONS:
Special instructions applicable to gifts (initial in front of the following sentence to have it apply):
I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

__________
__________
__________
__________
__________
__________
__________
__________
__________
__________
UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.
(B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.
IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor(s) to that agent: __________.

Signed this ______ day of __________, 20___
______________________________
(your signature)

State of Texas_____________________
County of _______________________
This document was acknowledged before me on ______________________(date) by ___________________________
(name of principal)
______________________________
(printed name)
My commission expires:_________

THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.
IX. APPENDIX B

DISCLOSURE STATEMENT*

INFORMATION CONCERNING THE STATUTORY DURABLE POWER OF ATTORNEY FOR _______________________

THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. Except for the powers you have crossed out, you are authorizing the person named as your agent (attorney-in-fact) full legal power and authority to act on your behalf, without any court approval or supervision, by taking any and all actions relating to the indicated transactions. **YOU SHOULD NOT APPOINT A PERSON AS YOUR AGENT UNLESS YOU HAVE COMPLETE AND TOTAL TRUST AND CONFIDENCE IN THE PERSON.** If, for example, you give your agent the power to handle real property transactions on your behalf, your agent will be able to bind you on all of the actions set out in § 492 of the Texas Probate Code. A copy of the relevant Texas Probate Code provisions, containing all of the powers that you would incorporate by reference into your power of appointment, is attached hereto. In deciding whether you want your agent to have a particular power, **YOU SHOULD READ THE CORRESPONDING STATUTORY PROVISION.** If you have any questions about this document, or about any of the statutory powers, you should address these questions to a member of the ________ firm, or to some other attorney of your choice. **YOU MAY REVOKE THIS POWER OF ATTORNEY AT ANY TIME IF YOU WISH TO DO SO.**

You may wish to designate an alternate agent in the event that your agent is unwilling, unable, or ineligible to act as your agent. Any alternate agent you designate will have the same authority to make property decisions for you. Even after you have signed this document, you have the right to make property decisions for yourself as long as you are able to do so.

This document does not authorize anyone to make medical or health care decisions for you. Such decisions can be made pursuant to a Medical Power of Attorney, if you have executed one.

Sign below to acknowledge your receipt of this disclosure statement prior to your execution of the Statutory Durable Power of Attorney, to affirm that **YOU HAVE BEEN GIVEN THE OPPORTUNITY (1) TO READ THIS STATEMENT AND THE ATTACHED STATUTORY POWERS and (2) TO ASK ABOUT THE SCOPE OF ANY POWERS THAT YOU DO NOT FULLY UNDERSTAND.**

___________________________________
Client’s Signature

___________________________________
Date

* as recommended by Professor Stanley M. Johanson
MEMORANDUM *

To: [Name of Principal]
From: [Firm Name]
Date: ____ day of September, 1997
Re: Important Information Regarding Your Statutory Durable Power of Attorney

The Texas Durable Power of Attorney Act, Tex. Prob. Code Ann. §§ 481-506 (the "Act"), permits you to give someone you trust (called your "agent" or "attorney-in-fact") broad, sweeping power to deal with your assets. The Act permits the use of a statutory form, called a "Statutory Durable Power of Attorney." The statutory form gives the agent very broad powers, but it permits you to omit one or more broad powers by crossing out those powers if you do not wish to give your agent the authority to act in these areas. Most of our clients are able to name an agent who they believe is completely trustworthy. In most cases where the agent is trustworthy, we recommend giving all of the standard powers included in the form -- in other words, we recommend that none of the listed powers be crossed out. If you are concerned about giving your agent such broad power, or if you have questions about what specific powers are included, please let us know, and we will be happy to discuss the Act with you.

The statutory form permits you to give your agent limited gift-giving powers by placing your initials by the appropriate sentence on the form. This gift-giving provision in the statutory form only applies if it is initialed. The gift-giving provision in the statutory form limits gifts to any one person in any calendar year to $10,000.

It has been our experience that most of our clients are willing to give the agent broader gift-giving powers than the statutory form's standard provision. Therefore, we have modified the statutory form to give you a choice as to gift giving powers. By initialing the appropriate box, you can:

- Give your agent no gift-giving powers (which may frustrate planning if you become disabled but which protects you from unwise gifts by your agent);
- Give your agent the gift-giving powers provided for in the statutory form (the power to make gifts up to $10,000 per calendar year per donee); or
- Give your agent the power to make larger gifts, including gifts to charity (which power gives your agent more flexibility if you become disabled but which may leave you vulnerable to excessive gifts by your agent and may cause your agent tax problems if he is within the group of persons to whom gifts are permitted).

*Memorandum and Statutory Power of Attorney as drafted by Glenn Karisch Esq. and available on his website “texasprobate.com.”

You should choose which of these three alternatives you wish to select and initial only one box on the form.

If you have questions about this matter or wish to further expand or limit gift-giving powers, please let us know and we will be happy to discuss it with you.
We also recommend that you give your agent the power to create a trust and/or make transfers to a trust. While this power is not included in the statutory form, it can be quite helpful if you are faced with a long-term disability. If you do not wish for one or more of these additional powers to be included, you must cross through it and initial it when you sign the power of attorney.

Of course, in any given case there may be good reasons to include or exclude one or more standard powers or additional powers. For example, as discussed above, you may trust your agent and wish to give him or her broad authority, but you may not wish to give the agent gift-giving powers. The gift-giving power gives your agent the authority to make gifts to himself or herself (if your agent is a beneficiary under your will or one of your heirs under Texas law). This gift-giving authority may help your family save taxes, but you may be uncomfortable giving your agent this much power. If you have any questions about these powers, please consult us.

The Act permits you to make the power immediately effective (in other words, effective the day you sign it, even if you are not incapacitated or disabled) or effective only upon your disability or incapacity. You make this choice by crossing out the alternative you do not wish to include. If you cross out neither alternative, the Act provides that the power is immediately effective. If you wish to make the power effective only upon your disability or incapacity (called a "springing power"), please consider the following:

- Your agent may have difficulty getting springing powers accepted by third parties, such as banks. These third parties are reluctant to rely on the springing power only to have a court determine later that the principal was not in fact incapacitated when the power was used.

- To help gain greater acceptance of springing powers in Texas, the Act provides that a third party, such as a bank, acting in good faith may rely on an affidavit of the agent that the principal is disabled or incapacitated. This means that the agent needs to provide no further proof of disability or incapacity than his or her own sworn statement. This may make it easier to get a springing power accepted, but it also may undermine the reason to use a springing power in the first place.

We have added a provision to the statutory form revoking all previous powers of attorney executed under the Act or its predecessor. (The provision makes clear that you are not revoking other agency-type arrangements, such as health care powers of attorney, directives to physicians, multi-party account agreements, etc.) If you have previously executed a power of attorney which has special revocation requirements (such as requiring the instrument revoking the power to be filed in the public records), please let us know. Otherwise, we will assume that the provision we added is effective to revoke any old powers of attorney you may have executed.

The standard statutory form provides that the power of attorney can be revoked only by actual notice to third parties, making it very difficult to revoke if your agent has moved any of your assets without disclosing such to you. You may provide that the power of attorney may be revoked by recording a revocation in the records of the county clerk where you live, but this may make the power of attorney more difficult for your agent to use. We have modified the form so that you may choose if you want the power to be revoked by actual notice to third parties or by recording in the public records.
XI. STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, [Name of Principal], [Street], [City, State, Zip], appoint the following as my agent (attorney-in-fact) to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out below:

[Name]
[Street]
[City, State, Zip]

TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD:

Real property transactions;
Tangible personal property transactions;
Stock and bond transactions;
Commodity and option transactions;
Banking and other financial institution transactions;
Business operating transactions;
Insurance and annuity transactions;
Estate, trust, and other beneficiary transactions;
Claims and litigation;
Personal and family maintenance;
Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;
Retirement plan transactions;
Tax matters.

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY AND MY AGENT (ATTORNEY IN FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT.
SPECIAL INSTRUCTIONS:

Special instructions applicable to gifts (initial in front of the appropriate sentence to have it apply):

Initi  Choose One of the Following By Initialing Your Choice:

al:

___  No Gift-Giving Power. My agent (attorney in fact) shall not have the power to make gifts.

___  Gift-Giving Power Limited to Gift Tax Exclusion. I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

___  Broad Gift-Giving Power. My agent (attorney in fact) shall have the power and authority to make gifts out of that portion of my estate that my agent determines is not required for my support during my lifetime to any one or more of the following persons or organizations without the necessity of any court approval or judicial action of any kind if my agent deems the gifts to be in the best interests of my family, for tax savings purposes or otherwise: (i) organizations to which charitable contributions may be made under the Internal Revenue Code and in which my agent reasonably believes that I have an interest; (ii) my spouse, any of my descendants, or any other person related to me by blood or marriage; (iii) any devisee or beneficiary under what my agent reasonably believes is my latest validly executed will or trust named in such will; and (iv) my agent, if my agent is eligible under either category (ii) or (iii) above. In exercising this power and authority, I remind my agent that he or she is acting in a fiduciary capacity.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT:

My agent shall have the power and authority to create a trust for my benefit, naming my agent as trustee or, if my agent so chooses, naming a bank or trust company with assets under management of $100 million or more as trustee, which trust may also benefit my spouse and descendants, and to transfer all or any part of my property or estate to the trust so created or to any existing trust of which I am a settlor, a beneficiary, or both, even though my agent may be the trustee.

Although this instrument contains modifications of the statutory durable power of attorney form found in Tex. Prob. Code Ann. § 490, I intend for it to be a "statutory durable power of attorney" as provided in that section and to be construed as such.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:
Initial: Cross Out the Alternative Not Chosen and Initial:

___ (A) This power of attorney is not affected by my subsequent disability or incapacity.

___ (B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

REVOCATION OF PREVIOUS POWERS OF ATTORNEY:

I hereby revoke all previous powers of attorney previously executed by me to be effective under the Texas Durable Power of Attorney Act, Tex. Prob. Code Ann. §§ 481-506, or its predecessor, Tex. Prob. Code Ann. § 36A. However, I do not revoke other agency-type arrangements not governed by either of such statutes, including but not limited to durable powers of attorney for health care, directives to physicians, multi-party account agreements at financial institutions.

REVOCATION OF THIS POWER OF ATTORNEY:

Initial: Choose One of the Following By Initialing Your Choice:

___ I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

___ I agree that any third party who receives a copy of this document may act under it. This power of attorney may be revoked only by an instrument signed by me and recorded in the real property records of Travis County, Texas.
SUCCESSOR AGENTS:

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor(s) to that agent:

**FIRST ALTERNATE OR SUCCESSOR AGENT:**

[Name]
[Street]
[City, State, Zip]

**SECOND ALTERNATE OR SUCCESSOR AGENT:**

[Name]
[Street]
[City, State, Zip]

Signed this ____ day of September, 1997.

_____

[Name of Principal]

STATE OF TEXAS
COUNTY OF _____________

This document was acknowledged before me on the ____ day of September, 1997, by [Name of Principal].

Notary Public, State of Texas

THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.
XII. APPENDIX D
Agency Agreement* for Durable Power of Attorney

This AGREEMENT is made by and between John Doe (hereafter "Principal") and Mary Doe, Attorney-in-Fact (hereafter "Agent").

1. Purpose. At the same time as the Principal and Agent are executing this Agreement, the Principal is executing a Durable Power of Attorney designating Agent as the attorney-in-fact under that instrument. Principal desires to grant to the Agent authority to act for the Principal so third parties may rely on the Agent’s legal authority to do so. The purpose of this Agreement is to define and explain the rights and obligations between Principal and Agent.

2. Appointment. Principal has appointed Agent as Agent under a Durable Power of Attorney dated __________. Agent accepts the appointment and agrees to exercise the authority granted to Agent under the Durable Power of Attorney for the benefit of Principal and in accordance with the authority granted in the instrument.

3. Term of Agreement. This Agreement is effective upon the date of the execution by the parties and shall remain in full force and effect until terminated or revoked as provided herein.

4. Compensation. Principal agrees to compensate Agent for all actions performed under the authority of the Durable Power of Attorney. The parties agree that the minimal weekly/monthly value of Agent’s services, at the date of signing this contract is $______ (the fee). The parties contemplate that the fee shall increase as does the market rate for similar services. Therefore, Agent may adjust the fee from time to time as necessary. In making any adjustment Agent may consider projected costs, prior year per capita costs, economic indicators, and change in the nature of the services rendered. Principal authorize Agent to deduct from Principal’s estate on a periodic basis the funds necessary to pay the fee.

5. Costs and Expenses. Principal shall reimburse Agent for all out-of-pocket expenses that Agent may incur in service to Principal. Such expenses may include but not be limited to motor vehicle mileage, utilities, groceries, toiletries, personal care items, and maintenance and repairs.

6. Joint Accounts. Except for accounts that are currently held jointly between Principal and Agent, Agent agrees not to establish any joint accounts consisting of all or part of Principal’s funds or property, whether in a banking institution, savings and loan, brokerage, or otherwise. All such accounts shall be held solely in the name of Principal.

7. Investments. Agent may make and change such investments from time to time according to his or her discretion and may continue to hold, manage, invest, and lend any stocks, securities or other property received by him or her hereunder, without any duty of diversification and without being subject to the "prudent person rule" as set forth in Texas Trust Code. In making investments or reinvestments, Agent shall be obligated only to use good faith and to exercise his or her honest judgment as to what investments are, from time to time, in Principal’s best interests. In making decisions as to how assets should be invested or managed, Principal specifically allows Agent to consider the interests of the ultimate beneficiaries of Principal’s estate. Principal agrees that unless otherwise stated, these beneficiaries consist of the Principal’s spouse and lineal descendants. Unless inconsistent with other provisions of this Agreement, Principal authorizes Agent to hold any portion of Principal’s estate in cash and uninvested, non-income producing assets whenever Agent deems such holding to be to the advantage of Principal, Principal’s estate, or the ultimate beneficiaries of Principal’s estate.
8. Record Keeping. Agent shall keep and retain a summary record of services rendered. It is understood and agreed, however, that Principal does not wish to pay the cost of detailed record keeping by Agent. Agent will keep an account of all payments made by Principal or received from Principal, whether through Principal, Agent, or a third party making payment designated as payments for services rendered under this Agreement.

9. Principal may request an account, at any time, of Agent. Where an account is required by this Agreement or requested by or on behalf of Principal, Agent shall be compensated for preparation of the account and any report or statement.

10. Accounting to Others. Within 30 days of written request by Principal, Principal’s attorney or accountant, an ultimate beneficiary of Principal’s estate as defined above, other Agent whether a co-or successor Agent, or any other person authorized by the Principal to make such request, Agent shall furnish to such person an inventory of the Principal’s property held or managed by the Agent and an accounting of Principal’s receipts and disbursements on behalf of the Principal. Before making this accounting, Agent may require Principal or a person authorized on Principal’s behalf to furnish written authorization of Agent’s right to release this information to the person making the request.

11. Agent may elect to furnish an annual accounting to Principal or a person authorized by Principal. Such person shall have 90 days from the date the annual accounting is sent to submit in writing to Agent objections to the accounting. If the person fails to object to any annual accounting within this time period, the annual accounting shall be deemed to be conclusive as to all persons to whom the annual accounting is furnished. The Agent shall include with the annual accounting a separate written notice stating the person’s obligation to object within this time period and the consequences of failure to do so. In any hearing on any objections, the Agent shall have the burden of persuasion of the correctness of the accountings or the reasonableness of any fees and costs to which a specific objection has been directed.

12. Bond. Principal agrees that Agent may serve without bond. If Principal requires bond, Principal agrees that the bond shall be paid by Principal or out of Principal’s estate.

13. Estate Planning. Principal has identified to Agent the individuals who are the ultimate beneficiaries of Principal’s estate. To the extent authorized by the Durable Power of Attorney and without compromising Principal’s quality of life and quality of care, Principal agrees that Agent may engage in Medicaid eligibility planning, asset protection planning, and other forms of estate planning to the end that Principal’s estate might be preserved for their benefit.

14. Gifting. Agent’s authority to make gifts of Principal’s estate, where authorized in the Durable Power of Attorney, shall be strictly construed.

15. Disclosures. Principal waives the privilege of confidentiality between Principal and Principal’s attorney and accountant in favor of Agent. Principal’s attorney and accountant are authorized to discuss with Agent any matters that Agent deems reasonable and necessary in the exercise of the powers granted under the Durable Power of Attorney.

16. Termination. This Agreement may be terminated or revoked by either party upon notice, oral or written, to the other, without cause. If Principal revokes the Durable Power of Attorney, this Agreement is automatically terminated. If Agent terminates this Agreement, Agent’s authority to act under the Durable Power of Attorney shall be automatically revoked. If Principal terminates this Agreement, Agent’s authority to act under the Durable Power of Attorney shall be automatically revoked.
Agreement, the Agent’s authority to act under the Durable Power of Attorney shall not be automatically revoked unless specifically stated by Principal.

18. Upon revocation of Agent’s authority under the Durable Power of Attorney, Agent shall submit an accounting to the Principal or other interested person as defined above (unless waived in writing by Principal) and shall return to Principal all property belonging to Principal.

19. Applicable Law. This agreement shall be governed by the laws of the State of Texas.

Executed by the undersigned on ____________, 2000.

Principal

Attorney-in-Fact