ADVISING THE NON-PROFESSIONAL FIDUCIARY

"ATTORNEYS IN FACT: SELECTED ISSUES UNDER THE POWER OF ATTORNEY STATUTE, RCW 11.94"

"NO GOOD DEED GOES UNPUNISHED"

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TABLE OF CONTENTS

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I. Introduction

Powers of attorney are probably the most popular and widely used device for managing the affairs of persons who are either (1) incapacitated or (2) temporarily away from the place where they usually make property and financial decisions. Attorneys prepare them as part of their client's package of estate planning documents, or as a stand alone document. Special powers of attorney are often executed to close sales in real estate transactions. Preprinted power of attorney forms are available in office supply stores. Using a power of attorney avoids the costs and complexity of a guardianship proceeding.

Most people executing powers of attorney name a spouse, a child or grandchild, or a trusted friend as their attorney-in-fact. Sometimes the attorney-in-fact is an attorney or accountant or has other specialized training, but usually not. The attorney-in-fact may or may not have expertise in financial matters. Even if the attorney-in-fact is well-equipped to perform her duties, her principal's incapacity may bring latent dysfunctional relationships into plain view: sibling rivalries, the blood relatives' dislike of a spouse (especially a new spouse) or domestic partner, and professional advisors being displaced by the attorney-in-fact.

Worse still are the situations where the attorney-in-fact is already financially dependent upon the principal and is determined to use the power of attorney document to advance his own financial interests. The bad acting attorney-in-fact rationalizes misdeeds by saying the principal agreed.

Since a power of attorney is a specific type of principal-agency relationship, *e.g. Bryant v. Bryant*, 125 Wn.2d 113, 118, 882 P.2d 169 (1994), cases involving other types of agency relationships provide helpful guidance in power of attorney situations. Many reported cases in agency relationships involve conduct by the agent which descends into fraud, theft, and other intentional misconduct. This article addresses issues which will confront an attorney-in-fact who wants to do the right thing and play by the rules. As attorneys, we have an obligation to explain the rules to our clients who have agreed to serve as an attorney-in-fact.

II. Authority and duties of the attorney-in-fact:

A. Extent of authority under the power of attorney document

The first consideration in advising the attorney-in-fact is to determine what the power of attorney document provides. Most attorneys-in-fact find the authorizing language in a power of attorney document difficult to understand. Because the power of attorney document describes many specific powers the attorney-in-fact can assume he has *all* powers. The attorney-in-fact is usually not aware of the restrictions to his power contained in the document. They also may misconstrue the scope of authority granted them by a power of attorney for specific purposes.

Powers of attorney are strictly construed and grant only those powers which are specified in the power of attorney document. An attorney-in-fact cannot go beyond or deviate from the express provisions of the power of attorney document. *Bryant v. Bryant*, 125 Wn.2d 113, 118 P.2d 169 (1994).

In *Bryant v. Bryant*, husband and wife formed a land development company in 1955 which husband managed and in which wife owned 1 out of the 500 outstanding shares. In 1968 wife executed a general power of attorney to her husband as attorney-in-fact. When the marriage began to fail, husband transferred all of the stock in the company to their daughter, and later used the power of attorney, contrary to the terms of a restraining order, to transfer other assets including the family home into an irrevocable trust for the benefit of the couple's children. The Court held that the transfers were invalid because the power of attorney document did not specifically authorize gifting.

It is a long-established rule that:

> It is the first duty of an agent, whose authority is limited, to adhere faithfully to his instructions in all cases to which they can properly be applied. If he exceeds, or violates, or neglects them, he is responsible for all losses which are the natural consequences of his acts. . . . The damages which the principal may recover in such cases are the actual damages sustained by reason of the agent's disobedience.

Lovel v. Musselman, 81 Wash. 470, 477, 142 P. 1166 (1914). Thus, an agent authorized to obtain for the principal a mortgage on improved land was liable for damages when he placed the mortgage on unimproved land. *Nelson v. Smith*, 140 Wash. 294, 248 P. 798 (1926). An attorney-in-fact authorized to apply the principal's funds to buy specific items to establish a principal's business does not receive funds "available for her use" which would support a charge of welfare fraud on account of the attorney-in-fact's failing to disclose those funds to the State. *State v. Wallace*, 97 Wn.2d 846, 851, 651 P.2d 201 (1982), where the Court said:

> By the terms of the limited power of attorney, therefore, petitioner was prohibited from using the funds for her own benefit. Any use of the funds

in a manner inconsistent with James Wallace's instructions would have constituted a breach of petitioner's fiduciary duty.

This is not to say that a power of attorney document must be read so narrowly that the attorney-in-fact is at risk for taking reasonable steps to carry out the authority actually granted. The power granted an agent to perform a particular service carries the authority to do whatever is usual and necessary to carry into effect the principal power granted to the agent. *Larson v. Bear*, 38 Wn.2d 485, 490, 230 P.2d 610 (1951); *Yarnall v. Knickerbocker Co.*, 120 Wash. 205, 209-10, 206 P. 936 (1922). The authority to sign tax returns necessarily includes the authority to determine what deductions should be taken; the authority to purchase or sell real estate necessarily includes the authority to determine the terms of sale.

But unless the power of attorney affirmatively authorizes the action taken by the attorney-in-fact, or the action taken is usual and necessary to carry out the authority given to the attorney-in-fact, the attorney-in-fact risks liability for acting in excess of their authority.

B. The duty of loyalty

An attorney-in-fact owes a duty of loyalty to the principal. This duty requires the attorney-in-fact to avoid any possible conflict of interest by acting solely in the principal's interest. *Keene v. Board of Accountancy*, 77 Wn. App. 849, 858, 894 P.2d 582 (1995). Keene was a certified public accountant, whose client, an elderly woman, loaned him $10,000 at a higher rate of interest than she was receiving on her other investments. Subsequently, the client gave Keene her power of attorney. Keene then made an unsecured loan of $9,000 of the principal's funds to a friend and former client who had previously declared bankruptcy. Neither loan was repaid, and Keene filed bankruptcy. The Court of Appeals concluded that Keene breached his duty of loyalty by accepting the loan from the client and making "an unsecured, risky loan" of the principal's funds, and upheld the Board of Accountancy's revocation of his license for five years for actions which, among other things, "constituted dishonesty, fraud or negligence in the practice of public accounting."

The duty of loyalty impacts the attorney-in-fact's role in two specific ways. First, even if the power of attorney document authorizes the attorney-in-fact to act in a specified manner, those actions must be taken solely in the interest of the principal and never in the interest of the attorney-in-fact. Second, the duty of loyalty supplements the specific statutory limitations on the attorney-in-fact's authority. The statutory limitations are discussed below.

C. Statutory limitations on attorney-in-fact authority

RCW 11.94.050(1) identifies actions which the attorney-in-fact cannot take, even if the power of attorney document purports to grant them all the powers which the principal could have exercised, "unless specifically provided otherwise in the document."

The 11.94.050(1) prohibition which attorneys-in-fact probably violate more often than any other is the attorney-in-fact cannot make gifts, to anyone, of the principal's property without specific authority to do so.

(1) Gifts to the attorney-in-fact – Rarely Permitted

In *Bryant v. Bryant*, the Court decided the case on the basis that the attorney-in-fact did not have gifting authority, either to himself of third parties, and chose not to address the argument that the transfers violated RCW 11.94.050. In most cases, one would reach the same result by analyzing the grant of authority in the power of attorney document, as the *Bryant* court did, as one would by identifying whether the action is prohibited under RCW 11.94.050(1). However, RCW 11.94.050(1) would probably be more helpful in advising a disbelieving client that they cannot make gifts than relying on the absence of authority in the power of attorney document. Also, in case the power of attorney document is ambiguous, RCW 11.94.050(1) can be used to resolve the ambiguity against the exercise of gifting authority.

Even if gifting is permitted under the power of attorney document, RCW 11.94.070 imposes additional limitations on the attorney-in-fact by incorporating RCW 11.95.100 "powers of appointment" through RCW 11.95.150 by reference. These provisions subject attorneys-in-fact to the same rules as holders of a power of appointment. RCW 11.95.100 provides that the holder of a power of appointment can exercise the power of appointment for their own benefit only for their health, education, support, and maintenance unless the power of appointment specifically adopts a broader or more restrictive standard. In drafting a power of appointment you cannot attempt to override the statutory limitations of the power merely by using words such as "absolute," "sole," "complete," or "conclusive".

One often sees language in power of attorney documents authorizing gifting in accordance with the principal's "pattern of making gifts," or similar language. This is also insufficient to overcome the restrictions on gifting to the agent in RCW 11.95.100. RCW 11.95.140 provides that RCW 11.95.100 applies to powers of attorney "unless the terms of the instrument refer specifically to RCW 11.95.100 and RCW 11.95.110 and provide expressly to the contrary."

The primary purpose of RCW 11.95.100 and RCW 11.95.110 is to avoid the attorney-in-fact being deemed to have a general power of attorney which, under IRC Section 2041, would cause the principal's assets to be included in the attorney-in-fact's estate for federal estate tax purposes if the attorney-in-fact dies before the principal. Because of the fear of creating a general power of appointment, one is unlikely to see gifting authority in a power of attorney document which overrides RCW 11.95.100 and RCW 11.95.110.

If the attorney-in-fact has a reasonable level of income and assets of their own, there is a high risk that gifts from the principal's estate for the benefit of the attorney-in-

fact will not meet the standard of providing for their health, education, support, and maintenance.

(2) Gifts to third parties – Sometimes Permitted

Perhaps the attorney-in-fact does not want to make gifts to herself, but wants to make gifts to third parties. Perhaps the power of attorney document even authorizes gifting. Significant pitfalls remain.

One of the essential elements of a gift is an intention of the donor to presently make a gift. *Henderson v. Tagg*, 68 Wn.2d 188, 192, 412 P.2d 112 (1966). In the power of attorney situation, the intention of the donor is that of the principal, not the intention of the attorney-in-fact. Power of attorney language authorizing gifting in accordance with the principal's "pattern of making gifts," is a way of carrying out the principal's intention. Even if the power of attorney document does not include the "pattern" language, it is a useful standard for the attorney-in-fact to follow unless the document contains a stricter standard.

If the principal had a pattern of making relatively modest gifts for birthdays and holidays, and the attorney-in-fact continues to make equally modest gifts to the same persons, no one is likely to raise any objection. But if the principal treated all the grandchildren equally, and the attorney-in-fact gifts in favor his own children, the attorney-in-fact is not carrying out the principal's intention. If the principal's gifts were in modest amounts, and the attorney-in-fact makes gifts in much larger amounts, the attorney-in-fact's intention, and not the principal's intention, is probably being followed unless the power of attorney document contains language authorizing gifting for estate planning purposes. However, the significant increase in the amount exempt from estate tax since 2001 has removed the estate tax planning justification for gifting for many principals.

(3) Testamentary Changes – Absolutely Forbidden

RCW 11.94.050(1) provides that attorneys-in-fact "shall not have the authority to make, amend, alter, or revoke the principal's wills or codicils." Unlike most of the prohibitions in RCW 11.94.050(1), which apply "unless specifically provided otherwise in the document," the prohibition on the attorney-in-fact's making or altering the principal's will is absolute. One occasionally sees powers of attorney which authorize the attorney-in-fact to make or alter the principal's will; such provisions are invalid and should never be relied upon by the attorney-in-fact.

Although this prohibition is clearly directed to the preparation of wills and codicils which the attorney-in-fact executes on behalf of the principal, it also prohibits revocation of wills. A will can be revoked not only by the execution of a new will, but by "being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same." RCW 11.12.040(1)(b). So the attorney-in-fact is also prohibited from destroying the principal's will. Although the testator can direct someone

else to destroy their will, "the direction of the testator and the facts of such injury or destruction must be proved by two witnesses." If the principal is incapacitated, then clearly they cannot give the requisite direction to destroy their will.

(4) Beneficiary designation changes – Sometimes Permitted

The attorney-in-fact may be given greater authority over the principal's estate planning documents other than their wills and codicils. RCW 11.94.050(1) prohibits the attorney-in-fact, "unless specifically provided otherwise in the document," from making, amending, altering, or revoking the principal's life insurance, annuity, or other contract beneficiary designation, employee benefit plan designations, trust agreements, registrations of the principal's securities in beneficiary form, payable on death or transfer on death beneficiary designations, joint tenancy with right of survivorship designations, community property agreements, or other provisions for nonprobate transfer at death.

Many power of attorney documents specifically authorize the attorney-in-fact to revoke the principal's community property agreements. This addresses the frequently encountered problem presented by the "third prong" of such agreements which vest title to the couple's property absolutely in the surviving spouse, even if this would have adverse Medicaid planning or estate tax planning consequences.

However, the power of attorney document must be scrutinized closely even with respect to this frequently granted authority. Revocation of community property agreements may be authorized in specific situations, such as Medicaid planning.

Even if revocation of a community property agreement is authorized, the attorney-in-fact should not revoke the document beyond what is necessary to protect the principal's interests. Often, it is only necessary to revoke the "third prong" dealing with transfers at death. Revoking the entire agreement would make it impossible for the attorney-in-fact to deal with what is now the separate property of the principal's spouse, and could alter the disposition of the principal's estate if there is no will in place.

It is unusual for a power of attorney document to grant authority to alter any of the principal's estate planning documents other than their community property agreements. The document should be scrutinized carefully since such authority is likely to have been specially drafted and included to deal with a specific type of asset or specific beneficiary issue. In addition, the attorney-in-fact must be mindful of the prohibition in RCW 11.95.100 and RCW 11.95.100 on modifying such documents in a way which benefits the attorney-in-fact other than to provide for his own health, education, support, or maintenance.

III. Compensation of the attorney-in-fact

As with other issues, the starting point on compensation for the attorney-in-fact is the power of attorney document. Although somewhat unusual to do so, the document may deny compensation to the attorney-in-fact, especially if the attorney-in-fact is the

spouse, who would be compensated with community funds, or a family member who is well provided for. The document may authorize compensation at the attorney-in-fact's normal rates, or similar language; usually found if a professional fiduciary is named as attorney-in-fact. If the designated attorney-in-fact is a family member, the power of attorney document often is silent on compensation for the attorney-in-fact.

If the power of attorney document does not mention compensation for the attorney-in-fact, a claim to compensation would be based on an implied contract to pay for the services provided. An implied in fact contract depends upon proof of consent or mutual intention that compensation would be paid in exchange for services; an implied in law contract arises from an implied duty of the parties and is based on the prevention of unjust enrichment. The amount of compensation in such case is a reasonable amount for the work done, "quantum meruit." *Eaton v. Engelcke Manufacturing, Inc.*, 37 Wn. App. 677, 680, 681 P.2d 1312 (1984).

If the attorney-in-fact is entitled to compensation, the best practice is to keep an itemized log of the services provided and time incurred, and to pay compensation on a regular basis. If the principal is not incapacitated, having the principal approve payment of itemized invoices or execute a separate agreement regarding compensation would establish the principal's intention that compensation should be paid. The attorney-in-fact should not wait to be compensated until the principal's death if there is no express agreement to provide compensation because evidence of the attorney-in-fact's transactions with the decedent will then be barred by the Deadman's Statute, RCW 5.60.030. In addition, the failure to claim compensation during the principal's lifetime has been treated as evidence that there is no implied in fact contract to provide services in exchange for compensation. *Johnson v. Nasi*, 50 Wn.2d 87, 91-92, 309 P.2d 380 (1957).

The question of compensation should be distinguished from the question of reimbursement for out-of-pocket expenses. A prohibition on compensation does not necessarily prohibit to reimbursement for the attorney-in-fact's reasonable expenses incurred in acting in that capacity. Most powers of attorney include language to the effect that the principal "shall hold harmless and indemnify the attorney-in-fact" for their actions as attorney-in-fact, typically limited to actions which are taken in good faith and not in fraud of the principal. Indemnity is the right to reimbursement when one party discharges a liability which another should rightfully have assumed, *e.g. Central Refrigeration v. Barbee*, 133 Wn.2d 509, 513, 946 P.2d 760 (1997), and would justify reimbursement of the attorney-in-fact's reasonable expenses.

IV. Court proceedings regarding powers of attorney

In 2001, the Legislature amended RCW Chapter 11.94 to authorize the filing of petitions to obtain court determination of issues relating to powers of attorney. The matters which may be determined in such proceedings include: whether the power of attorney is in effect or has terminated; compelling the attorney-in-fact to account or report on their actions; ratification of past acts or approval of proposed acts of the attorney-in-fact; ordering the attorney-in-fact to exercise or refrain from exercising

authority; modification of the power of attorney; removing the attorney in-fact; approving the attorney-in-fact's resignation and final accounts. RCW 11.94.090. While such proceedings provide a venue for persons opposed to the attorney-in-fact, they also provide a useful means for the attorney-in-fact to obtain the court's direction in case there is ambiguity concerning their authority or how their discretion ought to be exercised.

RCW 11.94.100(1) provides that such petitions may be filed by the attorney-in-fact, the principal, the principal's spouse, or the principal's guardian of the person or guardian of the estate. In addition, "any other interested person" may file such a petition:

- if they demonstrate to the court's satisfaction that they are interested in the welfare of the principal, and
- if they have a good faith belief that the court's intervention is necessary;
- if the principal is incapacitated or otherwise unable to protect their own interests.

The principal can, in the power of attorney document, preclude named persons from filing petitions regarding the power of attorney. RCW 11.94.100(2). However, not only must the power of attorney document preclude the named person from filing such petitions, but there must be a certificate from an attorney who was representing the principal when the power of attorney document was signed which states that the attorney advised the principal concerning their rights, the applicable law, and the effect and consequences of executing the power of attorney. Even if there is a certificate, the preclusion is not effective if the named person is serving as the attorney-in-fact's guardian at the time the petition is filed or if the named person establishes that the principal was subject to undue influence or mistaken beliefs.

In ruling on such petitions, the Court must consider the principal's best interests and order relief that is least restrictive to the exercise of the power of attorney and still consistent with protecting the principal's best interests. RCW 11.94.100.

In any proceeding under RCW 11.94.090, other than one filed by the attorney-in-fact, the court has discretion to award costs, including reasonable attorneys fees, to any person participating in the proceedings from any other person participating in the proceedings, or from the assets of the principal. RCW 11.94.120. This provision specifically controls over the general attorneys' fees statute, RCW 11.96A.150. Since proceedings filed by the attorney-in-fact are excluded from RCW 11.94.120, one would need to look either to the language of the power of attorney document or RCW 11.96A.150 for the basis for an award of fees and costs to the attorney-in-fact.

V. Conclusion – Details Count

Powers of attorney are easy forms for our clients to use and abuse. Many attorneys are not aware of the case law and statutes limiting powers of attorney. Attorneys should allow adequate time to discuss with our clients the optional provisions which we can include limiting or expanding the power of attorney. Attorneys should also allow adequate time to counsel our clients who have taken on the significant responsibility of serving as an attorney-in-fact.

11.95.100
Exercise of power in favor of holder — Limitations.

If the standard governing the exercise of a lifetime or a testamentary power of appointment does not clearly indicate that a broader or more restrictive power of appointment is intended, the holder of the power of appointment may exercise it in his or her favor only for his or her health, education, support, or maintenance as described in section 2041 or 2514 of the Internal Revenue Code and the applicable regulations adopted under the section.

[1993 c 339 § 7.]

Notes:

Severability -- 1993 c 339: See note following RCW 11.98.200.

11.95.110
Exercise of power in favor of holder — Disregard of provision conferring absolute or similar power — Power of removal.

If the holder of a lifetime or testamentary power of appointment may exercise the power in his or her own favor only for his or her health, education, support, or maintenance as described in section 2041 or 2514 of the Internal Revenue Code and the applicable regulations adopted under that section, then a provision of the instrument creating the power of appointment that purports to confer "absolute," "sole," "complete," "conclusive," or a similar discretion shall be disregarded in the exercise of that power in favor of the holder, and that power may then only be exercised reasonably and in accordance with the ascertainable standards set forth in RCW 11.95.100 and this section. A person who has the right to remove or replace a trustee does not possess nor may the person be deemed to possess, by virtue of having that right, the power of the trustee who is subject to removal or to replacement.

[1993 c 339 § 8.]

Notes:

Severability -- 1993 c 339: See note following RCW 11.98.200.

11.95.120
Exercise of power in favor of holder — Income under marital deduction — Spousal power of appointment.

Notwithstanding any provision of RCW 11.95.100 through 11.95.150 seemingly to the contrary, RCW 11.95.100 through 11.95.150 do not limit or restrict the distribution of income of a trust that qualifies or that otherwise could have qualified for the marital deduction under section 2056 or 2523 of the Internal Revenue Code, those Internal Revenue Code sections requiring that all income be distributed to the spouse of the decedent or of the trustor at least annually, whether or not an election was in fact made under section 2056(b)(7) or 2523(f) of the Internal Revenue Code. Further, RCW 11.95.100 through 11.95.150 do not limit or restrict the power of a spouse of the trustor or the spouse of the decedent to exercise a power of appointment described in section 2056(b)(5) or 2523(e) of the Internal Revenue Code with respect to that portion of the trust that could otherwise qualify for the marital deduction under either of those Internal Revenue Code sections.

[1993 c 339 § 9.]

Notes:

Severability -- 1993 c 339: See note following RCW 11.98.200.

11.95.130
Exercise of power in favor of holder — Inference of law.

RCW 11.95.100 through 11.95.150 do not raise an inference that the law of this state prior to July 25, 1993, was different than contained in RCW 11.95.100 through 11.95.150.

[1993 c 339 § 10.]

Notes:

Severability -- 1993 c 339: See note following RCW 11.98.200.

11.95.140
Exercise of power in favor of holder — Applicability.

(1)(a) RCW 11.95.100 and 11.95.110 respectively apply to a power of appointment created:

(i) Under a will, codicil, trust agreement, or declaration of trust, deed, power of attorney, or other instrument executed after July 25, 1993, unless the terms of the instrument refer specifically to RCW 11.95.100 or 11.95.110 respectively and provide expressly to the contrary; or

(ii) Under a testamentary trust, trust agreement, or declaration of trust executed before July 25, 1993, unless:

(A) The trust is revoked, or amended to provide otherwise, and the terms of any amendment specifically refer to RCW 11.95.100 or 11.95.110, respectively, and provide expressly to the contrary;

(B) All parties in interest, as defined in RCW 11.98.240(3), elect affirmatively, in the manner prescribed in RCW 11.98.240(4), not to be subject to the application of this subsection. The election must be made by the later of September 1, 2000, or three years after the date on which the trust becomes irrevocable; or

(C) A person entitled to judicial proceedings for a declaration of rights or legal relations under RCW 11.96A.080 obtains a judicial determination that the application of this subsection (1)(a)(ii) to the trust is inconsistent with the provisions or purposes of the will or trust.

(b) Notwithstanding (a) of this subsection, for the purposes of this section a codicil to a will, an amendment to a trust, or an amendment to another instrument that created the power of appointment in question shall not be deemed to cause that instrument to be executed after July 25, 1993, unless the codicil or amendment clearly shows an intent to have RCW 11.95.100 or 11.95.110 apply.

(2) Notwithstanding subsection (1) of this section, RCW 11.95.100 through 11.95.150 shall apply to a power of appointment created under a will, codicil, trust agreement, or declaration of trust, deed, power of attorney, or other instrument executed prior to July 25, 1993, if the person who created the power of appointment had on July 25, 1993, the power to revoke, amend, or modify the instrument creating the power

of appointment, unless:

(a) The terms of the instrument specifically refer to RCW 11.95.100 or 11.95.110 respectively and provide expressly to the contrary; or

(b) The person creating the power of appointment was not competent, on July 25, 1993, to revoke, amend, or modify the instrument creating the power of appointment and did not regain his or her competence to revoke, amend, or modify the instrument creating the power of appointment on or before his or her death or before the time at which the instrument could no longer be revoked, amended, or modified by the person.

[1999 c 42 § 617; 1997 c 252 § 74; 1993 c 339 § 11.]

Notes:

Part headings and captions not law -- Effective date -- 1999 c 42: See RCW 11.96A.901 and 11.96A.902.

Severability -- 1993 c 339: See note following RCW 11.98.200.

11.95.150
Exercise of power in favor of holder — Cause of action.

RCW 11.95.100 through 11.95.140 neither create a new cause of action nor impair an existing cause of action that, in either case, relates to a power that was exercised before July 25, 1993. RCW 11.95.100 through 11.95.140 neither create a new cause of action nor impair an existing cause of action that in either case relates to a power proscribed, limited, or qualified under RCW 11.95.100 through 11.95.140.

[1993 c 339 § 12.]

Notes:

Severability -- 1993 c 339: See note following RCW 11.98.200.

11.94.010
Designation — Authority — Effect of acts done — Appointment of guardian, effect — Accounting — Reliance on instrument.

(1) Whenever a principal designates another as his or her attorney-in-fact or agent, by a power of attorney in writing, and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's disability, the authority of the attorney-in-fact or agent is exercisable on behalf of the principal as provided notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney-in-fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or the principal's guardian or heirs, devisees, and personal representative as if the principal were alive, competent, and not disabled. A principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification. If a guardian thereafter is appointed for the principal, the attorney-in-fact or agent, during the continuance of the appointment, shall account to the guardian rather than the principal. The guardian has the same power the principal would have had if the principal were not disabled or incompetent, to revoke, suspend or terminate all or any part of the power of attorney or agency.

(2) Persons shall place reasonable reliance on any determination of disability or incompetence as provided in the instrument that specifies the time and the circumstances under which the power of attorney document becomes effective.

(3)(a) A principal may authorize his or her attorney-in-fact to provide informed consent for health care decisions on the principal's behalf. If a principal has appointed more than one agent with authority to make mental health treatment decisions in accordance with a directive under chapter 71.32 RCW, to the extent of any conflict, the most recently appointed agent shall be treated as the principal's agent for mental health treatment decisions unless provided otherwise in either appointment.

(b) Unless he or she is the spouse, state registered domestic partner, or adult child or brother or sister of the principal, none of the following persons may act as the attorney-in-fact for the principal: Any of the principal's physicians, the physicians' employees, or the owners, administrators, or employees of the health care facility or long-term care facility as defined in RCW 43.190.020 where the principal resides or receives care. Except when the principal has consented in a mental health advance directive executed under chapter 71.32 RCW to inpatient admission or electroconvulsive therapy, this authorization is subject to the same limitations as those that apply to a guardian under RCW 11.92.043(5) (a) through (c).

(4) A parent or guardian, by a properly executed power of attorney, may authorize an attorney-in-fact to make health care decisions on behalf of one or more of his or her children, or children for whom he or she is the legal guardian, who are under the age of majority as defined in RCW 26.28.015, to be effective if the child has no other parent or legal representative readily available and authorized to give such consent.

(5) A principal may further nominate a guardian or guardians of the person, or of the estate or both, of a minor child, whether born at the time of making the durable power of attorney or afterwards, to continue during the disability of the principal, during the minority of the child or for any less time by including such a provision in his or her power of attorney.

(6) The authority of any guardian of the person of any minor child shall supersede the authority of a designated attorney-in-fact to make health care decisions for the minor only after such designated guardian has been appointed by the court.

(7) In the event a conflict between the provisions of a will nominating a testamentary guardian under the authority of RCW 11.88.080 and the nomination of a guardian under the authority of this statute, the most recent designation shall control.

[2007 c 156 § 31; 2005 c 97 § 12; 2003 c 283 § 27; 1995 c 297 § 9; 1989 c 211 § 1; 1985 c 30 § 25. Prior: 1984 c 149 § 26; 1974 ex.s. c 117 § 52.]

Notes:

Severability -- Part headings not law -- 2003 c 283: See RCW 71.32.900 and 71.32.901.

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

Application, construction -- Severability -- Effective date -- 1974 ex.s. c 117: See RCW 11.02.080 and notes following.

11.94.020
Effect of death, disability, or incompetence of principal — Acts without knowledge.

(1) The death, disability, or incompetence of any principal who has executed a power of attorney in writing other than a power as described by RCW 11.94.010, does not revoke or terminate the agency as to the attorney-in-fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and the principal's heirs, devisees, and personal representatives.

(2) An affidavit, executed by the attorney-in-fact, or agent, stating that the attorney did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability, or incompetence, is, in the absence of a showing of fraud or bad faith, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(3) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

[1985 c 30 § 26. Prior: 1984 c 149 § 27; 1977 ex.s. c 234 § 27; 1974 ex.s. c 117 § 53.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

Application, effective date -- Severability -- 1977 ex.s. c 234: See notes following RCW 11.20.020.

Application, construction -- Severability -- Effective date -- 1974 ex.s. c 117: See RCW 11.02.080 and notes following.

11.94.030
Banking transactions.

If a principal, pursuant to RCW 11.94.010 or 11.94.020, has given a designated attorney-in-fact or agent all the principal's powers of absolute ownership or has used language to indicate that the attorney-in-fact or agent has all the powers the principal would have if alive and competent, then that language, notwithstanding chapter 30.22 RCW, includes the authority (1) to deposit and to make payments from any account in a financial institution, as defined in RCW 30.22.040, in the name of the principal, and (2) to enter any safe deposit box to which the principal has a right of access, subject to any contrary provision in any agreement governing the safe deposit box.

[1985 c 30 § 27. Prior: 1984 c 149 § 28.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.94.040
Liability for reliance on power of attorney document.

(1) Any person acting without negligence and in good faith in reasonable reliance on a power of attorney shall not incur any liability.

(2) If the attorney-in-fact presents the power of attorney to a third person and requests the person to accept the attorney-in-fact's authority to act for the principal, and also presents to the person an acknowledged affidavit or declaration signed under penalty of perjury in the form designated in RCW 9A.72.085, signed and dated contemporaneously with presenting the power of attorney, which meets the requirements of subsection (3) of this section, and the person accepting the power of attorney has examined the power of attorney and confirmed the identity of the attorney-in-fact, then the person's reliance on the power of attorney is presumed to be without negligence and in good faith in reasonable reliance, which presumption may be rebutted by clear and convincing evidence that the person accepting the power of attorney knew or should have known that one or more of the material statements in the affidavit is untrue. It shall not be found that an organization knew or should have known of circumstances that would revoke or terminate the power of attorney or limit or modify the authority of the attorney-in-fact, unless the individual accepting the power of attorney on behalf of the organization knew or should have known of the circumstances.

(3) An affidavit presented pursuant to subsection (2) of this section shall state that:

(a) The person presenting himself or herself as the attorney-in-fact and signing the affidavit or declaration is the person so named in the power of attorney;

(b) If the attorney in fact is named in the power of attorney as a successor attorney-in-fact, the circumstances or conditions stated in the power of attorney that would cause that person to become the acting attorney-in-fact have occurred;

(c) To the best of the attorney-in-fact's knowledge, the principal is still alive;

(d) To the best of the attorney-in-fact's knowledge, at the time the power of attorney was signed, the principal was competent to execute the document and was not under undue influence to sign the document;

(e) All events necessary to making the power of attorney effective have occurred;

(f) The attorney-in-fact does not have actual knowledge of the revocation, termination, limitation, or modification of the power of attorney or of the attorney-in-fact's authority;

(g) The attorney-in-fact does not have actual knowledge of the existence of other circumstances that would limit, modify, revoke, or terminate the power of attorney or the attorney-in-fact's authority to take the proposed action;

(h) If the attorney-in-fact was married to the principal at the time of execution of the power of attorney, then at the time of signing the affidavit or declaration, the marriage of the principal and the attorney-in-fact has not been dissolved or declared invalid; and

(i) The attorney-in-fact is acting in good faith pursuant to the authority given under the power of attorney.

(4) Unless the document contains a time limit, the length of time which has elapsed from its date of execution shall not prevent a party from reasonably relying on the document.

(5) Unless the document contains a requirement that it be filed for record to be effective, a person may place reasonable reliance on it regardless of whether it is so filed.

[2001 c 203 § 2; 1985 c 30 § 28. Prior: 1984 c 149 § 29.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.94.043
Durable power of attorney — Revocation or termination.

The durable power of attorney provided for under this chapter shall continue in effect until revoked or terminated by the principal, by a court-appointed guardian, or by court order.

[1989 c 211 § 2.]

11.94.046
Durable power of attorney — Validity.

(1) A durable power of attorney executed pursuant to chapter 11.94 RCW before July 23, 1989, that specifically authorizes an attorney-in-fact to make decisions relating to the health care of the principal shall be deemed valid, except for the exemptions provided for in RCW 11.94.010(3).

(2) Nothing in this chapter affects the validity of a decision made under a durable power of attorney executed pursuant to chapter 11.94 RCW before July 23, 1989.

[1989 c 211 § 3.]

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

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

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

[2001 c 203 § 12; 1989 c 87 § 1; 1985 c 30 § 29. Prior: 1984 c 149 § 30.]

Notes:

Effective dates -- 1989 c 87: "(1) Sections 7 and 8 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1989.

(2) Sections 1 through 5 of this act shall take effect October 1, 1989." [1989 c 87 § 9.]

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.94.060
Conveyance or encumbrance of homestead.

If a principal, pursuant to RCW 11.94.010 or 11.94.020, has given a designated attorney-in-fact or agent all the principal's powers of absolute ownership or has used language to indicate that the attorney-in-fact or agent has all the powers the principal would have if alive and competent, then these powers include the right to convey or encumber the principal's homestead.

[1985 c 30 § 30. Prior: 1984 c 149 § 31.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.94.070
Limitations on powers to benefit attorneys-in-fact.

(1) The restrictions in RCW 11.95.100 through 11.95.150 on the power of a person holding a power of appointment apply to attorneys-in-fact holding the power to appoint to or for the benefit of the powerholder.

(2) This section applies retroactively to July 25, 1993.

[1994 c 221 § 67.]

Notes:

Effective dates -- 1994 c 221: "(1) Except as provided in section 74 of this act, sections 1 through 72 of this act shall take effect January 1, 1995.

(2) *Section 3 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [April 1, 1994]." [1994 c 221 § 75.]

***Reviser's note:** "Section 3 of this act" is erroneous. This reference was apparently intended to be to section 67. The error arose in the renumbering of sections in the engrossing of amendments to Substitute House Bill No. 2270 (1994 c 221).

11.94.080
Termination of marriage or state registered domestic partnership.

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

(2) This section applies to all decrees of dissolution and declarations of invalidity of marriage entered after July 22, 2001.

[2007 c 156 § 14; 2001 c 203 § 1.]

11.94.090
Court petition.

(1) A person designated in RCW 11.94.100 may file a petition requesting that the court:

(a) Determine whether the power of attorney is in effect or has terminated;

(b) Compel the attorney-in-fact to submit the attorney-in-fact's accounts or report the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of the principal, the guardian of the person or the estate of the principal, or to any other person required by the court in its discretion, if the attorney-in-fact has failed to submit an accounting or report within sixty days after written request from the person filing the petition, however, a government agency charged with the protection of vulnerable adults may file a petition upon the attorney-in-fact's refusal or failure to submit an accounting upon written request and shall not be required to wait sixty days;

(c) Ratify past acts or approve proposed acts of the attorney-in-fact;

(d) Order the attorney-in-fact to exercise or refrain from exercising authority in a power of attorney in a particular manner or for a particular purpose;

(e) Modify the authority of an attorney-in-fact under a power of attorney;

(f) Remove the attorney-in-fact on a determination by the court of both of the following:

(i) The attorney-in-fact has violated or is unfit to perform the fiduciary duties under the power of attorney; and

(ii) The removal of the attorney-in-fact is in the best interest of the principal;

(g) Approve the resignation of the attorney-in-fact and approve the final accountings of the resigning attorney-in-fact if submitted, subject to any orders the court determines are necessary to protect the principal's interests;

(h) Confirm the authority of a successor attorney-in-fact to act under a power of attorney upon removal or resignation of the previous attorney-in-fact;

(i) Compel a third person to honor the authority of an attorney-in-fact, provided that a third person may not be compelled to honor the agent's authority if the principal could not compel the third person to act in the same circumstances;

(j) Order the attorney-in-fact to furnish a bond in an amount the court determines to be appropriate.

(2) The petition shall contain a statement identifying the principal's known immediate family members, and any other persons known to petitioner to be interested in the principal's welfare or the principal's estate, stating which of said persons have an interest in the action requested in the petition and explaining the determination of who is interested in the petition.

[2001 c 203 § 3.]

11.94.100
Persons allowed to file court petition.

(1) A petition may be filed under RCW 11.94.090 by any of the following persons:

(a) The attorney-in-fact;

(b) The principal;

(c) The spouse of the principal;

(d) The guardian of the estate or person of the principal; or

(e) Any other interested person, as long as the person demonstrates to the court's satisfaction that the person is interested in the welfare of the principal and has a good faith belief that the court's intervention is necessary, and that the principal is incapacitated at the time of filing the petition or otherwise unable to protect his or her own interests.

(2) Notwithstanding RCW 11.94.080, the principal may specify in the power of attorney by name certain persons who shall have no authority to bring a petition under RCW 11.94.090 with respect to the power of attorney. This provision is enforceable:

(a) If the person so named is not at the time of filing the petition the guardian of the principal;

(b) If at the time of signing the power of attorney the principal was represented by an attorney who advised the principal regarding the power of attorney and who signed a certificate at the time of execution of the power of attorney, stating that the attorney has advised the principal concerning his or her rights, the applicable law, and the effect and consequences of executing the power of attorney; or

(c) If (a) and (b) of this subsection do not apply, unless the person so named can establish that the principal was unduly influenced by another or under mistaken beliefs when excluding the person from the petition process, or unless the person named is a government agency charged with protection of vulnerable adults.

[2001 c 203 § 4.]

11.94.110
Ruling on court petition.

In ruling on a petition filed under RCW 11.94.090 and ordering any relief, the court must consider the best interests of the principal and will order relief that is the least restrictive to the exercise of the power of attorney while still adequate in the court's view to serve the principal's best interests. Upon entry of an order ruling on a petition, the court's oversight of the attorney-in-fact's actions and of the operation of the power of attorney ends unless another petition is filed under this chapter or unless the order specifies further court involvement that is necessary for a resolution of the issues raised in the petition.

[2001 c 203 § 5.]

11.94.120
Award of costs on court petition.

In any proceeding commenced by the filing of a petition under RCW 11.94.090 by a person other than the attorney-in-fact, the court may in its discretion award costs, including reasonable attorneys' fees, to any person participating in the proceedings from any other person participating in the proceedings, or from the assets of the principal, as the court determines to be equitable. In determining what is equitable in making the award, the court must consider whether the petition was filed without reasonable cause, and order costs and fees paid by the attorney-in-fact individually only if the court determines that the attorney-in-fact has clearly violated his or her fiduciary duties or has refused without justification to cooperate with the principal or the principal's guardian or personal representative. In a proceeding to compel a third party to accept a power of attorney, the court may order costs, including reasonable attorneys' fees, to be paid by the third party only if the court determines that the third party did not have a good faith concern that the attorney in fact's exercise of authority would be improper. To the extent this section is inconsistent with RCW

11.96A.150, this section controls the award of costs and attorneys' fees in proceedings brought under RCW 11.94.090.

[2001 c 203 § 6.]

11.94.130
Applicability of dispute resolution provisions to court petition.

The provisions of chapter 11.96A RCW, except for RCW 11.96A.260 through 11.96A.320, are applicable to proceedings commenced by the filing of a petition under RCW 11.94.090.

[2001 c 203 § 7.]

11.94.140
Notice of hearing on court petition.

(1) The following persons are entitled to notice of hearing on any petition under RCW 11.94.090:

(a) The principal;

(b) The principal's spouse;

(c) The attorney-in-fact;

(d) The guardian of the estate or person of the principal;

(e) Any other person identified in the petition as being interested in the action requested in the petition, or identified by the court as having a right to notice of the hearing. If a person would be excluded from bringing a petition under RCW 11.94.100(2), then that person is not entitled to notice of the hearing.

(2) Notwithstanding subsection (1) of this section, if the whereabouts of the principal are unknown or the principal is otherwise unavailable to receive notice, the court may waive the requirement of notice to the principal, and if the principal's spouse is similarly unavailable to receive notice, the court may waive the requirement of notice to the principal's spouse.

(3) Notice must be given as required under chapter 11.96A RCW, except that the parties entitled to notice shall be determined under this section.

[2001 c 203 § 8.]

11.94.150
Mental health treatment decisions — Compensation of agent prohibited — Reimbursement of expenses allowed.

No person appointed by a principal as an agent to make mental health treatment decisions pursuant to a mental health advance directive under chapter 71.32 RCW shall be compensated for the performance of his

or her duties as an agent to make mental health treatment decisions. This section does not prohibit an agent from receiving reimbursement for reasonable expenses incurred in the performance of his or her duties under chapter 71.32 RCW.

[2003 c 283 § 28.]

Notes:

Severability -- Part headings not law -- 2003 c 283: See RCW 71.32.900 and 71.32.901.

11.94.900
Application of 1984 c 149 §§ 26-31 as of January 1, 1985.

Sections 26 through 31, chapter 149, Laws of 1984 apply as of January 1, 1985, to all existing or subsequently executed instruments but shall not apply to any instrument the terms of which expressly or impliedly make those sections inapplicable.

[1985 c 30 § 140.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

FINANCIAL DURABLE POWER OF ATTORNEY EFFECTIVE ON DISABILITY AND NOMINATION OF GUARDIAN OF ESTATE
OF
[Principal]

1. Designation. The undersigned, [Principal] ("Principal" herein), presently of [City], [County] County, Washington, designates [his] [relation to principal], [Attorney-in-fact], presently of [City], [State], as attorney-in-fact for the Principal. If [Attorney-in-fact] is unable or unwilling to act in such capacity, the Principal designates [his] [relation to principal], [Contingent Attorney-in-fact], presently of [City], [State], as attorney-in-fact for the Principal.

2. Effectiveness; Duration. This Durable Power of Attorney shall not become effective until written evidence of incompetency or of the determination of disability is made by the Principal's regular attending physician. Once [Attorney-in-fact], or [Contingent Attorney-in-fact], if [Attorney-in-fact] is unable or unwilling to so act, agrees to act as attorney-in-fact, this Durable Power of Attorney shall continue until revoked or terminated under Section 5 below, notwithstanding any uncertainty as to whether the Principal is dead or alive. Disability shall include the inability to manage property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance.

3. Powers. The attorney-in-fact shall have all of the powers of an absolute owner over the assets and liabilities of the Principal, whether located within or without the State of Washington. These powers shall include, without limitation, the power and authority specified below:

3.1 Real Property. The attorney-in-fact shall have authority to purchase, take possession of, lease, sell, convey, exchange, mortgage, release and encumber real property or any interest in real property.

3.2 Personal Property. The attorney-in-fact shall have authority to purchase, receive, take possession of, lease, sell, assign, endorse, exchange, release, mortgage and pledge personal property or any interest in personal property.

3.3 Financial Accounts. The attorney-in-fact shall have the authority to deal with accounts maintained by or on behalf of the Principal with institutions (including, without limitation, banks, savings and loan associations, credit unions and securities dealers and representatives and administrators of retirement benefits or employment-related benefits). This shall include the authority to maintain and close existing accounts, to open, maintain and

close other accounts, and to make deposits, transfers, and withdrawals with respect to all such accounts.

3.4 United States Treasury Bonds. The attorney-in-fact shall have the authority to purchase United States Treasury Bonds which may be redeemed at par in payment of federal estate tax.

3.5 Monies Due. The attorney-in-fact shall have authority to request, demand, recover, collect, endorse and receive all monies, debts, accounts, gifts, bequests, dividends, annuities, rents and payments due the Principal.

3.6 Claims Against Principal. The attorney-in-fact shall have authority to pay, settle, compromise or otherwise discharge any and all claims of liability or indebtedness against the Principal and, in so doing, use any of the Principal's funds or other assets or use funds or other assets of the attorney-in-fact and obtain reimbursement out of the Principal's funds or other assets.

3.7 Legal Proceedings. The attorney-in-fact shall have authority to participate in any legal action in the name of the Principal or otherwise. This shall include (a) actions for attachment, execution, eviction, foreclosure, indemnity, and any other proceeding for equitable or injunctive relief and (b) legal proceedings in connection with the authority granted in this instrument.

3.8 Written Instruments. The attorney-in-fact shall have the power and authority to sign, seal, execute, deliver and acknowledge all written instruments and do and perform each and every act and thing whatsoever which may be necessary or proper in the exercise of the powers and authority granted to the attorney-in-fact as fully as the Principal could do if personally present.

3.9 Transfer of Assets. If the Principal needs or requires treatment or services for which Medicaid assistance would be available, or may shortly need or require such services, the attorney-in-fact shall have the authority to transfer assets of all kinds to the trustee of any trust established by the Principal alone or by the Principal and the Principal's spouse, or to effect any such transfer to the Principal's spouse's own separate title or [to other persons to whom transfers are authorized], even if the transferee is the attorney-in-fact, when such transfer is made pursuant to RCW 74.09 to qualify the Principal for Medicaid assistance. No such transfer shall be deemed a prohibited "gift" for purposes of this Durable Power of Attorney. In such an instance, the Principal's attorney-in-fact shall be expressly authorized to revoke on the Principal's behalf any community property agreement which the Principal and the Principal's spouse may have jointly executed.

[Optional if Principal does not want to authorize Medicaid qualification transfers] The attorney-in-fact shall not have the authority to transfer assets of the Principal to qualify the Principal for Medicaid assistance.

3.10 Safe Deposit Box. The attorney-in-fact shall have the authority to enter any safe deposit box in which the Principal has a right of access.

3.11 Transfers to Trust. The attorney-in-fact shall have the authority to transfer assets of all kinds to the trustee of any trust which,

a. is for the sole benefit of the Principal as to the Principal's separate property or

b. is for the sole benefit of the Principal and the Principal's spouse as to their community property,

and which terminates at the Principal's death as to the Principal's property with the Principal's property distributable to the personal representative of the Principal's estate.

3.12 Disclaimer. The attorney-in-fact shall have the authority to disclaim any interest, as defined in RCW 11.86.010, in any property to which the Principal would otherwise succeed. The attorney-in-fact shall have the authority to sign and deliver a disclaimer and determine the amount thereof under the Internal Revenue Code and Washington law when in the attorney-in-fact's judgment and discretion it is the best interest of the Principal's estate or the Principal's family so to do. In addition, the attorney-in-fact shall have the authority to disclaim, decline or refuse to accept any basic award to the Principal under RCW Chapter 11.54, or any other statutory award or allowance which the Principal might otherwise be entitled to claim.

3.13 Tax Matters. The attorney-in-fact shall have the authority to represent the Principal in all tax matters; to prepare, sign and file federal, state, and local income, gift and other tax returns of all kinds, including, where appropriate, joint returns, FICA returns, payroll tax returns, claims for refunds, requests for extensions of time to file returns and/or pay taxes, extensions and waivers of applicable periods of limitation, protests and petitions to administrative agencies or courts, including the tax court, regarding tax matters, and any and all other tax related documents, including but not limited to consents and agreements under Section 2032A of the Internal Revenue Code of 1986, as amended, and consents to split gifts, closing agreements, and any power of attorney form required by the Internal Revenue Service and any state and local taxing authority with respect to any tax year between the years 1988 and 2040; to pay taxes due, collect, and make such disposition of refunds as the attorney-in-fact shall deem appropriate; post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service and any state and local taxing authority; to exercise any elections the Principal may have under federal, state or local tax law;

to allocate any generation-skipping tax exemption to which Principal is entitled; and generally to represent the Principal or obtain professional representation for the Principal in all tax matters and proceedings of all kinds and for all periods between the years 1988 and 2040 before all officers of the Internal Revenue Service and state and local authorities and in any and all courts; to engage, compensate, and discharge attorneys, accountants, and other tax and financial advisers and consultants to represent and assist Principal in connection with any and all tax matters involving or in any way related to the Principal or any property in which the Principal has or may have an interest or responsibility.

[Optional if Principal wishes to include gifting authority; many do not]

[3.14 Gifting. The attorney-in-fact shall have the authority to make gifts of the Principal's assets of any kind, not to exceed the lesser of (a) the annual gift tax exclusion amount under Section 2503(b) of the Internal Revenue Code or (b) Fifteen Thousand Dollars ($15,000) per "permitted donee" in any one calendar year. A "permitted donee" for purposes of this Section 3.14 consists of the Principal's _____. The total of gifts to a permitted donee and gifts to a trust for the benefit of the same permitted donee shall not exceed the amount permitted under this Section 3.14 in any one calendar year, and no gift to a trust shall be made in a form which does not qualify for any federal gift tax exclusion.] [Note that this language does not override the statutory limitations on the attorney-in-fact's gifting to the attorney-in-fact, nor does it provide for gifts for educational and medical purposes which are not subject to the annual gift tax exclusion]

4. Limitations on Powers. Notwithstanding the foregoing, the attorney-in-fact shall not have authority to make, amend, alter, revoke or change any life insurance policy, employee benefit, or testamentary disposition of the Principal's property or [except as provided in Section 3.14, if gifting authority is included] to make any gifts of such property or to exercise any power of appointment. This limitation shall not affect the authority of the attorney-in-fact to disclaim any interest. The term "employee benefit" shall not include any health insurance plan or health insurance policy applicable during the Principal's lifetime ("health insurance") and the attorney-in-fact may make elections with respect to health insurance to the same extent as the Principal could.

5. Termination. This Durable Power of Attorney may be terminated by:

a. the Principal's execution of a written instrument of revocation, if this Durable Power of Attorney has not become effective in accordance with its terms; or

b. the Principal's execution of a written notice of revocation and by written notice of such revocation to the attorney-in-fact, if this Durable Power of Attorney has become effective in accordance with its terms and the Principal is not incapacitated so as to be unable to execute an instrument of revocation; or

c. a guardian of the estate of the Principal after court approval of such revocation; or

d. the death of the Principal upon actual knowledge or receipt of written notice by the attorney-in-fact.

If this Durable Power of Attorney has been recorded, any written instrument of revocation shall also be recorded in the office of the recorder or auditor of the place where the Power of Attorney was recorded.

6. Accounting. Upon request of the Principal or the guardian of the estate of the Principal or the personal representative of the Principal's estate, the attorney-in-fact shall account for all actions taken by the attorney-in-fact for or on behalf of the Principal.

7. Reliance. Any person acting without negligence and in good faith in reasonable reliance on this Durable Power of Attorney shall not incur any liability thereby. Any action so taken, unless otherwise invalid or unenforceable, shall be binding on the heirs and personal representative of the Principal.

8. Indemnity. The estate of the Principal shall hold harmless and indemnify the attorney-in-fact from all liability for acts done in good faith and not in fraud of the Principal. [Note this language should be narrowed if a professional fiduciary is to serve as attorney-in-fact]

9. Nomination of Guardian. The Principal nominates [Attorney-in-fact], or [Contingent Attorney-in-fact] if [Attorney-in-fact] is unable or unwilling so to act, as guardian of the Principal's estate if protective proceedings for the Principal's estate are ever commenced.

10. Revocation of Prior Powers of Attorney. The Principal hereby revokes all powers of attorney previously executed by the Principal for property or financial decisions, including but not limited to that certain "_____" dated _____. [Be certain to review prior Power of Attorney to see if notice must be given to the attorney-in-fact and prepare suitable documents to provide such notice. If the other spouse is the attorney-in-fact, this can be done as a mutual acknowledgment of notice.]

11. Applicable Law. The laws of the State of Washington shall govern this Durable Power of Attorney.

DATED: _____, 2009.

_____
[Principal]

STATE OF WASHINGTON)
) ss.
COUNTY OF [COUNTY])

On this day personally appeared before me [Principal], to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the purposes therein mentioned.

GIVEN under my hand and official seal this _____ day of January, 2009.

_____
Signature
Print name: _____
Notary Public in and for the State of Washington,
residing at _____
My commission expires _____