

POWERS OF ATTORNEY

*Volunteer Lawyers Program
Alabama State Bar*

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1994-2004

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1994

PREFACE

The power of attorney is an extremely flexible planning tool that allows an individual (the principal) to authorize another (the agent or Attorney-in-Fact) to deal with his or her property. Although the power of attorney is most often thought of in terms of a planning tool for the elderly or disabled, it should not be limited to this segment of society, but should also be considered by those who are young and in good health in planning for the possibility of incapacity or unavailability. Because of the possibility of incapacity, it is recommended that all powers of a attorney be made durable pursuant to Ala. Code §26-1-2 (1992).

Although many attorneys may consider a power of attorney a “form” document that can be simply printed from their computer, the drafting attorney needs to discuss the various uses of the power of attorney with the client and determine what type of power of attorney is appropriate for the client’s situation. An important part of this will be helping the client to decide who should be named as Attorney-in-Fact and determining if more than one Attorney-in-Fact should be appointed. In addition, the drafting attorney should explain to the client (and impress upon the Attorney-in-Fact) that (i) an Attorney-in-Fact is a fiduciary and has a duty to act in the best interests of the client/principal, (ii) by executing the power of attorney the Principal’s property does not become the property of the Attorney-in-Fact, and (iii) in order to avoid personal liability, the Attorney-in-Fact must indicate that he is taking action and executing or endorsing documents as an agent for the client/principal.

This article is intended as a checklist of issues that the practitioner should consider in preparing a power of attorney. It is not intended to be an exhaustive analysis of all issues related to powers of attorney under Alabama law. The practitioner should use the forms at the end of this article as a guide and should adapt the forms to meet the client’s particular situation. An excellent discussion of Alabama law regarding powers of attorneys and additional forms are found in Chapter 324 of the Southeast Transaction Guide.

Andrew J. Potts, Esq., Editor

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I. DEFINITION

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A power of attorney is a written delegation of authority by one person, the principal, to another person, the “Attorney-in-Fact” or agent. The power of attorney confers upon the Attorney-In-Fact the authority to act on behalf of the principal within the scope of the authority granted in the power of attorney.

II. BENEFITS OF A POWER OF ATTORNEY

A power of attorney has many advantages. It is an inexpensive, flexible planning tool and is easier to implement in comparison to the other options which afford similar powers over the principal’s property—conservatorships and trusts.¹ It is important to remember that a power of attorney may not preclude the need for the appointment of a guardian or conservator.² However, the principal may nominate an individual to serve as guardian or conservator in the power of attorney and the Probate Court must appoint that nominee except for good cause or disqualification.³

III. WHO IS THE CLIENT?

The drafting attorney must remember that the principal is the client, and it is the principal’s interest that must be protected. While a third party may approach you to create a power of attorney, this person is not the client.

IV. CAPACITY

The Principal must have the capacity to create a valid power of attorney and the drafting attorney must determine whether the principal possesses the ability to understand the “nature and significance of the act of execution”⁴of the power of attorney. If there is any question about the principal’s capacity, the drafting attorney should obtain medical documentation that the principal is competent.

In some cases, the principal may have a physical disability that prevents the principal from signing the power of attorney. In this situation, the instrument should indicate that someone is signing the power of attorney at the principal’s direction and the notary acknowledgment should reflect this.

¹ Barbara J. Scheiner & Sanford J. Schlesinger, *Estate and Financial Planning for the Aging or Incapacitated Client*, Practising Law Institute (1992) [hereinafter *Financial Planning*].

² Ala. Code §26-1-2(c)(1) (1992).

³ Ala. Code §26-1-2(c)(2) (1992).

⁴ *Financial Planning*, supra note 1.

The agent must also have capacity to become the Attorney-in-Fact and the agent must be mentally capable of carrying out the delegated duties described in the power of attorney.⁵ Both the principal and the agent must be nineteen (19)⁶ or the disabilities of minority should have been removed.

V. CHOICE OF ATTORNEY(S)-IN-FACT

One of the most important decisions facing the principal is who will serve as Attorney-in-Fact and whether it may be appropriate to appoint more than one Attorney-in-Fact. The Attorney-in-Fact must be responsible for and capable of carrying out the principal's business; although relatives are often considered, they may not always be the appropriate choice to act as agent.

If the principal decides that one Attorney-in-Fact should be appointed, at least one successor Attorney-in-Fact should be named in the event the original Attorney-in-Fact becomes unable to carry out his or her duties. If the principal appoints two or more agents concurrently, the power of attorney should clearly indicate whether the agents must act jointly or whether any one of them may act alone.

Another consideration in choosing the Attorney-in-Fact is the physical proximity of the agent to the subject matter of the power of attorney. It may be quite difficult for the Attorney-in-Fact to deal with problems over great distances.

VI. AGENT'S DUTY TO PRINCIPAL

As an agent, the Attorney-in-Fact must act in the principal's best interest in dealing with the principal's property. The following pronouncement from the Supreme Court of Alabama in *Seigny v. New South Federal Savings and Loan Association* sets forth the agent's obligations to the principal:

When one accepts the agency, she implicitly covenants to use the powers conferred upon her for the sole benefit of the party conferring such power, consistent with the purposes of the agency relationship....Therefore, when one accepts the power of attorney, she impliedly covenants to use the powers bestowed upon her for the sole benefit of the one conferring that power on her, consistent with the purposes of the agency relationship represented by the power of attorney.⁷

⁵ 17 Southeast Transaction Guide Ch. 324, at 324.03[3] (1992).

⁶ Ala. Code §26-1-1(a) (1992).

⁷ *Seigny v. New South Federal Savings and Loan Association*, 586 So.2d 884, 886 (Ala. 1991).

VII. SCOPE OF AUTHORITY

An Attorney-in-Fact only has authority over the principal's property and is not the guardian of the principal (except to the extent that there may be a delegation of the right to make health care decisions). The parameters of the agent's powers are set out in the power of attorney, and the agent's authority will be limited by the terms of the instrument, the common law of agency and state law.⁸ In *Sevigny v. New South Federal Savings and Loan Association*, the Alabama Supreme Court addressed the scope of authority granted under a power of attorney:

Powers of attorney will be strictly construed, restricting the powers to those expressly granted and those incidental powers that are necessary to effectuate the expressed powers....The principal-agency relationship is fiduciary in nature and imposes upon the agent a duty of loyalty, good faith, and fair dealing....An agent is not permitted to occupy a position that would allow her to profit as a result of that agency relationship. (Citations omitted.)⁹

A power of attorney may grant broad sweeping powers to the agent, or the power of attorney may only allow the Attorney-in-Fact to undertake specific limited action on behalf of the principal. Because of the broad range of power that may be delegated, the drafting attorney needs to define the scope of the agent's authority in light of the client's needs. Examples of broad powers are set forth in Form A.

If the principal wishes to limit the power of attorney to specific powers, the instrument should indicate that the Attorney-in-Fact is being appointed "for the following limited purposes" and the specific limited powers should be enumerated. If the power of attorney is being given for a specific purpose (i.e., refinancing a home) the drafting attorney may want the party who will be dealing with the agent to review the instrument to ensure that it will accomplish the principal's goals.

In Alabama, an Attorney-in-Fact may only sell real property if that power is included in the instrument.¹⁰ In order to comply with the witness requirements for the conveyance of real property and to place the power of attorney in recordable form, the power of attorney should be acknowledged by a notary. As a general rule, all powers-of-attorney should be notarized.

An Attorney-in-Fact may make gifts of the principal's property even though the instrument is silent on this point. Section 26-1-2.1 of the Code of Alabama allows an Attorney-in-Fact to make gifts (subject to certain dollar limitations) *if* (i) the power of attorney gives the

⁸ Wertheimer, *Property Management Considerations for the Elderly*, Continuing Legal Education, Cumberland School of Law, September 25, 1992 *Elder Law: What Every Practitioner Must Know* (1992).

⁹ *Sevigny*, 586 So.2d at 886, 887.

¹⁰ *Dillard v. Gill*, 166 So 431, 433 (Ala. 1936). See Ala. Code §35-4-28 (1991).

agent broad powers, (ii) the Attorney-in-Fact determines that it is in the principal's best interest (or the best interest of the principal's estate or will reduce estate taxes) *and* (iii) the principal has a history of making such gifts.¹¹ If the principal wishes to specifically authorize the attorney-in-fact to make gifts, the drafting attorney must address the following issues: (i) what limit should be placed on the size of the gift? (to prevent problems related to the federal gift tax annual exclusion and to prevent the Attorney-in-Fact from having a general power of appointment); (ii) should the Attorney-in-Fact be authorized to make gifts to himself or herself?; (iii) if gifts are made, should such gifts be equalized among all members of a class? (i.e., children and grandchildren).

VIII. TYPES OF POWERS OF ATTORNEY

A. POWER OF ATTORNEY—NONDURABLE

A nondurable power of attorney terminates upon the incapacity, disability or incompetency of the principal and for this reason it is seldom used.

B. DURABLE POWER OF ATTORNEY—Ala. Code §26-1-2

The durable power of attorney is the most utilized form power of attorney. It gives the Attorney-in-Fact authority to act notwithstanding the subsequent incapacity, disability or incompetency of the principal.¹²

In order to qualify as a durable power of attorney, the instrument must be in writing and must include the following language: **“This power of attorney shall not be affected by disability, incompetency or incapacity of the principal.”**¹³

C. SPRINGING POWER OF ATTORNEY—Ala. Code §26-1-2

The springing power of attorney is a durable power of attorney that becomes effective upon the principal's incapacity. Like the durable power of attorney, the instrument must be in writing and must include the following language: **“This power of attorney shall become effective upon the disability, incompetency, or incapacity of the principal.”**¹⁴

The drafting attorney should include in the springing power of attorney a clear definition of disability or provide a mechanism for determining when the principal is

¹¹ Ala. Code §26-1-2.1 (1992).

¹² Ala. Code §26-1-2(a) (1992).

¹³ *Id.*

¹⁴ *Id.*

deemed to be incapacitated.¹⁵ Unless there is a clear mechanism to determine incapacity, a third party may be hesitant to accept the springing power of attorney.¹⁶

A simple mechanism for establishing incapacity is to provide in the power of attorney that the principal is deemed to be incapacitated if the Attorney-in-Fact has a statement from a licensed physician indicating that the principal requires assistance in handling his or her affairs. Another option is to require statements from at least two (2) licensed physicians. A further alternative is to provide that the principal is deemed to be incapacitated if the Attorney-in-Fact has a statement from a third party (such as the principal's parent, brother, sister or other trusted relative or associate) indicating that the principal requires assistance in handling his or her affairs. If this mechanism is used, a physician's statement should be used as a back-up in the event the name affiant dies, becomes incapacitated or is otherwise unavailable.

Whatever mechanism is chosen, at least two factors should be considered—cost and efficiency. It is simple enough to get a signed affidavit from a doctor or a third party, however, this may be costly and may result in time delays.¹⁷ In addition, even though the Attorney-in-Fact has such an affidavit, third parties may want evidence of the principal's continuing incapacity.

The drafting attorney should also inquire into the reasoning behind the principal's desire to create a springing power of attorney. It may be in the principal's best interest to create a durable power of attorney instead of a springing power of attorney. If the principal's only concern is the prospective agent's abilities, then joint Attorneys-in-Fact may allay the principal's concerns.

¹⁵ *Financial Planning*, supra note 1.

¹⁶ Cumberland School of Law, supra note 9, at 12.

¹⁷ Wiilemien E. Dingemans, *Durable Power of Attorney For Property*, Vt. B.J. & L. Dig. 36, February 18, 1992.

D. HEALTH CARE POWER OF ATTORNEY

An Attorney-in-Fact may make health care decisions for the principal if, in the opinion of the attending physician the principal cannot give directions to health care providers.¹⁸ Unless limited in the durable power of attorney, an Attorney-in-Fact make any health care decision that the principal could have made except decisions regarding (i) psychosurgery, (ii) sterilization, (iii) abortion (unless necessary to preserve the principal's life) or (iv) involuntary commitment.¹⁹ In addition, an Attorney-in-Fact may make decisions regarding the provision, withholding or withdrawal of "life-sustaining treatment" and artificial feeding or hydration if (i) the Attorney-in-Fact is specifically authorized to make these decisions in the durable power of attorney, (ii) the substantive provisions of the durable power of attorney are in substantial compliance with the Revised Alabama Natural Death Act²⁰ and the durable power of attorney is executed and accepted in substantial compliance with the revised Alabama Natural Death Act and (iii) the Attorney-in-Fact's authority is "implemented" in the manner permitted under the revised Alabama Natural Death Act. It is unclear under the new Act whether a durable power of attorney containing health care provisions must be executed with the formalities of the revised Alabama Natural Death Act (two witnesses, neither of whom are unrelated to principal or named as attorney-in-fact). The prudent course is to have two witnesses and include the declaration contained in the revised Alabama Natural Death Act.

An alternative to authorizing the Attorney-in-Fact to make health care decisions is to appoint a "health care proxy" in accordance with the revised Alabama Natural Death Act.²¹ However, it appears that a health care proxy can only make health care decisions if the principal has either a terminal illness or is in a state of permanent unconsciousness.²² If the principal does not want artificial measures to be taken to prolong the dying process, the principal should execute an Advance Directive for Health Care/Living Will in accordance with the revised Alabama Natural Death Act.

E. DELEGATION OF PARENTAL RESPONSIBILITIES Ala. Code §26-2A-7

The custodial parent(s) or guardian of a minor or otherwise incapacitated person may, through a power of attorney, delegate "any power regarding health, support, education or maintenance of the person or property of the minor child or ward except the power to consent to marriage or adoption of the minor ward."²³ This delegation may not

¹⁸Ala. Code §26-1-2(g) (1992).

¹⁹Ala. Code §26-1-2(g)(1) (1992).

²⁰Ala. Code §26-1-2(g)(2) (1992).

²¹Ala. Code §26-1-2(g)(2) (1992).

²²Ala. Code §22-8A-4(d) (1997).

²³ Ala. Code §26-2A-7(a) (1992).

exceed one (1) year, but there is no preclusion of the use of an automatic renewal of the delegation of such duties through a power of attorney.²⁴ The custodial parent or guardian should consider executing a power of attorney over their children if they will be away from the children and will be unavailable to make these decisions.

IX. DELEGATION OF AUTHORITY BY ATTORNEY-IN-FACT

It may be appropriate to allow the Attorney-in-Fact the right to delegate his or her powers. This would allow the Attorney-in-Fact to have another act on his or her behalf if necessary (i.e., if the Attorney-in-Fact were out of town).

X. EXECUTION OF DOCUMENTS BY THE ATTORNEY-IN-FACT

The drafting attorney should instruct the Attorney-in-Fact on how to execute documents so as to avoid personal liability. Liability may be avoided if the Attorney-in-Fact acts within the scope of the power of attorney and signs in his or her capacity as Attorney-in-Fact. The agent may want to sign as follows:

PRINCIPAL (Print Name)
by: AGENT (Signature), his/her Attorney-in-Fact

XI. REVOCATION/TERMINATION

Although an oral revocation is enough to undo an agency agreement, it is good practice to put the revocation in writing. The revocation of a durable power of attorney should be in writing, notarized, and a copy of the revocation should be sent to the Attorney-in-Fact with a return acknowledgment requested. In addition, copies should be sent to all third parties that the agent has dealt with.²⁵ If the power of attorney has been recorded, the revocation should also be recorded. It appears that any authority granted to a spouse as Attorney-in-Fact under a durable power of attorney terminates if (i) the marriage is dissolved or annulled or (ii) the parties are legally separated or divorce proceeding have begun.²⁶

A power of attorney also terminates upon the death of the principal or it may terminate in accordance with the terms of the instrument (i.e., on a certain date). However, it is important to note that even though a power of attorney has been revoked or terminated, if neither the Attorney-in-Fact nor the third party has knowledge of the revocation or termination of the power of attorney, the agent's actions may still be binding on the principal and his successors in interest.²⁷

²⁴ Ala. Code §26-2A-7 (1992) Comments.

²⁵ Hatfield, *supra* note 18.

²⁶ Ala. Code §26-1-2(g)(3) (1992).

²⁷ Ala. Code §26-1-2(d)(1) & (2) (1992).

XII. PERIODIC REVIEW

It is recommended that the principal periodically review the power of attorney with their attorney to make sure that the power of attorney continues to meet the principal's objectives and ensure that appropriate Attorneys-in-Fact are named.

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2. 2A C.J.S. Agency §§ 28, 29, 31 & 44.

XIV. APPENDIX

FORM A DURABLE POWER OF ATTORNEY - BROAD POWERS

DURABLE POWER OF ATTORNEY

1. KNOW ALL MEN BY THESE PRESENTS: That I, _____, residing at _____, Alabama hereby make, constitute and appoint _____ as my true and lawful attorney(s), **(if more than one attorney-in-fact is appointed, add “jointly,” “either of them” or “any one of them” to indicate how they must act)** to act in, manage and conduct all of my affairs and, for that purpose, in my name, place and stead, to do and execute all or any of the following acts, deeds and things:

(a) To have and gain entry and access to my safety deposit box or vault at any time; to remove any or all contents thereof; to sign any papers or documents relating thereto; to deposit any papers, documents or securities in such safety deposit box or vault and to do with respect to any of the contents of said safety deposit box or vault as my said attorney(s) may see fit;

(b) To sell, lease, exchange or dispose of any of my real estate and/or personal property to any person or persons, for any price, and upon such terms and conditions, for cash or on credit, as he/she may deem fit, and to execute any contracts, conveyances, or other instruments whatsoever, with full covenants of warranty;

(c) To demand, recover and receive, all and any sums of money, debts or effects, due, payable, coming or belonging to me;

(d) To borrow sums of money from time to time from any person, firm or corporation, including the borrowing of any sums from any insurance company, and to make and execute promissory notes, mortgages, pledges of insurance policies and any other transfers of security;

(e) To sign checks and otherwise withdraw funds from any bank accounts or other accounts, to endorse any checks, to deposit any checks or other sums in any bank account;

(f) To purchase any goods, merchandise, stocks, bonds or other personal property, on my account and for such prices and in such amounts as he/she may deem proper;

(g) To settle and adjust all accounts and demands now subsisting or which may hereafter subsist between me and any person or persons as he/she may deem proper;

(h) To pay and discharge all debts and demands due or payable or which may hereafter become due and payable by me unto any persons, firms or corporations;

(i) To redeem or cause to be redeemed any bonds, including United States Government Bonds, belonging to me;

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(j) To vote at the meetings of stockholders or other meetings of any corporation, to act as my attorney or proxy in respect of any stocks, shares or other instruments now or hereafter held by me therein, and for that purpose to execute any proxies or other instruments;

(k) To commence and prosecute any suit or action which he/she shall deem proper for the recovery, possession or enjoyment of any thing or matter which is or which may hereafter be due, payable or belonging to me; to defend any suit or action which may be brought against me or in which I may be interested as he/she shall deem proper;

(l) To sign, make, execute and file any Federal or State income tax returns, claims for refund and to defend me against any proposed additional taxes;

(m) To make health care decisions for me; provided, however, that this particular power shall exist only when I am unable, in the judgment of my attending physician, to make those health care decisions. My attorney(s)-in-fact shall have the power to make health care decisions on my behalf, including making decisions regarding my medical or domiciliary care, including admissions to hospitals or other institutions or placement in a nursing home, to consent to, to refuse to consent to, or to withdraw consent to the provision of any care, treatment, surgery, service or procedure to maintain, diagnose or treat a physical or mental condition, as well as the right to sign such medical forms as may be necessary to carry out such decisions, talk with health care personnel, examine my medical records and to consent to the disclosure of such records; **ADD SPECIFIC REFERENCE TO THE POWER TO MAKE DECISIONS REGARDING THE PROVISION, WITHHOLDING OR WITHDRAWAL OF "LIFE-SUSTAINING TREATMENT" AND ARTIFICIAL FEEDING OR HYDRATION, IF APPROPRIATE; IF THIS POWER IS ADDED, THE SUBSTANTIVE PROVISIONS OF THE REVISED ALABAMA NATURAL DEATH ACT MUST BE INCLUDED AND THE POWER OF ATTORNEY MUST BE EXECUTED AND ACCEPTED IN SUBSTANTIALLY THE SAME FORM AS THE REVISED ALABAMA NATURAL DEATH ACT; CONSIDER NOMINATING A HEALTH CARE PROXY IN ACCORDANCE WITH THE NEW ADVANCE DIRECTIVE FOR HEALTH CARE FORM SET FORTH IN THE REVISED ALABAMA NATURAL DEATH ACT.**

(n) To file claims for medical insurance and to obtain information from any insurance company with respect to any policy of health or medical insurance under which I am insured; to have access to my medical records and to obtain information of any type from any physician or other health care professional who may be treating me;

(o) To generally do and perform all matters and things, transact all business, make, execute and acknowledge all contracts, orders, deeds or other conveyances, mortgages, leases and to execute all other instruments of every kind which may be necessary or proper to effectuate all powers hereinabove specifically granted, or any other matter or thing appertaining or belonging to me, with the same full powers, and to all intents and purposes, with the same validity as I could, if personally present (giving and granting unto my said attorney(s), full power to substitute

one or more attorneys under him/her, and the same at his/her pleasure to revoke); and hereby ratifying and confirming whatsoever my said attorney(s) shall and may do, by virtue hereto.

2. The powers herein granted to my said Attorney(s)-in-Fact shall be exercisable by him/her/them at any time and from time to time.

3. This Power of Attorney shall remain in full force and effect and any party dealing with my said Attorney(s)-in-Fact at any time shall be fully protected and is hereby discharged, released and indemnified from so doing in respect of any matter relating hereto unless such particular party shall have received prior notice in writing of the revocation of this power.

4. THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY MY DISABILITY, INCOMPETENCY OR INCAPACITY AND MAY BE EXERCISED NOTWITHSTANDING ANY SUCH DISABILITY, INCOMPETENCY OR INCAPACITY AND NOTWITHSTANDING ANY UNCERTAINTY AS TO WHETHER I AM DEAD OR ALIVE.

5. If _____ shall die, resign, become incompetent or otherwise cease to serve as my Attorney(s)-in-Fact hereunder, then I make, constitute and appoint _____ as his/her successor, with all of the powers, duties and authorities originally granted to my Attorney(s)-in-Fact herein. **(Note: if more than one Attorney-in-Fact was originally appointed and the attorneys-in-fact were required to act jointly, indicate if the remaining Attorney-in-Fact may act alone or if another Attorney-in-Fact must be appointed).**

6. If at any time proceedings are commenced in any court to appoint a guardian, conservator or other fiduciary for me, then I nominate _____ to serve as such fiduciary, and I direct that no bond be required with respect to this appointment. If _____ shall die, resign, become incompetent or otherwise cease to serve as such fiduciary, then I nominate _____ to serve as such fiduciary, and I direct that no bond be required with respect to this appointment.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on _____, 199_.

_____(SEAL)

INSERT IF GRANTING POWER TO MAKE HEALTH CARE DECISIONS

The declarant has been personally known to me and I believe him or her to be of sound mind. I did not sign the declarant's signature above for or at the direction of the declarant and I am not appointed to make health care decisions as provided herein. I am not related to the declarant by blood, adoption, or marriage, entitled to any portion of the estate of the declarant according to the laws of intestate succession or under any will of declarant or codicil thereto, or directly financially responsible for declarant's medical care. Dated as of the day and year first written above.

Address: _____

Address: _____

STATE OF ALABAMA)

COUNTY OF _____)

I, the undersigned, a Notary Public, in and for said County, in said State, hereby certify that _____, _____ and _____, whose names are signed to the foregoing Power of Attorney and who are known to me, acknowledged before me on this day, that, being fully informed of the contents of the foregoing instrument, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal on _____, 200_.

Notary Public

My Commission Expires: _____

(NOTARIAL SEAL)

FORM B
SPRINGING DURABLE POWER OF ATTORNEY

DURABLE POWER OF ATTORNEY

1. KNOW ALL MEN BY THESE PRESENTS: That **subject to Paragraph 4, I**, _____, residing at _____, Alabama, hereby make, constitute and appoint _____ (if more than one attorney-in-fact is appointed add **“jointly,” “either of them” or “any one of them” to indicate how they must act**) as my true and lawful attorney(s), to act in, manage and conduct all of my affairs and, for that purpose, in my name, place and stead, to do and execute all or any of the following acts, deeds and things:

Insert Powers Granted to Attorney-in-Fact

1. After this Power of Attorney becomes effective under Paragraph 4, the powers herein granted to my said Attorney(s)-in-Fact shall be exercisable by him/her/them at any time and from time to time.

2. After becoming effective under Paragraph 4, this Power of Attorney shall remain in full force and effect and any party dealing with my said Attorney(s)-in-Fact at any time shall be fully protected and is hereby discharged, released and indemnified from so doing in respect of any matter relating hereto unless such particular party shall have received prior notice in writing of the revocation of this power.

3. THIS POWER OF ATTORNEY SHALL BECOME EFFECTIVE ONLY UPON MY DISABILITY, INCOMPETENCY OR INCAPACITY AND SHALL THEREAFTER NOT BE AFFECTED BY SUCH DISABILITY, INCOMPETENCY OR INCAPACITY AND MAY BE EXERCISED NOTWITHSTANDING ANY SUCH DISABILITY, INCOMPETENCY OR INCAPACITY AND NOTWITHSTANDING ANY UNCERTAINTY AS TO WHETHER I AM DEAD OR ALIVE. FOR PURPOSES OF THIS POWER OF ATTORNEY, I SHALL BE DEEMED TO BE INCAPACITATED IF MY ATTORNEY-IN-FACT PRESENTS A LETTER FROM A PHYSICIAN LICENSED TO PRACTICE MEDICINE IN ANY STATE OF THE UNITED STATES, STATING THAT HE OR SHE HAS PERSONALLY EXAMINED ME AND DETERMINED THAT I AM IN NEED OF ASSISTANCE IN HANDLING MY AFFAIRS.

4. If _____ shall die, resign, become incompetent or otherwise cease to serve as my Attorney-in-Fact hereunder, then I make, constitute and appoint _____ as his/her successor, with all of the powers, duties and authorities originally granted to my Attorney(s)-in-Fact herein.

5. If at any time proceedings are commenced in any court to appoint a guardian, conservator or other fiduciary for me, then I nominate _____ to serve as such fiduciary, and I direct that

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no bond be required with respect to this appointment. If _____ shall die, resign, become incompetent or otherwise cease to serve as such fiduciary, then I nominate _____ to serve as such fiduciary, and I direct that no bond be required with respect to this appointment.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on _____, 1994.

_____(SEAL)

STATE OF ALABAMA)

COUNTY OF _____)

I, the undersigned, a Notary Public, in and for said County, in said State, hereby certify that _____, whose name is signed to the foregoing Power of Attorney and who is known to me, acknowledged before me on this day, that, being fully informed of the contents of the foregoing instrument, he/she executed the same voluntarily on the day the same bears date.

Given under my hand and official seal on _____, 200_.

Notary Public

My Commission Expires:_____

(NOTARIAL SEAL)

FORM C
DURABLE POWER OF ATTORNEY FOR CHILDREN

DURABLE POWER OF ATTORNEY

1. KNOW ALL MEN BY THESE PRESENTS: That pursuant to Ala. Code §26-2A-7, we, _____ and _____, residing at _____, Alabama hereby make, constitute and appoint _____ **(if more than one attorney-in-fact is appointed, add “jointly,” “either of them” or “any one of them” to indicate how they must act)** as our true and lawful attorney(s), to act in our name, place and stead, to do and execute all or any of the following acts, deeds and things with respect to the care and custody of our children, _____ and _____:

(a) To participate in decisions regarding their education including attending conferences with their teachers or any other educational authorities, granting permission for their participation in school trips and other activities, and making any other decisions and executing any documents pertinent to their education.

(b) To grant permission and consent to our children participating in any activity sponsored by any group, association or organization which activity our Attorney(s)-in-Fact may deem appropriate.

(c) To make health care decisions on behalf of our children, including making decisions regarding their medical or dental care, whether routine or emergency in nature, including admissions to hospitals or other institutions; to consent to, to refuse to consent to, or to withdraw consent to the provision of any care, tests, treatment, surgery, service or procedure to maintain, diagnose or treat a physical or mental condition, as well as the right to sign such medical forms as may be necessary to carry out such decisions; to talk with health care personnel who may be treating our children and to examine their medical records and to consent to the disclosure of such records in circumstances the attorney(s) may deem appropriate; to file claims for medical insurance and to obtain information from any insurance company with respect to any policy of health or medical insurance under which our children are insured; provided however, that our Attorney(s)-in-Fact shall not be required to execute any documents which would involve incurring any personal liability for any such treatment and care, and we affirm that we will be responsible for payment for any such care or treatment consented to by our Attorney(s)-in-Fact which is not covered by insurance.

(d) To generally do and perform all matters and things, to execute all other instruments of every kind which may be necessary or proper to effectuate all powers hereinabove specifically granted, or any other matter or thing appertaining to our children, with the same full powers, and to all intents and purposes, with the same validity as we could, if personally present; and hereby ratifying and confirming whatsoever our said attorney(s) shall and may do, by virtue hereto.

2. The powers herein granted to our said Attorney(s)-in-Fact shall be exercisable by any one of them or all of them at any time and from time to time until _____, 200_.

3. This Power of Attorney shall remain in full force and effect until the date stated in Paragraph 2 above, and any party dealing with our Attorney(s)-in-fact during such time shall be fully protected and is hereby discharged, released and indemnified from so doing in respect of any matter relating hereto unless such particular party shall have received prior notice in writing of the revocation of this Power.

4. THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY THE DISABILITY, INCOMPETENCY OR INCAPACITY OF EITHER OF US AND MAY BE EXERCISED NOTWITHSTANDING ANY SUCH DISABILITY, INCOMPETENCY OR INCAPACITY AND NOTWITHSTANDING ANY UNCERTAINTY AS TO WHETHER EITHER OR BOTH OF US ARE DEAD OR ALIVE.

5. IN WITNESS WHEREOF, we hereunto set our hands and seals on _____, 200_.

_____(SEAL)

_____(SEAL)

STATE OF ALABAMA)

COUNTY OF _____)

I, the undersigned, a Notary Public, in and for said County, in said State, hereby certify that _____ and _____, whose name(s) are signed to the foregoing Power of Attorney and who is known to me, acknowledged before me on this day, that, being fully informed of the contents of the foregoing instrument, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal on _____, 199_.

Notary Public

My Commission Expires: _____

(NOTARIAL SEAL)

FORM D
INSTRUCTIONS FOR EXECUTING DOCUMENTS

Execution of Documents as Attorney-in-Fact

When executing any document as Attorney-in-Fact, you should sign the document indicating that you are signing in your capacity as Attorney-in-Fact. Since JOHN DOE appointed you his Attorney-in-Fact, you should sign as follows:

“JOHN DOE” (sign the principal’s name)
by: Attorney-in-Fact (signature), his Attorney-in-Fact.

STATUTES

Act 97-360

§ 26-1-2. Durable power of attorney.

(a) A durable power of attorney is a power of attorney by which a principal designates another his or her attorney in fact or agent in writing and the writing contains the words "This power of attorney shall not be affected by disability, incompetency, or incapacity of the principal" or "This power of attorney shall become effective upon the disability, incompetency, or incapacity of the principal" or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability, incompetency, or incapacity.

(b) All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability, incompetency, or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal were competent, not disabled and not incapacitated.

(c)(1) If, following execution of a durable power of attorney, a court of the domicile of the principal appoints a guardian, curator, or other fiduciary charged with the management of all the property of the principal or all of his or her property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he or she was not disabled, incompetent, or incapacitated.

(2) A principal may nominate, by a durable power of attorney, the guardian, curator, or other fiduciary for consideration by the court if proceedings to appoint a fiduciary for the principal are thereafter commenced. The court shall make its appointment in accordance with the most recent nomination of the principal in a durable power of attorney except for good cause or disqualification.

(d)(1) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the successors in interest of the principal.

(2) The disability, incompetency, or incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the disability, incompetency, 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 or her successors in interest.

(e) As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he or she did not have, at the time of the exercise of the power, actual knowledge of the termination of the power by revocation or of the death, disability, incompetency, or incapacity of the principal is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the

power of attorney requires execution and delivery of any instrument that is recordable, the affidavit, when authenticated for record, is likewise recordable.

(f) This section shall not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

(g)(1) A principal may designate under a durable power of attorney an individual who shall be empowered to make health care decisions on behalf of the principal. in the manner set forth in the Natural Death Act, if in the opinion of the principal's attending physician the principal is no longer able to give directions to health care providers. Subject to the express limitation on the authority of the attorney in fact contained in the durable power of attorney, the attorney in fact may make any health care decision on behalf of the principal that the principal could make but for the lack of capacity of the principal to make a decision, but not including psychosurgery, sterilization, abortion when not necessary to preserve the life of the principal, or involuntary hospitalization or treatment covered by Subtitle 2 of Title 22. A durable power of attorney executed pursuant to this section may be revoked by written revocation signed and dated by the principal or person acting at the direction of the principal, or being obliterated, burnt, torn, or otherwise destroyed or defaced in a manner indicating intention to cancel or by a verbal expression of intent to revoke made in the presence of a witness 19 years of age or older who signs and dates a writing confirming an expression to revoke.

(2) Notwithstanding anything in this section to the contrary, an attorney in fact shall have the authority to make decisions regarding provision, withholding, or withdrawal of life-sustaining treatment and artificially provided nutrition and hydration but only a. if specifically authorized to do so in the durable power of attorney, b. if the substantive provisions of the durable power of attorney are in substantial compliance and if the durable power of attorney is executed and accepted in substantially the same form as set forth in the Alabama Natural Death Act, and c. in instances of terminal illness or injury or permanent unconsciousness, if the authority is implemented in the manner permitted under the Alabama Natural Death Act. All durable powers of attorney executed prior to May 8, 1997, shall be effective to the extent specifically provided therein notwithstanding the provisions of this subsection. The decisions made by the attorney in fact shall be implemented in accordance with the same procedures set forth in the Alabama Natural Death Act for health care proxies.

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

(4) Subject to any limitation in the durable power of attorney, an attorney in fact may, for the purpose of making a health care decision, request, review, and receive any information, oral or written, regarding the principal's physical or mental health, including medical and hospital records, execute a release or other document required to obtain the information, and consent to the disclosure of the information.

(5) Under no circumstances shall the health care provider of the principal or a nonrelative employee of the health care provider of the principal make decisions under the durable power of attorney. For purposes of this subsection, a health care provider is defined as any person or entity who is licensed, certified, registered, or otherwise authorized by the laws of this

state to administer or provide health care in the ordinary course of business or in the practice of a profession.

(6) No health care provider or any employee or agent thereof who in good faith and pursuant to reasonable medical standards follows the direction of a duly authorized attorney in fact shall, as a result thereof, be subject to criminal or civil liability, or be found to have committed an act of unprofessional conduct for an action taken thereunder. Any health care cost or liability for the cost associated with any decision made pursuant to this section shall be the same as if the health care were provided as a result of the principal's decision relating to his or her own care.

(7) Any person who, without the consent of the principal, willfully conceals, cancels, or alters a durable power of attorney or any amendment or revocation of the agency or who falsifies or forges a durable power of attorney, amendment, or revocation for purposes of making health care decisions shall be civilly liable. In addition, those persons shall be subject to the criminal penalties set forth in the Alabama Natural Death Act.

(8) Any individual acting as an attorney in fact under a duly executed durable power of attorney, which includes provisions which comply with subdivision (2) regarding health care decisions who authorizes the providing, withholding, or withdrawing of life-sustaining treatments or artificially provided nutrition or hydration in accordance with the durable power of attorney and pursuant to this subsection shall not be subject to criminal prosecution or civil liability for that action.

(9) Nothing in this subsection regarding the appointment of an attorney in fact with respect to health care decisions shall impair or supersede any legal right or legal responsibility which any person may have, under case law, common law, or statutory law to effect the provision, withholding, or withdrawal, of life-sustaining treatment or artificially provided nutrition and hydration in any lawful manner. In such respect, the provisions of this subsection are cumulative.

(10) No physician or other health care provider, and no health care service plan, health maintenance organization, insurer issuing disability or life or health insurance, self-insured employee welfare benefit plan, nonprofit medical service corporation, or mutual nonprofit hospital or hospital service corporation shall require any person to execute a durable power of attorney with respect to health care decisions as a condition for being insured for, or receiving, health care services.

(11) Nothing in this subsection regarding the appointment of an attorney in fact with respect to health care decisions shall impair or supersede the jurisdiction of the circuit court in the county where a patient is undergoing treatment to determine whether life-sustaining treatment or artificially provided nutrition and hydration shall be withheld or withdrawn in circumstances not governed by this subsection.

(12) This subsection shall create no presumption concerning the intention of an individual, who has not executed a durable power of attorney regarding health care decisions, or any other advance directive for health care, or if the durable power of attorney, or advance directive for health care is executed, the durable power of attorney or advance directive for health care is ambiguous or silent as to a particular health care matter, to consent to the use or withdrawing or withholding of life-sustaining treatment or artificially provided nutrition and hydration. The terms "person" and "advance directive for health care" shall have the meaning as under Sections 22-8A-1, et seq.

(13) A durable power of attorney executed in another state in compliance with the law of that state or of this state is valid for purposes of this subsection. but this subsection does not authorize the administration, withholding, or withdrawal of health care otherwise prohibited by the laws of this state.

(14) Any durable power of attorney regarding health care decisions made prior to May 8, 1997, shall be given effect provided that the durable power of attorney was legally effective when written and artificially provided nutrition and hydration shall not be withdrawn pursuant to the durable power of attorney unless specifically authorized herein.

§ 26-1-2.1. Attorney-in-fact; power to make gifts.

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

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

(c) This section is declaratory of Section 26-1-2 and shall not be construed to nullify any actions taken by any attorney in fact prior to May 6, 1994.