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ESTATE PLANNING, DISABILITY, AND THE DURABLE POWER OF ATTORNEY

A. L. MOSES*
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Attorneys and their clients have paid scant attention to the possibility of the client incurring a serious mental or physical disability and to the problems a disability may create. The more foreseeable problems and concerns of disability are normally limited to the physical and emotional impact, but disability may also result in the serious impairment of the client's ability to manage assets. The modern estate planner must consider and plan for this contingency if he is to ensure the proper management of the client and his assets. South Carolina has recently enacted a durable power of attorney statute1 that can serve as a

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Whenever a principal designates another his attorney-in-fact by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate" showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his physical disability or mental incompetence, the authority of the attorney-in-fact is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or mental incompetence of the principal. All acts done by the attorney-in-fact pursuant to the power during any period of disability or mental incompetence shall have the same effect and inure to the benefit of and bind the principal or his heirs, devisees, legatees and personal representative as if the principal were mentally competent and not disabled. The attorney-in-fact shall have a fiduciary relationship with the principal and shall be accountable and responsible as a fiduciary. The appointment of a power of attorney under this act act shall not prevent a person or his representative from applying to the court and having a committee appointed after which the power of attorney shall become inoperative. A power of attorney executed under the provisions of this act shall be executed and attested with the same formality and with the same requirements as to witnesses as a will. In
valuable tool in estate planning. This article discusses the problems that disability can create for the estate management and custody of the disabled person and the solutions to these problems under the new South Carolina durable power of attorney act. Particular attention is paid to the problems created by mental disability.

I. PROBLEMS CREATED BY DISABILITY

The potential problems of disability for estate planning have been ignored by lawyers and clients much more frequently than they have been considered. The lack of interest is probably attributable to the certainty of death and the uncertainty of disability, but those who have not experienced a long-term disability, either firsthand or vicariously, have difficulty recognizing the physical, emotional, and economic catastrophe that it can represent.

Disabilities can be divided into physical disabilities and mental disabilities, though both may occur simultaneously. A severe physical disability unaccompanied by mental incapacity can create obstacles to effective management of assets during the lifetime of an individual by creating physical and emotional obstacles to the exercise of sound judgment. Personal supervision of assets and investigation can become more physically burdensome, and judgment may be affected and impaired by any emotional distress that may result from the physical disability. Additionally, if the disability is sufficiently severe, consideration must be given to the possibility that impaired or deteriorating health may eventually result in a mental disability.

Mental disability presents substantially more serious consequences for the disabled person, especially in the area of legal capacity. If the mental disability is substantial, it can involve not only the problems related to physical disabilities, but also a loss of the legal right to make contracts or gifts.

If disability of any nature, especially a legally incapacitating

addition, the instrument shall be probated and recorded in the same manner as a deed. Unless the instrument provides otherwise, the probate judge may, in his discretion, and at any time after the onset of mental disability, on motion of any interested party or his own motion, require that an inventory of all deposits, choses in action and personal property be filed with the court and a surety bond be posted by the attorney-in-fact in such manner and amount that would be applicable to a decedent’s estate.


disability, can create serious asset management problems, how likely is it to occur? Insurance statistics\(^4\) indicate that a twenty-two year old person is seven and one-half times more likely to suffer a disability of ninety days or more than he is to die. Such a disability is four and one-quarter times more likely to occur than death for a sixty-two year old. At age twenty, 789 persons out of 1000 can expect to suffer a disability of ninety days or more at some time during their lives. At age forty, 635 persons out of 1000 can expect to suffer such a disability, and at age sixty, 221 persons out of 1000 can expect to suffer a disability lasting ninety days or longer.

If the disability for a twenty-two year old person has continued for one year, there is a fifty-two percent chance that it will continue for an additional two years and a thirty-two percent chance that it will continue for an additional five years. If the person is fifty-seven and the disability has continued for a year, there is a seventy-three percent chance that it will continue for two additional years and a fifty-five percent chance that it will continue for an additional five years.

These statistics clearly show that although disability, unlike death, is not a certainty, it is far more likely to occur for persons under sixty than is death. For these reasons, the problem of disability demands the attention of estate planners and their clients. Ignoring the likelihood of disability may well result in the defeat of an elaborate estate plan and may cost the client money and flexibility.

II. Asset Management Methods During Disability

A. Physical Disability

The onset of a physical disability does not affect an individual’s legal capacity to manage his assets. As a practical matter, however, a physical disability can be severe enough to make it inconvenient or even impossible for a person to manage his own affairs, especially if the assets of the disabled person require active physical supervision. The alternatives to managing one’s own assets are elected for convenience rather than for necessity since a person with only a physical disability has the legal capacity to change the method of asset management if it is not to his liking.

One possibility for a physically disabled person is to transfer

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4. Schlesinger, *Drafting the Estate Plan to Cover Disability*, U. MIAMI 7th ANN. INST. EST. PLAN. ¶ 73.201.1 (1973) (citing 1964 Comm’t Disability Table).
the assets that require management to a trustee who will manage them for the disabled person. These trusts are normally completely revocable during the settlor's lifetime as long as the settlor remains competent, and the settlor, therefore, is able to retain control over investments and the amount of income and principal distributed to him by the trust. Upon the settlor's death, the trustee either transfers the trust principal to the settlor's estate under a "pour back" provision in the trust instrument, or the settlor's will may "pour over" the balance of his estate to the trust and the trustee will distribute it according to the post-death dispositive scheme of the trust.

Another common procedure of asset management is to appoint someone, normally an individual and frequently a spouse or child, as agent or attorney in fact for the disabled principal under a general power of attorney. Under the general power, the agent is authorized to manage the property of the principal as long as the power remains in effect. These powers are normally revocable at will and are automatically revoked by the death of the principal.

The attorney in fact, as a type of agent, differs from the trustee in that he does not hold title to the principal's property that is subject to the power, although he may have extensive powers to deal with that property. The title to the assets remains with the principal. Further, a trustee generally has an affirmative duty to take specific actions under the trust agreement while the power granted to an attorney in fact is normally permissive rather than mandatory. A trustee is also required to file fiduciary income tax returns, which are not ordinarily required of the attorney in fact.5

B. Mental Disability

If the disability is merely physical, these solutions are adequate because the disabled person retains mental and legal capacity. Mental disability sufficient to render a person legally incompetent, however, results in a loss of the power to enter into contractual relations and adds further complications for asset management. If an inter vivos trust has been created, but property has not been transferred to it prior to the time the legally

5. Because the durable power of attorney statute provides that the agent has a fiduciary relationship with the principal, it is conceivable that under appropriate circumstances an attorney in fact could be subjected to the requirements imposed by tax laws upon a trustee.
incapacitating mental disability occurs, the settlor cannot thereafter effectively transfer property to the trust. A legally incapacitating mental disability probably revokes the general power of attorney, and once the power is revoked, the incompetent cannot legally create a new arrangement for the management of his assets. Thus, elaborate schemes to provide management upon incompetency can be defeated by the incompetency itself. Consequently, at the time when these devices are most needed, they become inoperative. If incapacity has occurred prior to a transfer of assets to an effective trust, the appointment of a committee appears to be the only alternative for managing the incompetent’s estate. The procedure for the appointment of a committee, however, can be expensive, time-consuming, and unpleasant.  

The procedure for the appointment of a committee requires a verified petition that must be prepared and served upon the incompetent, the guardian, if any, and the nearest relative or friend. The incompetent must then be examined by two designated examiners, one of whom must be a licensed physician, and both examiners must transmit their report of examination to the probate court. After a hearing and a finding of incompetency, the probate court appoints a committee for the management of the incompetent’s estate. If the appointment of a committee is made, the statute for appointment procedure also requires the court to “make any further orders necessary for the custody and control of the individual’s estate.”

The appointment of a committee creates a number of problems. The limited authority of a committee extends only to the incompetent’s property and not to his person, which means that the power of a committee to deal with an incompetent is incomplete. The committee in a new and different action must frequently seek additional or supplemental authority from a court to deal with the property of an incompetent and must provide evidence supporting the requests, both of which involve time, effort, and expense. If the action involves real property, the court

6. RESTATEMENT (SECOND) OF AGENCY §§ 120, 122 (1957). This assumes that the managing agency and general power do not conform to S.C. CODE ANN. § 32-13-10 (Cum. Supp. 1978). For the full text of that section, see note 1 supra.


10. Id. § 44-23-730.

11. Id.

of common pleas has jurisdiction. If a guardianship of the person of an adult incompetent is desired, the probate court has authority by a recent statutory amendment to make such appointments. The guardians and committees are also subject to requirements that they furnish bond, submit inventories, and make periodic accountings. Moreover, an incompetent is not empowered to select the committee or guardian.

The expensive, burdensome, and time-consuming requirements of guardianships and committeeships have led to the observation: "If you're going to become incompetent, you'd better be rich!" The new South Carolina durable power of attorney act now provides a less expensive and more flexible alternative. Since it is critical that the client execute the durable power of attorney instrument before the mental incapacity arises, lawyers and clients must give careful and deliberate consideration to the possibility of a future disability and plan accordingly.

III. THE SOUTH CAROLINA DURABLE POWER OF ATTORNEY ACT

A. Background

Unhappiness with the rule terminating or suspending a power of attorney upon the incapacity of the principal has resulted in statutory changes in a number of states, including the southeastern states of Virginia, North Carolina, Georgia, and Florida, and also in the Uniform Probate Code (UPC). These

The judge of probate shall have jurisdiction in relation to the appointment and removal of guardians of the person of minors and persons who are mentally incompetent and in relation to the duties imposed by law on these guardians and in the management and disposition of the estates of their wards.

14. Id. (emphasis added).

15. A 1971 amendment added the words "of the person" to this section. No. 249, 1971 S.C. Acts 286. The predecessor statute that did not contain those words was held not to expressly authorize a guardianship of the person. Ex parte Davidge, 72 S.C. 16, 51 S.E. 269 (1905).

16. Id. §§ 21-19-130 to -140.


changes permit a power of attorney to continue despite the principal’s incompetence, if the power expressly provides that it survives incompetency and meets certain other statutory requirements. Because these powers survive incompetency, they are frequently referred to as durable powers of attorney.

On February 2, 1978, the new South Carolina durable power of attorney act (the Act) was signed by the Governor and placed this state among the growing number of states permitting such powers.

B. Formal Requirements of the Act

The Act does not make all powers of attorney durable, but rather only those that meet the statutory requirements. The formal requirements of the statute relate to:

1. The specific language that must be included in the instrument creating the durable power of attorney;
2. the manner in which the instrument must be executed, witnessed, attested, and probated; and
3. the recordation of the instrument in the public records.

1. The Specific Language Requirement.—The Act permits durability if among other things

the writing contains the words “This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate” showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his physical disability or mental incompetence.24

This language raises the question whether the words of the Act must be used verbatim in a power of attorney instrument for the power to possess durability. Such a requirement has the advantage of certainty, but it can deny durability if different, but equivalent, language is used, even when the intent of the principal is clearly indicated in the instrument. By contrast, the comparable language of section 5-501 of the UPC permits durability when the power of attorney contains either of two sentences25 set

24. Id.
25. Section 5-501 of the Uniform Probate Code permits durability if the power of attorney “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
forth in the statute or "similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability." If the precise words of the Act are required, a grammatical problem is also created. The problem arises because a power of attorney is usually prepared in the language of the first person, and consistency requires that the third person sentence mandated by the Act be modified accordingly. To prepare a power of attorney in the first person, however, and then to use the third person sentence required by the Act is to create a grammatical anomaly in the instrument. Until the statute is amended or interpreted, however, prudence dictates use of the exact language of the Act, however awkward it may appear.

2. Execution, Witnessing, Attestation, and Probate.—The Act requires a durable power instrument to be "executed and attested with the same formality and with the same requirements as to witnesses as a will." South Carolina law requires the testator either to sign the will personally or to have another sign it for him in his presence and by his express direction. The will must also be signed by three witnesses in the presence of both the testator and each other.

The case law governing the effective execution of a will should be applicable to the execution of a durable power instrument. Under these cases, the testator may sign by initials or by mark, and a seal is not required. Witnesses may sign by initials, one witness may sign on behalf of another witness, and, if the signing is all a part of a contemporaneous execution, the

conferred shall be exercisable, notwithstanding his disability." UNIFORM PROBATE CODE § 5-501.

26. Id.
All wills and testaments of real and personal property shall be in writing and signed by the party so devising or bequeathing such property or by some other person in his presence and by his express direction and shall be attested and subscribed in the presence of the testator and of each other by three or more credible witnesses or else they shall be utterly void and of no effect.

Id.

29. Id.
33. Adams v. Chaplin, 10 S.C. Eq. (1 Hill Eq.) 265 (1833).
witnesses may sign prior to the testator. South Carolina also requires that the witnesses to the will must have been "credible" or competent to testify in court. Pursuant to statute, a witness to a will or codicil is competent to attest or prove it despite any interest he or his spouse has in the document or any appointment to any trust, duty, or office under the will, although there may be forfeitures of testamentary interests or fiduciary commissions. Since the Act provides that a durable power instrument must be "executed and attested with the same formality and with the same requirements as to witnesses as a will," the statute allowing witnesses to a will who are interested in the will to be competent would seem applicable to a durable power, although the forfeitures do not appear relevant. It is prudent, however, for the agent to refrain from serving as a witness since he will be presenting the instrument to third parties who may hesitate to rely on an instrument with apparent irregularities, even though acceptable legally.

3. Recording.—In addition to the execution and attestation requirements, the Act requires that the power "shall be probated and recorded in the same manner as a deed." Under the South Carolina Recording Act, a deed can be recorded if "[t]he execution thereof shall be first proved by the affidavit of a subscribing witness to such instrument." The affidavit is commonly known in South Carolina as a "probate."

The language of the Act requiring the power to be "recorded in the same manner as a deed" would seem to mean that the power must be recorded in the deed book of a particular county, but the Act does not prescribe the county. Presumably, the power must be recorded in the county in which the principal resides, but if the attorney in fact resides in a different county, it may facilitate his exercise of the power to record it there also. If the principal moves to another county and establishes a residence there after the recordation of the power, the question of whether the power must be recorded in the new county of residence arises and the Act does not provide a solution. Although the Act does not require it, recording the power in each county in which the princi-

38. Id. § 32-13-10 (Cum. Supp. 1978). For the text of this statute, see note 1 supra.
40. Id. § 30-5-30(1).
pal owns real property will facilitate real property transactions under the power.

There may be a reluctance in some cases, based upon a desire for privacy, to record the power until it becomes necessary to exercise it. If the power is not recorded immediately, the question of its durability may arise, particularly if the power is not recorded until after the onset of incapacity. Arguably in that event the last step necessary to make the power durable did not occur until after incompetency and, therefore, the power did not become durable but actually was suspended by incompetency. Since it is uncertain whether durability attaches upon effective execution or upon recordation, it is prudent to record the power immediately after its execution.

A documentary stamp tax in the amount of fifty cents\textsuperscript{41} is imposed upon a power of attorney and is payable at the time of recording.

\section*{C. Dower}

The ability of an attorney in fact authorized to mortgage or sell real property of his married male principal, whether competent or incompetent, is restricted by the dower interest of the principal’s wife in his real estate. As long as the wife is competent and available, the restriction created by the dower interest may be more theoretical than real. If, however, the wife is incompetent or unavailable, the problem can be very real indeed. A special statute permits a wife to renounce dower on a power of attorney, but the power must be recorded in the county where the land is located.\textsuperscript{42} That statute has not been construed by the South Carolina Supreme Court, and unanswered questions remain on its applicability to property not specifically described in the power.

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\textsuperscript{41} Id. \textsection 12-21-390 (1976).
\textsuperscript{42} Id. \textsection\textsection 21-5-150, -160.
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The wife of any person executing a power of attorney authorizing his appointed attorney-in-fact to sell, convey, or mortgage real estate in his name by deed, release or mortgage may, whether she be of lawful age or be a minor, release, renounce and bar herself of her dower in all premises described in the power of attorney which may thereafter be so conveyed or mortgaged under the terms of the power of attorney, by acknowledging upon a private and separate examination before a person authorized by law to administer oaths in this State, that she did freely and voluntarily, without any compulsion, dread or fear of any person whomsoever, renounce and release her dower, in such of the premises as may thereafter be conveyed or mortgaged under the terms of the power of attorney, to the grantee, his heirs and assigns.

\textit{Id.} \textsection 21-5-160.
or acquired by the principal after the power was executed. Nevertheless, it is advantageous to obtain the renunciation and perhaps litigate its validity at a later time, if such litigation should be required. Without the renunciation, there may be nothing to litigate, and the effective use of the power may be stymied.

D. Capacity

Although the Act does not expressly require the principal to have capacity at the time the power is executed, the Act rather clearly indicates that the legislature so intended. For example, the Act provides that when the necessary language is included "the authority of the attorney-in-fact is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or mental incompetence of the principal."\(^{43}\) The power must also be executed "with the same requirements as to witnesses as a will."\(^{44}\) Under South Carolina law,\(^{45}\) witnesses to a will attest not only to the signatures but also to the testator's capacity,\(^{46}\) and the language of the Act requires a similar attestation by the witnesses to a durable power. The legal disability of minority presents similar, although not identical, problems. It is also noteworthy that the applicable statute does not permit persons under eighteen to make a will.\(^{47}\)

E. Fiduciary Relationship

The Act provides that "[t]he attorney-in-fact shall have a fiduciary relationship with the principal and shall be accountable and responsible as a fiduciary."\(^{48}\) The quoted language seems to incorporate the law applicable to fiduciaries generally into the relationship between the principal and the attorney in fact. Specific South Carolina statutes\(^ {49}\) on fiduciary responsibilities are probably applicable to an attorney in fact under a durable power of attorney. One of the important statutes establishes the

\(^{43}\) Id. § 32-13-10 (Cum. Supp. 1978) (emphasis added). For the text of this statute, see note 1 supra.

\(^{44}\) Id.

\(^{45}\) Id. § 21-7-50 (1976). For the text of this statute, see note 28 supra.


\(^{48}\) Id. § 32-13-10 (Cum. Supp. 1978). For the text of this statute, see note 1 supra.

The Restatement (Second) of Agency states that "[a]n agent is a fiduciary with respect to matters within the scope of his agency." Restatement (Second) of Agency § 13 (1957).

“Prudent Man Rule,” which creates a mandatory standard for investments by fiduciaries. The other statutes may also have some application to the attorney in fact under other provisions of the Act. The quoted language of the Act is broad enough to include case law on fiduciaries as well.

F. Limitations Upon the Attorney in Fact Under the Act

The Act provides some devices by which the activities of the attorney in fact can be monitored and the estate of the principal can be safeguarded after the onset of incompetency. The Act states:

Unless the instrument provides otherwise, the probate judge may, in his discretion, and at any time after the onset of mental disability, on motion of any interested party or his own motion, require that an inventory of all deposits, choses in action and personal property be filed with the court and a surety bond be posted by the attorney-in-fact in such manner and amount as would be applicable to a decedent’s estate.

Just as in the recordation provision, the statute does not indicate which probate judge is to act. Since the statute relating to appointment of a committee calls for action in the probate court of the county in which the alleged incompetent resides or resided prior to his admission to a mental health facility, it is reasonable to assume the probate judge referred to in this Act is the judge in the county in which the principal resides, or his residence just prior to admission to a mental health facility.

If a bond is required and the surety is a company authorized

50. Id. § 21-11-10. This statute provides:
   In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property and every kind of investment, specifically including but not by way of limitation, bonds, debentures and other corporate obligations, and stocks, preferred or common, and within the limitations of the foregoing standard a fiduciary may retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase.

Id.

51. Id. § 32-13-10 (Cum. Supp. 1978). For the text of this statute, see note 1 supra.

to do a suretyship business in South Carolina the attorney in fact can charge the premium to the principal’s estate, but not in excess of one percent per annum on the amount of the bond. The amount of the bond under the Act is the amount “that would be applicable to a decedent’s estate.” If, however, a decedent dies intestate in South Carolina and has named a qualified resident executor, no bond is required. Presumably, the Act intended to incorporate the statute applicable to an intestate estate for which an administration bond is required in an amount equal to twice the value of the personal property of the estate. The bond in this case must be executed by two sureties, unless the surety is a corporate surety authorized and licensed to do business in South Carolina, in which case the bond can be reduced to an amount equal to one and one-half times the estimated value of the intestate’s personal property. The reduction lies within the discretion of the probate court. Notwithstanding the foregoing, the Act permits the principal to specify in the durable power that a bond shall not be required.

G. Revocation, Suspension, and Lapse of the Durable Power

As long as the principal remains competent, he can revoke the durable power of attorney at will. After the onset of incompetency, however, his contractual disability would prevent him from both entering and voiding contracts. Revocation of the power prior to incompetency, as between principal and agent, is not difficult, but problems may arise when innocent third parties deal with an attorney in fact who does not reveal that his authority has been revoked. These problems, however, are not peculiar to the durable power.

Although the death of the principal revokes the authority of the agent, even under a durable power authorized by the Act, other statutes give validity to the acts of the agent if an innocent third party was unaware of the death of the principal at the time the agent acted. Moreover, the affidavit of the attorney in fact

53. Id. § 21-11-100 (1976).
54. Id. § 32-13-10 (Cum. Supp. 1978). For the text of this statute, see note 1 supra.
57. Id. § 32-13-10 (Cum. Supp. 1978). For the text of this statute, see note 1 supra.
58. Cf. O’Neill ads. Farr, 30 S.C.L. (1 Rich.) 80, 88 (1844) (“mental capacity and the free exercise of it are as essential to the revocation as to the creation of the will”). See also Kollack v. Williams, 131 S.C. 352, 127 S.E. 444 (1925).
59. Id. § 32-11-10 (1976). See also id. § 32-11-40.
attesting to a lack of actual knowledge or notice of the principal's death is, in the absence of fraud, conclusive proof of the absence of such knowledge or notice by such attorney in fact.\textsuperscript{60}

The effective resignation of the attorney in fact will also terminate the agency. Because of the attorney in fact's fiduciary relationship to the principal, however, it is questionable whether the attorney in fact can resign after the onset of incompetency if the resignation would be a detriment to the incompetent principal. By analogy, executors are permitted to resign only when, in the opinion of the probate judge, "such resignation will not be injurious to the estate."\textsuperscript{61} When a trustee has accepted his trust, he generally cannot resign unless he had either (1) the consent of all beneficiaries capable of consent, (2) the trust permits the resignation, (3) or he obtains the court's permission to resign.\textsuperscript{62} If the principal has become incompetent, but the durable power specifically permits the attorney in fact to appoint another agent, and the original attorney in fact can find another person willing to act, it may be that the original agent will be permitted to resign upon his appointment of a successor who accepts the appointment.\textsuperscript{63}

The Act further provides that upon the appointment of a committee for an incompetent principal, the power of attorney becomes inoperative.\textsuperscript{64} The Act is not clear on whether the term "inoperative" means that the power is terminated or merely suspended during the time that the committee holds office. If the power is merely suspended, the question then arises whether the power is temporarily revived by the death of the committee or permanently revived if the principal regains competency.

\textbf{H. Succession}

The Act clearly contemplates the immediately effective appointment of the attorney in fact when the power is executed by the principal, rather than an appointment which does not take effect until incompetency. The statutes in some other states permit a power to become effective upon the incompetency of the principal. Such powers are called "springing" powers.\textsuperscript{65} Conse-
sequently, the question arises under the South Carolina version whether it is possible to provide for succession in the durable power in the event the original attorney in fact dies after the onset of incompetency. If the successor who purports to assume office after incompetency is viewed as having done so by reason of a deferred appointment, it may be that he has not been effectively appointed under South Carolina law. By contrast, if a successor is deemed to have been appointed concurrently with the execution of the power but is prohibited from acting until his predecessor has been removed, resigned, died, or otherwise prevented from serving, it may be that a successor has been appointed effectively. If the distinction is valid, succession provisions in the durable power should be drafted accordingly. A provision specifically permitting the original agent to appoint a successor may also resolve the succession problem if the vacancy is not created by the death or incapacity of the agent. 66

Another method to provide against vacancies in office is to appoint several persons as agents, each being authorized to act alone. If the durable power is limited in scope, such as transferring a settlor’s property to a revocable, inter vivos trust, the potential problems of having several agents may be minimal. If several agents are appointed under a general power, any exercise should require a majority of agents who are then living and have the legal capacity to act. The requirement of action by a majority will prevent separate, mutually contradictory actions by multiple agents acting independently. Without such a requirement, for example, a tract of the principal’s real property might be conveyed to one purchaser by one of several agents and to a second purchaser by another agent.

IV. APPLICATIONS FOR THE DURABLE POWER OF ATTORNEY

A. Who Needs a Durable Power of Attorney?

The answer to the question of who needs a durable power of attorney might be “Who needs a will?” or simply “Who will become incompetent?” The Act provides a reasonably simple mechanism by which a person may prepare for a contingency that could have devastating consequences to himself and to his family. Thus, the possibility of naming an agent under a durable power

66. RESTATEMENT (SECOND) OF AGENCY § 77, Comments a and b (1957).
should be discussed with any client for whom the lawyer is preparing a will or providing estate planning services.

B. In General

Under the general rules of the law of agency, an individual has broad discretion to delegate to other persons the power to act on his behalf.\(^\text{67}\) It is generally held that whatever a person can do himself, he may also do through an agent.\(^\text{68}\) Some rather narrow exceptions exist, however, for certain acts that are said to be so peculiarly personal that they cannot be delegated. For example, contracting for marriage and making of a will are nondelegable acts.\(^\text{69}\) Although South Carolina provides that a person may delegate the execution of the will under certain limited circumstances, the law does not expressly authorize the delegation of the necessary testamentary decisionmaking for the disposition of property, the appointment and empowerment of fiduciaries, and related matters.\(^\text{70}\) Similar restrictions may apply to delegating a right to create, amend, or revoke a revocable \textit{inter vivos} trust if the trust would otherwise serve as a substitute for the will by disposing of property after the decedent's death.\(^\text{71}\) Therefore, because the rules applicable to determining the matters which can or cannot be delegated are not well developed, the question of delegability must be considered by the draftsman with respect to each matter delegated.

C. Management of Assets

1. \textit{The General Durable Power of Attorney}.—A general power of attorney can be used as a device under which the incompetent's estate, not held in trust, can be managed by an individual, frequently a spouse or family member. If the general power is executed pursuant to the requirements of the durable power statute,\(^\text{72}\) incompetence will not, of course, make the power void or voidable. Other problems, however, are associated with such powers. As one writer has noted, "Any power of attorney is useful only to the extent the agent is able to persuade third persons to

\begin{itemize}
\item \(^\text{67}\) 2A C.J.S. Agency § 144 (1972).
\item \(^\text{68}\) Id.
\item \(^\text{69}\) Restatement (Second) of Agency § 17 (1957).
\item \(^\text{70}\) See S.C. Code Ann. § 21-7-50 (1976). For the text of this statute, see note 28 \textit{supra}.
\item \(^\text{71}\) Huff, \textit{supra} note 65, at § 305.4.
\item \(^\text{72}\) See notes 27-47 and accompanying text \textit{supra}.
\end{itemize}
permit him to transact business on behalf of the principal." It may generally be said that the more specific the language in a power of attorney, the more likely it is that third parties can be persuaded to deal with the attorney in fact. The form of general durable power of attorney set forth at the end of the article is prepared according to the requirements of the durable power statute and its length is attributable to an effort to include many powers specifically and in some detail.

2. The Limited Pour Over Durable Power.—Another application for the durable power that is extremely useful in an estate planning context is the limited "pour over" durable power. This special power permits the funding of an unfunded trust by an attorney in fact during the settlor’s lifetime after he has become incompetent. If an individual’s estate plan includes a pour over will and revocable unfunded inter vivos trust that permits but does not require the principal to fund the trust during his lifetime and the trust has provisions requiring the trustee to pay income and principal for the benefit of the settlor or his spouse and issue after such lifetime funding, the limited pour over durable power can still effectively fund the trust and accomplish the settlor’s estate plan. These powers limit the authority of the attorney in fact to transferring property from the settlor to the trustee. Because such trusts are normally revocable as long as the settlor is competent, the settlor does not assume much risk in appointing an attorney in fact under a power so limited. It is also prudent to consider the appointment of several attorneys in fact, all of whom are authorized to act either alone or together so that the death or unavailability of one attorney in fact will not defeat the entire scheme. Appointment of several attorneys in fact to serve concurrently, each having the power to act alone, may also eliminate problems of defining, providing for, and determining events of succession if an attorney in fact were appointed with successors.

In using the limited pour over durable power, care must be exercised so that portions of the testamentary scheme are not inadvertently defeated. If a pour over will and inter vivos trust dispose of the settlor’s property after death, an attorney in fact under the limited power may transfer the bulk of the settlor’s assets to the trust during his lifetime following the settlor’s incompetency. The transfer of assets may leave inadequate assets

73. Huff, supra note 65, at ¶ 304.
74. For an example of this limited pour over durable power, see Appendix B infra.
remaining in the executor's hands to satisfy bequests or devises under the will, and abatement may result. If this power of attorney is used, the estate planner should consider providing for contingent gifts under the trust, payable only if and to the extent that gifts under the will are not paid but would have been paid but for the transfer of the principal's assets to the trust by the attorney in fact.

D. Custody and Control of the Person

1. Custody and Control During the Principal's Lifetime.—When mental incompetency arises, attention is normally directed towards the legal problems of asset management, but equal, and sometimes greater, problems of the physical care of the incompetent are also presented. The new durable power of attorney can now provide the means by which persons can plan for their care and control if incompetency arises. The durable power can contain provisions relating not only to asset management, but also to the care, custody, and control of the incompetent. The use of this power can greatly alleviate these problems and facilitate the enterprise of caring for an incompetent and his estate. A power of attorney dealing with the custody of the person should cover such matters as the establishment of the incompetent's place of residence, including the specific location, city, county, and state, and it may also include establishing that residence at a nursing or convalescent home. The power can also permit the attorney in fact to retain and dismiss a variety of professional help (medical, legal, accounting) and to consent to those kinds of medical or surgical treatment and procedures for which consent is required. It should also convey the authority to pay debts, to apply for governmental and insurance benefits, to prepare and execute tax returns, to prosecute and defend legal actions, to purchase, dispose of or abandon clothing, household and personal effects, to arrange for transportation and travel, and perhaps even to make advance funeral arrangements.

2. The Living Will. 75—Because it is now possible for the life of an individual to be artificially prolonged by medical technology even though the brain function has irreversibly ceased, substantial concern and debate have arisen over the moral, legal, and ethical questions involved in such circumstances. Legislatures have been prompted to adopt statutes that permit an individual

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75. For an example of a living will, see Appendix C infra.
to request or require that he not be kept alive artificially if his brain function has irrevocably ceased, but such legislation has recently been rejected in South Carolina.76

It may be, however, that a properly drafted durable power of attorney can be utilized to authorize an attorney in fact to prohibit various kinds of medical treatment under circumstances when the principal does not desire to receive such treatment. At least two possible grounds appear for the validity of a durable power of attorney used for "antidysthanasium."77 (1) An individual has a right under common law to refuse medical treatment, but the extent of the right is not the subject of unanimous agreement among the jurisdictions. Some cases have held that a patient can refuse only "extraordinary," "extreme," "radical," or "heroic" measures or treatment,78 but such terms create definitional problems, because what may be extraordinary in one circumstance may not be in another. Other cases permit a patient to refuse even ordinary treatment such as a blood transfusion.79 No South Carolina cases have been decided in this area. The possibility of battery, however, should be of particular concern to anyone who administers medical treatment to a patient over the objection of a properly authorized attorney in fact of the patient,80 and in some instances, the patient has the statutory right to refuse certain kinds of medical treatment.81 (2) The right to refuse medical treatment may find some constitutional support in Justice Brandeis' dissenting opinion in Olmstead v. United States:82

The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men.83

77. The term "antidysthanasium" is defined to mean "the failure to take positive action to prolong the life of an incurable patient." Hyland & Baine, In Re Quinlan: A Synthesis of Law and Medical Technology, 18 JURIMETRICS J. 107, 120 (1977).
82. 277 U.S. 458 (1928).
83. Id. at 478 (Brandeis, J., dissenting).
More recently, the New Jersey Supreme Court in the case of *In re Quinlan*[^84] permitted a father, as guardian of his daughter, to authorize and require the discontinuance of medical equipment used to keep her alive. The comatose daughter had been diagnosed as being in a "chronic or persistent vegetative state,"[^85] characterized by decortication of the brain.[^86] The decision was grounded in the daughter's constitutional right to privacy.[^87]

A common law right to refuse medical treatment and a constitutional right to privacy may be rights that are delegable to an agent, and such an authorization may be permissible under South Carolina's new durable power of attorney act. Arguably, however, these rights may be so personal as to be nondelegable. If marriage and making a will are nondelegable duties, it is possible that the South Carolina Supreme Court may so classify delegations of the right to refuse medical treatment.

Even though the applicability of the Act to this kind of circumstance is not entirely clear, two benefits can nevertheless be derived from the execution of such a power on behalf of a principal who desires it. First, the power will establish the principal's desires under the circumstances, which should be an important consideration to whomever must ultimately make the final determination, whether it be physician, family, or the court, and for that reason it may have some persuasive effect. Second, the power might and probably should be held valid under a declaratory judgment obtained by the attorney in fact or an injunction obtained by him to carry out the principal's wishes.

In preparing a "living will" durable power, consideration should be given to including a statement of the principal's intent for whatever persuasive effect it may have and to serve as a guide to the construction of the instrument. In addition, the event that will authorize the attorney in fact to discontinue life-sustaining devices or medical treatment must be given careful consideration and may vary from one principal to another. One standard might be "irreversible cessation of spontaneous brain function."[^88] In addition, some thought must be given to the question of who will make the determination that the triggering event has occurred.

[^85]: Id. at 24, 355 A.2d at 654.
[^86]: Id.
[^87]: Id. at 38-42, 355 A.2d at 662-64.
Should it be one or perhaps two physicians, and what should their qualifications be? An exculpatory clause for the benefit of the attorney in fact and the medical personnel with whom he must deal for actions taken in reliance upon the durable power would be prudent. Specific authorization to the attorney in fact to obtain a declaratory judgment, to seek an injunction to enforce the power, and to seek damages will also aid in the implementation of the power. Because of the novelty of this application of the Act and the possibility of criminal sanctions if the power should be exercised and subsequently held invalid as unauthorized by the Act, prudence dictates that such a power should be exercised only after a declaratory judgment has been obtained permitting this application.

V. ESTATE TAX CONSIDERATIONS

A. I.R.C. Sections 2036 and 2038

Several sections of the federal estate tax (and the South Carolina estate tax as well) should be carefully considered by the draftsman in preparing a durable power of attorney. Sections 2036 and 2038 of the Internal Revenue Code provide a trap for the unwary. If the settlor of an irrevocable trust appoints his wife as trustee and the wife subsequently appoints the settlor-husband as agent under a general durable power of attorney, the entire trust may be brought back into the estate of the husband-settlor agent. The problem does not arise if the wife dies first, but if the husband predeceases her, the powers delegated to him under a broad, general durable power of attorney may trigger sections 2036 and 2038. If the powers of a trustee (a) are delegable under applicable state laws or expressly under the terms of the trust instrument and (b) are of such a nature that sections 2036 (retained life estate) or 2038 (power to alter, amend, revoke, or terminate) would apply, the trust principal may be includable in the settlor-agent’s gross estate. A general durable power of attorney given under those circumstances should expressly exclude a delegation to the agent of the principal’s trust powers.

89. See Schlesinger, Drafting the Estate Plan to Cover Disability, U. MIAMI 7TH ANN. INST. EST. PLAN. ¶ 73.211.4 (1973).
90. See I.R.C. §§ 2036, 2038.
91. Huff, supra note 65, at ¶ 309.4.
B. I.R.C. Section 2041

Section 2041 of the Internal Revenue Code also presents a potential problem for a power of attorney. Both federal and South Carolina tax laws define a general power of appointment as a power “exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate,”\(^\text{92}\) and such a power is includable in the decedent’s estate. If the power to make gifts can be and is effectively delegated to an agent under a general durable power of attorney and the potential donees of the gifts include the agent, section 2041 may be applicable. Several cases\(^\text{93}\) have held that a trustee with a power to appoint trust principal to himself or for his benefit possesses a general power of appointment, if the power is not sufficiently restricted.\(^\text{94}\) The description of the agent as a fiduciary in the South Carolina durable power of attorney act is especially significant for this reason.

Under the Internal Revenue Code, a power of appointment is not a general taxable power if it is limited to a power to “consume, invade or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support or maintenance of the decedent.”\(^\text{95}\) If the agent’s power to use the principal’s assets for his own benefit is limited, the agent probably does not possess a general power of appointment over the principal’s assets, and the assets will not be included in the agent’s estate.

Additionally, if the agent’s power to use the principal’s property for his own benefit is limited to the greater of $5,000 or five percent of the principal’s property on an annual noncumulative basis, the estate tax cost to the agent of such a power is limited to the extent to which the power could have been exercised by the agent at the time of his death.\(^\text{96}\)

The problem of section 2041 is not limited to instances in which gifts are involved. The regulations under section 2041 also provide: “A power of appointment exercisable for the purpose of discharging a legal obligation of the decedent . . . is considered a power of appointment exercisable in favor of the decedent or his


\(^{93}\text{See, e.g., Miller v. U.S., 387 F.2d 866 (3rd Cir. 1968); Strite v. McGinnes, 330 F.2d 234 (3rd Cir. 1964).}\)

\(^{94}\text{I.R.C. § 2041(b)(1)(A).}\)

\(^{95}\text{Id.}\)

\(^{96}\text{Id. § 2041(b)(2).}\)
creditors." If a wife gives her husband a broad general durable power of attorney under which it is possible for him to use her property to fulfill his legal obligation to provide for her support and he predeceases her, he may be deemed by the Internal Revenue Service to have died possessing a general power of appointment over his wife's assets since he could have used them to fulfill his legal obligation of support. If those assets are substantial, the estate tax consequences can well be disastrous. It may be possible, however, to avoid the problem by including a provision in the durable power prohibiting the agent from using the principal's property to pay his own legal obligations. Because the agent is a fiduciary under the Act such a provision may be unnecessary, but it should provide some insurance to the cautious draftsman.

C. I.R.C. Section 2042

If a husband has given an insurance policy to his wife and she appoints him as her attorney in fact under a broad, general durable power, the husband may possess the "incidents of ownership" of the policy which will bring it into his gross estate if he predeceases his wife. If a decedent possesses any of the incidents of ownership of an insurance policy at his death, the proceeds of the policy are includable in his estate for estate tax purposes. The regulations provide:

Generally speaking the term [incidents of ownership] has reference to the right of the insured or his estate to the economic benefits of the policy. Thus, it includes the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

The cases are divided on the question of whether incidents of ownership of an insurance policy held by a trustee will make such a policy includable in the trustee's gross estate for estate tax purposes. Because of this uncertainty, when the wife owns an

98. I.R.C. § 2042.
99. Id. § 2042(2).
101. In Estate of Skifter v. Comm'r, 468 F.2d 699 (2d Cir. 1972), the court held that a decedent trustee had no incidents of ownership in a trust unless the decedent also possessed the beneficial interest in the trust. But see Rose v. United States, 511 F.2d 259 (5th Cir. 1975).
102. Huff, supra note 65, at ¶ 309.5
insurance policy on her husband and appoints him under a general durable power, the power should expressly provide that the agent has no authority whatever over such insurance policies.

D. Specific Gifts

The making of gifts under a durable power, if permitted by applicable law, can have useful applications. Under prior federal estate tax law, all gifts made within three years of death were presumed, albeit rebuttably, to have been made in contemplation of death, and if the presumption was not rebutted, the gifts were included in the decedent’s gross estate at their value as of the date of his death. For gifts made after 1976, the 1976 Tax Reform Act automatically includes such gifts in the decedent’s gross estate. An exception is made, however, for annual present interest gifts for which no gift tax return is required to be filed. Thus, a person with three children and nine grandchildren can reduce his gross estate every year by as much as thirty-six thousand dollars with cash gifts to his children and grandchildren. Over a three-year period the estate can be reduced by more than one hundred thousand dollars. If the donor is incompetent, however, his gross estate cannot be so reduced. Therefore, if the durable power authorizes the continuation of a gift program, the estate can be reduced in this manner even if the principal is incompetent for many years prior to his death.

It has been suggested that if such gifts would have the effect of changing the ultimate disposition under a will they would be testamentary in nature and, therefore, would be nondelegable on the same grounds that the making of a will for another is nondelegable. In some cases, however, nontestamentary acts are permitted to have a testamentary effect. For example, the courts in some jurisdictions have permitted fiduciaries of an incompetent, upon the grounds of “substituted judgment,” to make inter vivos gifts. In South Carolina, a testamentary scheme may also be altered by “facts of independent significance.” Since the Act

105. I.R.C. § 2035(a).
106. Id. § 2035(b).
requires that durable powers be executed and attested like a will, the gifts under a delegable power may be valid, even if they may have some testamentary effect.

A durable power that specifically authorizes gifts limited to a pattern of giving established in the past among a specific group of recipients and not exceeding a prescribed amount per year would appear to be more supportable than an unlimited power to make gifts, because it is merely a continuation of the incompetent’s own actions before incompetency. Gifts in such a case might lose their testamentary taint.

If the principal intends that the attorney in fact be included among the authorized recipients of gifts under the power, the attorney in fact should be specifically named as a recipient to avoid the possibility of allegations of self-dealing.

E. Flower Bonds

Federal law permits certain United States bonds to be redeemed at par in payment of estate taxes. These “flower bonds” must have been purchased by the decedent prior to his death, either personally or by an agent under a durable power. If the purchase of the bonds might be advantageous, the attorney in fact under the durable power should be specifically authorized to purchase the bonds and, if necessary, to borrow the funds to make the purchase. Flower bonds purchased by an attorney in fact under a nondurable power of attorney may not be eligible for redemption if the decedent was incompetent at the time of the purchase. Some cases, however, hold the contrary.

Code Ann. §§ 21-33-10 to -40 (1976) (Addition to Trusts); Restatement (Second) of Trusts § 54 (1957).


111. I.R.C. § 6312 (repealed March 3, 1971, with respect to obligations subsequently issued but applicable to previously issued obligations).


113. Id.

114. In Estate of Pfohl, 70 T.C. No. 62 (August 7, 1978), the Tax Court held that the incompetence of the principal rendered the power of attorney voidable rather than void. The court concluded that since the executor did not disaffirm the purchase of the flower bonds, the purchase was valid. For further discussion of this issue, see 48 J. Tax. 26 (1978); 49 J. Tax. 9, 199, 272 (1978).
F. Deferrals of Estate Tax, Special Valuation, and Special Tax Treatment

Under applicable sections of the Internal Revenue Code, portions of the federal estate tax may be deferred,115 valuation of certain kinds of property may be reduced,116 and redemption of corporate stock may be treated as a capital gain if specified conditions are met.117 For example, under section 6166, portions of the estate tax attributable to an interest in a closely held business may be paid over a fifteen year period if the interest exceeds sixty-five percent of the value of the decedent’s adjusted gross estate for federal estate tax purposes. If the interest exceeds thirty-five percent of the value of the decedent’s gross estate or fifty percent of the value of the taxable estate, the estate tax attributable to the value of the interest may be paid over a ten-year period.118 If the decedent owned stock in a corporation and the stock comprises more than fifty percent of the value of the adjusted gross estate, the stock can be redeemed by the corporation for cash at capital gain rates to the extent of the aggregate amount of death taxes, federal taxes, and administration expenses.119 If fifty percent or more of the decedent’s adjusted gross estate consists of real or personal property used in farming or a closely held business and twenty-five percent of the adjusted gross estate consists of the adjusted value of such real property, the value of the farm or business may be reduced as much as $500,000 from its “highest or best use” value to its actual use value.120 Because the applicability of these tax relief sections is dependent upon these ratios, it is not uncommon for estate planners to recommend a program of arranging assets of the estate during a decedent’s lifetime to qualify under one or more of these statutes. This program can take the form of transferring additional assets to the business to increase the ratio of qualifying to nonqualifying assets in the estate or of making gifts to third parties of nonqualifying assets to achieve the same result.

Under an appropriately prepared durable power of attorney, and assuming no delegability problems,121 an attorney in fact will

115. I.R.C. §§ 6166, 6166A.
116. Id. § 2032A.
117. Id. § 303.
118. Id. § 6166.
119. Id. § 303.
120. Id. § 2032A.
121. See notes 67-71 and accompanying text supra.
be able to commence or continue such a program for the benefit of an incompetent.

G. Disclaimers and Renunciations

In some instances, a refusal by a beneficiary under a will to accept a testamentary gift can result in significant estate tax savings. For example, if a testator bequeaths a sum of money to a child, alternatively to the testator’s wife, a disclaimer or renunciation of that gift by the child may cause it to be distributed to the testator’s surviving spouse, possibly creating or increasing both federal and state estate tax marital deductions. Disclaimers of testamentary gifts, properly and timely made, are valid in South Carolina as a matter of property law and their use is recognized by provisions of state and federal tax law.

If the power to disclaim on behalf of an incompetent by an attorney in fact under a durable power of attorney is delegable, it is possible to obtain estate tax savings that will benefit members of the incompetent’s family. Consequently, if it is anticipated that a disclaimer problem may arise, it may be prudent to include in the durable power of attorney an authorization to disclaim, along with some guidelines governing the circumstances under which the power to disclaim should be exercised. A disclaiming attorney under a durable power may require litigation to establish its validity, but without the disclaimer provision, there may be nothing to litigate or negotiate.

VI. Summary

Important changes in the Act, however, are necessary to eliminate uncertainties and potential problems, but even in its

122. I.R.C. § 2518.
125. I.R.C. § 2518.
126. But see Huff, supra note 65, at ¶ 305.4.
127. The authors propose the following as amendments to the Act:

Whenever a principal designates another as his attorney-in-fact by a power of attorney in writing and the writing contains the words “This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate” or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding physical disability or mental incompetence, the authority of the attorney-in-fact is exercisable by him as provided in the power
present form the Act has provided new and helpful methods for dealing with problems of physical disability and mental incompetence. These methods are less expensive and more flexible than those previously in existence, and lawyers should not be reluctant to suggest the use of such power when indicated by the circumstances.

on behalf of the principal notwithstanding later disability or mental incompetence of the principal. All acts done by the attorney-in-fact pursuant to the power during any period of disability or mental incompetence shall have the same effect and inure to the benefit of and bind the principal or his heirs, devisees, legatees and personal representative as if the principal were mentally competent and not disabled. An instrument to which this act is applicable may also provide for successor attorneys-in-fact and provide conditions for their succession, and the succession may occur whether or not the principal is then physically disabled or mentally incompetent. The attorney-in-fact shall have a fiduciary relationship with the principal and shall be accountable and responsible as a fiduciary. The appointment of a power of attorney under this act shall not prevent a person or his representative from applying to the court and having a committee appointed after which the power of attorney shall become inoperative. A power of attorney executed under the provisions of this act shall be executed and attested with the same formality and with the same requirements as to witnesses as a will. In addition, the instrument shall be probated and recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded. After the instrument has been recorded (whether recorded prior to or after the onset of the principal's physical disability or mental incompetence) it shall be effective notwithstanding such physical or mental disability. Unless the instrument provides otherwise, the probate judge may, in his discretion, and at any time after the onset of mental disability, on motion of any interested party or his own motion, require that an inventory of all deposits, choses in action and personal property be filed with the court and a surety bond be posted by the attorney-in-fact in such manner and amount that would be applicable to an intestate's estate.
APPENDIX A

CHECKLIST — VARIABLE DURABLE POWER OF ATTORNEY

1. **Principal**
   A/01 Principal's name
   A/02 County
   A/03 Principal's City or Town

2. **Attorney in Fact**
   B/01 Attorney in fact name:
   - □ Use standby provision (Alt. §A)
     Standby Attorneys in fact:
     B/02
     B/03
     B/04

3. **Coverage**
   - □ Art. I §A—Broad coverage
   - □ Art. I §B—General Asset Management
   - □ Art. I §C—Management of Person
   - □ Art. I §D—Transfers-in-Trust

4. **Trustees**
   C/01 Name of Trustee:
   C/02 Date of Trust: □ "of even date herewith"
   □ 

5. **Miscellaneous**
   - □ Renunciation of Dower [Alt. §B]

6. **Copies**
   _____ copies (plus original & file copy)
STATE OF SOUTH CAROLINA  
COUNTY OF A/02  

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that as principal (the "Principal") I, A/01, a resident of A/03, the state and county aforesaid, have made, constituted and appointed and by these presents do make, constitute and appoint B/01 my true and lawful attorney ("Attorney") for the purposes hereinafter set forth.

[Optional: Subject to the limitations set forth in this paragraph, I have also made, constituted and appointed and by these presents do make, constitute and appoint as my true and lawful attorneys, B/02, B/03 and B/04, for the purposes hereinafter set forth. So long as the limitations described below shall apply to B/02, B/03 or B/04, they or such of them to whom such limitations apply shall be referred to herein as my "Standby Attorneys." The term "Attorney" as used herein shall apply to any Standby Attorney at such time as the limitations described below no longer apply.

(a) The limitations referred to above upon the authority of my Standby Attorneys to act hereunder are as follows:

(i) In no event is B/02 authorized to act hereunder so long as B/01 is living, competent to act and has not resigned nor been removed;

(ii) In no event is B/03 authorized to act hereunder so long as B/01 or B/02 is living, competent to act and has not resigned nor been removed;

(iii) In no event is B/04 authorized to act hereunder so long as either B/01, B/02 or B/03 is living, competent to act and has not resigned nor been removed.

(b) The limitations upon the authority to act of a Standby Attorney shall not apply if such Standby Attorney has executed and delivered an affidavit setting forth that the limitations described above upon such Standby Attorney’s authority to act do not then apply. Upon the execution and delivery of such an affidavit by a Standby Attorney, such Standby Attorney shall be authorized to act as Attorney and no person acting in reliance upon such affidavit shall incur liability to me or to my estate.

(c) A Standby Attorney is subject to removal as provided in Article II, paragraph D, hereof.]

ARTICLE I

Empowerment of Attorney

Attorney is authorized in Attorney’s absolute discretion from time to time and at any time with respect to my property, real or personal, at any time owned or held by me and without authorization of any court and in addition to any other rights, powers or authority granted by any other provision of this power of attorney or by statute or general rules of law (and regardless of whether I am mentally incompetent or physically or mentally disabled or incapable of managing my property and income), with full power of substitution, as follows:

A. Powers In General

To do and perform all and every act, deed, matter, and thing whatsoever in and about my estate, property and affairs as fully and effectually to all
intents and purposes as I might or could do in my own proper person, if personally present, the specifically enumerated powers described below being in aid and exemplification of the full, complete, and general power herein granted and not in limitation or definition thereof;

B. Powers Relating to Management of Assets

1. To buy, receive, lease as lessor, accept or otherwise acquire; to sell, convey, mortgage, grant options upon, hypothecate, pledge, transfer, exchange, quit-claim, or otherwise encumber or dispose of; or to contract or agree for the acquisition, disposal, or encumbrance of any property whatsoever or any custody, possession, interest, or right therein, for cash or credit and upon such terms, considerations and conditions as Attorney shall think proper, and no person dealing with Attorney shall be bound to see to the application of any monies paid;

2. To take, hold, possess, invest or otherwise manage any or all of my property or any interest therein; to eject, remove or relieve tenants or other persons from, and recover possession of, such property by all lawful means; and to maintain, protect, preserve, insure, remove, store, transport, repair, build on, raze, rebuild, alter, modify, or improve the same or any part thereof, and/or to lease any property, real or personal for me or my benefit, as lessee, with or without option to renew; to collect, receive and receipt for rents, issues and profits of my property;

3. To make, endorse, accept, receive, sign, seal, execute, acknowledge, and deliver deeds, assignments, agreements, certificates, endorsements, hypothecations, checks, notes, mortgages, vouchers, receipts, consents, waivers, releases, undertakings, satisfactions, acknowledgments and such other documents or instruments in writing of whatever kind and nature as may be necessary, convenient, or proper in the premises;

4. To subdivide, develop or dedicate real property to public use or to make or obtain the vacation of plats and adjust boundaries, to adjust differences in valuation on exchange or partition by giving or receiving consideration, and to dedicate easements to public use without consideration;

5. To invest and reinvest all or any part of my property in any property and undivided interests in property, wherever located, including bonds, debentures, notes, secured or unsecured, stocks of corporations regardless of class, interests in limited partnerships, real estate or any interest in real estate whether or not productive at the time of investment, interests in trusts, investment trusts, whether of the open and/closed fund types, and participation in common, collective or pooled trust funds or annuity contracts without being limited by any statute or rule of law concerning investments by fiduciaries;

6. To continue and operate any business owned by me and to do any and all things deemed needful or appropriate by Attorney, including the power to incorporate the business and to put additional capital into the business, for such time as Attorney shall deem advisable, without liability for loss resulting from the continuance or operation of the business except for Attorney's own negligence; and to close out, liquidate, or sell the business at such time and upon such terms as Attorney shall deem best;

7. To transfer all of my stock and/or securities to my Attorney, as agent (with the beneficial ownership thereof remaining in me) if necessary or convenient in order to exercise the powers with respect to such stock and/or securities granted herein;

8. To sell or exercise stock subscription or conversion rights;

9. To refrain from voting or to vote shares of stock owned by me at
shareholders' meetings in person or by special, limited, or general proxy and in general to exercise all the rights, powers and privileges of an owner in respect to any securities constituting my property;

10. To participate in any plan of reorganization or consolidation or merger involving any company or companies with respect to stock or other securities which I own and to deposit such stock or other securities under any plan of reorganization or with any protective committee and to delegate to such committee discretionary power with relation thereto, to pay a proportionate part of the expenses of such committee and any assessments levied under any such plan, to accept and retain new securities received by Attorney pursuant to any such plan, to exercise all conversion, subscription, voting and other rights, of whatsoever nature pertaining to such property, and to pay any amount or amounts of money as Attorney may deem advisable in connection therewith;

11. To institute, prosecute, defend, abandon, compromise, arbitrate, and dispose of legal, equitable, or administrative hearings, actions, suits, attachments, arrests, distresses or other proceedings, or otherwise engage in litigation involving me, my property or any interest of mine;

12. To deal with Attorney in Attorney's individual, or any fiduciary, capacity, in buying and selling assets, in lending and borrowing money, and in all other transactions, irrespective of the occupancy by the same person of dual positions;

13. To insure my property against damage or loss and Attorney against liability with respect to third persons;

C. Powers Relating to Custody of Person

1. In general, and in addition to all the specific acts in this section enumerated, to do any other act or acts, which I can do through an agent, for the welfare of my spouse, children and/or dependents or for the preservation and maintenance of my other personal relationships to parents, relatives, friends and organizations.

2. To do all acts necessary for maintaining the customary standard of living of my spouse, children, and/or dependents of mine, including by way of illustration and not by way of restriction, power to provide living quarters by purchase, lease or by other contract, or by payment of the operating costs, including interest, amortization payments, repairs and taxes, of premises owned by me and occupied by my family and/or dependents, to provide normal domestic help for the operation of the household, to provide usual vacations and usual travel expenses, to provide usual educational facilities, and to provide funds for all the current living costs of my spouse, children and/or dependents, including, among other things, shelter, clothing, food and incidentals; and if necessary to make all necessary arrangements, contractual or otherwise, for me at any hospital, nursing home, convalescent home or similar establishment;

3. To continue whatever provision has been made by me, prior to the creation of this power or thereafter, for my spouse, children and/or dependents, with respect to automobiles, or other means of transportation, including by way of illustration but not by way of restriction, power to license, to insure and to replace any automobiles owned by me and customarily used by my spouse, children and/or dependents; to apply for a Certificate of Title upon, and endorse and transfer title thereto, any automobile, truck, pickup, van, motorcycle or other motor vehicle, and to represent in such transfer assignment that the title to said motor vehicle is free and clear of all liens and
encumbrances except those specifically set forth in such transfer assignment;

4. To continue whatever charge accounts have been operated by me prior to the creation of this power or thereafter, for the convenience of my spouse, children and/or my dependents, to open such new accounts as Attorney shall think to be desirable for the accomplishment of any of the purposes enumerated in this section, and to pay the items charged on such accounts by any person authorized or permitted by me to make such charges prior to the creation of this Power;

5. To continue the discharge of any services or duties assumed by me prior to the creation of this power or thereafter, to any parent, relative or friend of mine;

6. To supervise, compromise, enforce, arbitrate, defend or settle any claim by or against me arising out of property damages or personal injuries suffered by or caused by me, or under such circumstances that the loss resulting therefrom will, or may fall on me; or to intervene in any action or proceeding relating thereto;

7. To continue payments incidental to my membership or affiliation in any church, club, society, order or other organization or to continue contributions thereto;

8. To demand, to receive, to obtain by action, proceeding or otherwise any money or other thing of value to which I am or may become or may claim to be entitled as salary, wages, commission or other distribution upon any stock, or as interest or principal upon any indebtedness, or any periodic distribution of profits from any partnership or business in which I have or claim an interest, and to endorse, collect or otherwise realize upon any instrument for the payment so received;

9. To prepare, to execute and to file all joint or separate tax, social security, unemployment insurance and information returns for any years required by the laws of the United States, or of any state or subdivision thereof, or of any foreign government, to prepare, to execute and to file all other papers and instruments which Attorney shall think to be desirable or necessary for safeguarding me against excess or illegal taxation or against penalties imposed for claimed violation of any law or other governmental regulation, and to pay, to compromise, or to contest or to apply for refunds in connection with any taxes or assessments for which I am or may be liable, to consent to any gift for gift tax purposes and to utilize any gift splitting provision, or to make any tax election;

10. To execute, to acknowledge, to verify, to seal, to file and to deliver any application, consent, petition, notice, release, waiver, agreement or other instrument which Attorney may think useful for the accomplishment of any of the purposes enumerated in this section;

11. To hire, to discharge, and to compensate any attorney, accountant, expert witness or other assistant or assistants where Attorney shall think such action to be desirable for the proper execution by Attorney of any of the powers described in this section, and for the keeping of needed records thereof;

12. To employ and compensate medical personnel including physicians, surgeons, dentists, medical specialists, nurses, and paramedical assistants deemed by Attorney needful for the proper care, custody and control of my person and to do so without liability for any neglect, omission, misconduct or the fault of any such physician or other medical personnel, provided such physician or other medical personnel were selected and retained with reason-
able care, and to dismiss any such persons at any time, with or without cause.

13. To authorize any and all kinds of medical procedures and treatment including but not limited to medication, therapy, surgical procedures, and dental care, and to consent to all such treatment, medication or procedures where such consent is required; to obtain the use of medical equipment, devices or other equipment and devices deemed by Attorney needful for proper care, custody and control of my person and to do so without liability for any neglect, omission, misconduct or fault with respect to such medical treatment or other matters authorized herein;

14. To apply for, elect, receive deposit and utilize on my behalf all benefits payable by any governmental body or agency, state, federal, county, city or other and to obtain, make claim upon, collect and dispose of insurance and insurance proceeds for my care, custody and control.

15. To house (or provide for housing), support and maintain any animals which I own and to contract for and pay the expenses of proper veterinary care and treatment for such animals, or if the care and maintenance of such animals shall become unreasonably expensive in Attorney’s opinion to dispose of such animals.

16. To deposit in my name and for my account, with any bank, banker or trust company or any building or savings and loan association or any other banking or similar institution, all moneys to which I am entitled or which may come into Attorney’s hands as such attorney-in-fact, and all bills of exchange, drafts, checks, promissory notes and other securities for money payable belonging to me, and for that purpose to sign my name and endorse each and every such instrument for deposit or collection; and from time to time, or at any time, to withdraw any or all monies deposited to my credit at any bank, banker or trust company or any building or savings and loan association or any other banking or similar institution having monies belonging to me, and, in connection therewith, to draw checks or to make withdrawals in my name; to make, do, execute, acknowledge and deliver, for and upon my behalf and in my name, all such checks, notes and contracts;

17. To endorse, receive, deposit and/or collect checks payable to my order drawn on the Treasurer or other fiscal officer or depository of the United States, or any sovereign state or authority, or any political subdivision or instrumentality thereof, or any private person, firm, corporation, or partnership;

18. To have access at any time or times to any safe deposit box rented by me, wheresoever located, and to remove all or any part of the contents thereof, and to surrender or relinquish said safe deposit box, and any institution in which any such safe deposit box may be located shall not incur liability to me or my estate as a result of permitting Attorney to exercise this power;

19. To borrow money and to encumber, mortgage or pledge any and all of my property in connection with the exercise of any power vested in Attorney;

20. To purchase for my benefit and in my behalf United States Government bonds redeemable at par in payment of United States estate taxes imposed at my death upon my estate;

21. To make advance arrangements for funeral services, including but not limited to purchase of a burial plot and marker and such other and related arrangements for services, flowers, ministerial services, transportation and other necessary, related, convenient or appropriate goods and services as my Attorney shall deem advisable or appropriate under the circumstances.
D. Powers Relating to Transfers in Trust

1. In Attorney’s sole discretion, to convey, assign and transfer to C/01 as trustee (the “Trustee”) under agreement (the “Trust”) with me as settlor, dated C/02, 19__, all or any part of my property and income of every kind and description, real, personal, intangible or mixed, wherever located, and whether acquired before or after the execution of this power of attorney, said property and income to be held, administered and distributed in accordance with the terms of the Trust;

2. In Attorney’s sole discretion, to assign to the Trust presently and prospectively (or designate Trustee as beneficiary of) the proceeds of and policies of insurance which I may now or hereafter become entitled to receive, including but not limited to insurance proceeds payable by reason of my disability, the said proceeds to be held, administered and distributed in accordance with the terms of the Trust;

3. To execute documents and papers, including deeds of my interests in real property, bills of sale of my personality, assignments of my intangibles (including my Certificates of Deposit), to make and/or endorse my checks, make savings withdrawals from my savings accounts, enter my safe deposit box and remove all or any part of the contents thereof which, together with any other and further acts or things necessary, appropriate or incidental thereto, shall be necessary or appropriate in order to make the transfers described above in paragraphs 1 and 2 of this Section;

ARTICLE II.

Termination, Amendment, Resignation and Removal

A. Power Not Affected by Principal’s Incapacity

This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate. It is my intent that the authority conferred herein shall be exercisable notwithstanding my physical disability or mental incompetence.

B. Termination and Amendment

This power of attorney shall remain in full force and effect until the earlier of the following events: (i) Attorney has resigned as provided herein; (ii) I have revoked this power of attorney by written instrument recorded in the public records of the county aforesaid, or (iii) a committee shall have been appointed for me by a court of competent jurisdiction. This power of attorney may be amended by me at any time and from time to time but such amendment shall not be effective as to third persons dealing with Attorney without notice of such amendment unless such amendment shall have been recorded in the public records of the county aforesaid.

C. Resignation

In the event that Attorney shall become unable or unwilling to serve or continue to serve, then Attorney may resign by delivering to me in writing a copy of his resignation and recording the original in the public records of the county aforesaid. Upon such resignation and recording, Attorney shall thereupon be divested of all authority under this power of attorney.
D. Removal

Any person named herein as Attorney may be removed by written instrument executed by me and recorded in the public records of the county aforesaid.

ARTICLE III.

Incidental Powers and Binding Effect

In connection with the exercise of the powers herein described, Attorney is fully authorized and empowered to perform any other acts or things necessary, appropriate, or incidental thereto, with the same validity and effect as if I were personally present, competent, and personally exercised the powers myself. All acts lawfully done by Attorney hereunder during any period of my disability or mental incompetence shall have the same effect and inure to the benefit of and bind me and my heirs, devisees, legatees and personal representatives as if I were mentally competent and not disabled. The powers herein conferred may be exercised by Attorney alone and the signature or act of Attorney on my behalf may be accepted by third persons as fully authorized by me and with the same force and effect as if done under my hand and seal and as if I were present in person, acting on my own behalf and competent. No person who may act in reliance upon the representations of Attorney for the scope of authority granted to Attorney shall incur any liability to me or to my estate as a result of permitting Attorney to exercise any power, nor shall any person dealing with Attorney be responsible to determine or insure the proper application of funds or property.

ARTICLE IV.

Miscellaneous

A. Exculpation

Attorney, Attorney’s heirs, successors and assigns are hereby released and forever discharged from any and all liability upon any claim or demand of any nature whatsoever by me, my heirs or assigns, the beneficiaries under my will or under any trust which I have created or shall hereafter create or any person whosoever on account of any failure to act of Attorney pursuant to this power of attorney.

B. Definitions

Whenever the word “Attorney” or “Principal” or any modifying or substituted pronoun therefor is used in this power of attorney, such words and respective pronouns shall be held and taken to include both the singular and the plural, the masculine, feminine and neuter gender thereof.

C. Severability

If any part of any provision of this power of attorney shall be invalid or unenforceable under applicable law, said part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of said provision or the remaining provisions of this power of attorney.

D. Compensation

Attorney shall be entitled to reimbursement for all reasonable costs and
expenses actually incurred and paid by Attorney on my behalf pursuant to any provision of this power of attorney, but Attorney shall not be entitled to compensation for services rendered hereunder.

E. Restrictions
Notwithstanding any provision herein to the contrary, Attorney shall not satisfy the legal obligations of Attorney out of any property subject to this power of attorney, nor may Attorney exercise this power in favor of Attorney, Attorney's estate, Attorney's creditors or the creditors of Attorney's estate.

F. Reservations
Notwithstanding any provision hereto to the contrary, Attorney shall have no power or authority whatever with respect to (a) any policy of insurance owned by me on the life of Attorney, and (b) any trust created by Attorney as to which I am a trustee.

IN WITNESS WHEREOF, as Principal, I have executed this power of attorney as of this day of , 19__, in multiple counterpart originals and I have directed that photographic copies of this power be made which shall have the same force and effect as an original.

_________________________________(SEAL)

PRINCIPAL

STATE OF SOUTH CAROLINA } ATTESTATION
COUNTY OF ___________________

The foregoing power of attorney was this day of , 19__, signed, sealed, published and declared by the Principal as the Principal's appointment and empowerment of an attorney-in-fact, in the presence of us who at the Principal's request and in the Principal's presence and in the presence of each other, have hereunto subscribed our names as witnesses hereto.

__________________________________ of ________________________________
Witness Address

__________________________________ of ________________________________
Witness Address

__________________________________ of ________________________________
Witness
STATE OF SOUTH CAROLINA  
COUNTY OF ____________  

PROBATE

Personally appeared deponent and made oath that deponent saw the within named Principal sign, seal and as the Principal's act and deed deliver the within power of attorney and that deponent, with the other witnesses whose names are subscribed above, witnessed the execution thereof.

________________________________________
Witness

SWORN to before me this
_____ day of ________, 19__.

________________________________________(L.S.)
Notary Public for South Carolina.

My Commission expires: ____________

Optional Renunciation of Dower:

STATE OF SOUTH CAROLINA  
COUNTY OF ____________  

RENUCIATION OF DOWER  
UNDER
S. C. CODE ANN. § 21-5-150

I the undersigned notary public do hereby certify unto all whom it may concern that the undersigned wife of the above named Principal did this day appear before me, and upon being privately and separately examined by me did declare that she does freely and voluntarily, without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish all her interest and estate and also all her right and claim of dower of, in or to, all and singular, such real property or any part or parts thereof, herein described, as may thereafter be conveyed or mortgaged under the terms of the within power of attorney to any grantee or grantees, mortgagee or mortgagees, the heirs, successors and assigns thereof forever.

________________________________________
Wife of the Principal

SWORN to before me this
_____ day of ________, 19__.

________________________________________(L.S.)
Notary Public for South Carolina.

My Commission expires: ____________
APPENDIX B

POUR OVER DURABLE POWER OF ATTORNEY

STATE OF SOUTH CAROLINA  
COUNTY OF _______________  

SPECIAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that as principal I, _______________ (hereinafter sometimes referred to as "principal"), a resident of the state and county aforesaid, have made, constituted and appointed and by these presents do make, constitute and appoint each of the following as my true and lawful attorneys:

1. ____________________________
2. ____________________________
3. ____________________________

said appointment being made for the purposes hereinafter set forth.

W IT N E S S E T H

WHEREAS, I have heretofore created a trust (the "Trust") by agreement dated ____________ with ______________ as trustee(s) (the "Trustee"), which trust contains provisions permitting the Trustee, among other things, to manage my property and income for my benefit, and,

WHEREAS, I desire to provide a means by which my property and income not heretofore assigned or transferred to the Trust, may be assigned or transferred to the Trust, and,

WHEREAS, the persons named above have agreed to act and serve hereunder in accordance with the terms hereof.

NOW, THEREFORE, THIS SPECIAL POWER OF ATTORNEY:

1. Empowerment of Attorney

Attorney (which term as used in this Special Power of Attorney shall mean any one of them acting alone, or two or more of them acting together) is authorized from time to time and at any time (and regardless of whether I am mentally incompetent or physically or mentally disabled or incapable of managing my property and income), as follows:

(a) In Attorney's sole discretion, to convey, assign and transfer to the Trustee all or any part of my property and income of every kind and description, real, personal, intangible or mixed, wherever located, and whether acquired before or after the execution of this Special Power of Attorney, said property and income to be held, administered and distributed in accordance with the terms of the Trust.

(b) In Attorney's sole discretion, to assign to the Trust presently and prospectively (or designate Trustee as beneficiary of) the proceeds of any policies of insurance which I may now or hereafter become entitled to receive, including but not limited to insurance proceeds payable by reason of my disability, the said proceeds to be held, administered and distributed in accordance with the terms of the Trust.

2. Resignation and Revocation

(a) This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate. It is my intent that the authority conferred herein shall be exercisable notwithstanding my physical disability or mental incompetence.
(b) This power of attorney shall remain in full force and effect until the earlier of the following events: (i) Attorney has resigned as provided herein, (ii) I have revoked this Special Power of Attorney by written instrument recorded in the public records of the county aforesaid, or (iii) a committee shall have been appointed for me by a court of competent jurisdiction.

(c) In the event that Attorney shall become unable or unwilling to serve, then Attorney may resign by delivering to me in writing a copy of his resignation and recording the original in the public records of the county aforesaid. Upon such resignation and recording, Attorney shall thereupon be divested of all authority under this Special Power of Attorney.

3. **Incidental Powers and Binding Effect**

(a) In order to make the transfers described above in subparagraphs (a) and (b) of paragraph 1 hereof, Attorney is fully authorized and empowered to execute documents and papers, including deeds of my interests in real property, bills of sale of my personality, assignments of my intangibles (including my Certificates of Deposit), to make and/or endorse my checks, make savings withdrawals from my savings accounts, enter my safe deposit box and remove all or any part of the contents thereof and to perform any other and further acts or things necessary, appropriate or incidental thereto, with the same validity and effect as if I were personally present, competent and personally exercised the powers myself. No person dealing with Attorney shall be responsible to determine or insure the proper application of funds or property.

(b) All acts done by Attorney pursuant to this Special Power of Attorney during any period of disability or mental incompetence shall have the same effect and inure to the benefit of and bind me and my heirs, devisees, legatees and personal representatives as if I were mentally competent and not disabled.

(c) The powers herein conferred may be exercised by Attorney alone and the signature or act of Attorney on my behalf may be accepted by third persons as fully authorized by me and with the same force and effect as if done under my hand and seal and as if I were present in person, acting on my own behalf and competent. No person who may act in reliance upon the representations of Attorney for the authority granted to Attorney shall incur any liability to me or to my estate as a result of permitting Attorney to exercise any power.

(d) Any action taken by Attorney pursuant to this power shall be deemed conclusively to be an acceptance of the appointment hereunder as attorney-in-fact.

4. **Exoneration of Attorney and Trustee**

Attorney, Attorney's heirs, successors and assigns, and the Trustee, its directors, employees, attorneys, agents and servants, successors and assigns, are hereby released and forever discharged from any and all liability upon any claim or demand of any nature whatsoever by me, my heirs or assigns, the beneficiaries under my will or under any trust which I have created or shall hereafter create or any person whomsoever on account of action taken or failure to act of Attorney and/or Trustee pursuant to this Special Power of Attorney.

IN WITNESS WHEREOF, as principal, I have executed this Special Power of Attorney as of this ____ day of __________, 19_____, in several counterpart originals and I have directed that photographic copies of this
power be made which shall have the same force and effect as an original.

__________________________________________ (SEAL)

PRINCIPAL

STATE OF SOUTH CAROLINA  }
COUNTY OF_______________ }  ATTESTATION

The foregoing Special Power of Attorney was this _____ day of ______, 19____, signed, sealed, published and declared by the principal as his appointment and empowerment of attorneys in fact, in the presence of us who at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses hereto.

_________________________ of __________________________
Witness Address

_________________________ of __________________________
Witness Address

_________________________ of __________________________
Witness Address

STATE OF SOUTH CAROLINA  }
COUNTY OF_______________ }  PROBATE

Personally appeared deponent and made oath that deponent saw the within named principal sign, seal and as the principal’s act and deed deliver the within Special Power of Attorney and that deponent, with the other witnesses whose names are subscribed above, witnessed the execution thereof.

_________________________
Witness

SWORN to before me this
_____ day of __________, 19_____.

_________________________ (L.S.)
Notary Public for South Carolina
My Commission expires:___________
Optional Renunciation of Dower:

STATE OF SOUTH CAROLINA  
COUNTY OF______________  

RENUNCIATION OF DOWER  
UNDER  
S. C. CODE ANN. § 21-5-150  

I, the undersigned notary public do hereby certify unto all whom it may concern that the undersigned wife of the above named principal did this day appear before me, and upon being privately and separately examined by me did declare that she does freely and voluntarily, without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish all her interest and estate and also all her right and claim of dower of, in or to, all and singular, such real property or any part or parts thereof, described herein, as may thereafter be conveyed under the terms of the within Special Power of Attorney to any grantee or grantees, the heirs, successors and assigns thereof forever.

___________________________________________
Wife of the Principal

SWORN to before me this
____ day of ____________, 19___.
___________________________________________(L.S.)
Notary Public for South Carolina

My Commission expires:_______________
APPENDIX C

DURABLE POWER OF ATTORNEY — LIVING WILL — MULTIPLE APPOINTMENT

STATE OF SOUTH CAROLINA } SPECIAL POWER OF ATTORNEY
COUNTY OF__________________________ }

KNOW ALL MEN BY THESE PRESENTS that as principal I, ___________________________ (hereinafter sometimes referred to as "Principal"), a resident of the state and county aforesaid, have made, constituted and appointed and by these presents do make, constitute and appoint each of the following as my true and lawful attorneys:

1. ___________________________
2. ___________________________
3. ___________________________

said appointment being made for the purposes hereinafter set forth.

WHEREAS, despite my desire to live and enjoy life as long as possible, I nevertheless do not wish to prolong my life at all costs. Accordingly, I desire to establish the means by which, under the circumstances specified below, my life shall not be prolonged by artificial means and I shall be permitted to die, and

WHEREAS, I desire that my wishes in this regard be carried out, despite the contrary feelings, beliefs or opinions of my immediate family, other relatives or friends, and

WHEREAS, under the circumstances specified below, the existence of which having been determined in the manner hereinafter described, I expressly do not consent to the use of such medication or such life sustaining devices as shall be specified by any of my attorneys in fact named herein,

NOW, THEREFORE, THIS SPECIAL POWER OF ATTORNEY:

1. Empowerment of Attorney

Attorney (which term as used in this special power of attorney shall mean any one of them acting alone, or two or more of them acting together) is authorized as follows:

(a) In Attorney’s sole discretion, to discontinue all, some, or any medication being administered to me and all, some, or any life sustaining devices being operated for my benefit, provided in the opinion of two or more physicians licensed to practice in South Carolina, based upon ordinary standards of medical practice, given in writing to Attorney:

(i) I have undergone an irreversible cessation of total spontaneous brain function, or

(ii) I have lost consciousness for a period of six months and my condition is terminal, irreversible, or there is no reasonable medical expectation of recovery.

(b) In Attorney’s sole discretion, to petition any court of competent jurisdiction for a mandatory injunction requiring compliance by hospital staff, doctors, nurses or any other medical personnel with the actions taken by Attorney authorized under this special power of attorney.

(c) In Attorney’s sole discretion, prior to taking any of the actions
authorized hereunder, to seek on my behalf and at my expense a declaratory judgment from any court of competent jurisdiction interpreting the validity of any or all acts authorized by this special power of attorney, but such declaratory judgment shall not be necessary in order for Attorney to perform any act authorized hereunder.

(d) In Attorney's sole discretion, in my name, on my behalf and at my expense to bring an action against any hospital staff, physician, nurse or other medical personnel who fail to comply with actions taken by Attorney under this special power of attorney and to demand damages of all kinds, including actual and punitive damages.

2. Resignation and Revocation

(a) This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate. It is my intent that the authority conferred herein shall be exercisable notwithstanding my physical disability or mental incompetence.

(b) This power of attorney shall remain in full force and effect until the earlier of the following events:

(i) Attorney has resigned as provided herein;

(ii) I have revoked this special power of attorney by written instrument recorded in the public records of the county aforesaid; or

(iii) A committee shall have been appointed for me by a court of competent jurisdiction.

(c) In the event that Attorney shall become unable or unwilling to serve or to continue to serve, then Attorney may resign by delivering to me in writing a copy of his resignation and recording the original in the public records of the county aforesaid. Upon such resignation and recording, Attorney shall thereafter be divested of all authority under this special power of attorney.

3. Incidental Powers and Binding Effect

(a) The powers herein conferred may be exercised by Attorney alone and the signature or act of Attorney on my behalf may be accepted by third persons as fully authorized by me and with the same force and effect as if done under my hand and seal and as if I were present in person, acting on my own behalf and competent. No person who may act in reliance upon the representations of Attorney for the authority granted to Attorney shall incur any liability to me or to my estate as a result of permitting Attorney to exercise any power. I do hereby ratify and confirm each and every act which Attorney shall and may do by virtue hereof.

(b) The invalidity of any provision or part of this special power of attorney shall not affect the validity of any other provision or part hereof.

4. Exoneration of Attorney and Others

On behalf of myself, my heirs, assigns, executors and administrators, I hereby release and forever discharge Attorney as well as any hospital staff, physician, or nurse or other medical personnel acting pursuant to any authorization by Attorney for rendering an opinion to my Attorney as hereinabove described relied on by Attorney and all other persons, firms and corporations who have or shall have acted in reliance upon this special power of attorney, from all liability, claims or damages of any kind arising out of any act authorized directly or indirectly or by necessary implication under this instrument.
IN WITNESS WHEREOF, as Principal, I have executed this Special Power of Attorney as of this _____ day of _________, 19___, in several counterpart originals and I have directed that photographic copies of this power be made which shall have the same force and effect as an original.

(SEAL)

PRINCIPAL

STATE OF SOUTH CAROLINA { 
COUNTY OF________________ } 
ATTESTATION

The foregoing Special Power of Attorney was this_____ day of_________, 19___, signed, sealed, published and declared by the principal as his appointment and empowerment of an attorney in fact, in the presence of us who at his request and in his presence of each other, have hereunto subscribed our names as witnesses hereto.

Witness

___________________________ of _________________ Address

Witness

___________________________ of _________________ Address

Witness

___________________________ of _________________ Address

STATE OF SOUTH CAROLINA { 
COUNTY OF________________ } 
PROBATE

PERSONALLY APPEARED the undersigned witness and made oath that deponent saw the within named Principal sign, seal and as Principal's act and deed deliver the within Special Power of Attorney and that deponent, with the other witnesses whose names are subscribed above, witnessed the execution thereof.

___________________________

Witness

SWORN TO before me this

_____ day of _________, 19___

___________________________ (L.S.)

Notary Public for South Carolina

My Commission expires:______________