

**Alabama State Bar  
Elder Law Section**

**Summary of Elder Law Section Meeting and News  
Alan Zeigler, Chair  
September 30, 2011**

For everyone who missed it, we had a great Elder Law Section meeting on Friday, September 30, in Gardendale. Many thanks to everyone for their attendance and participation at the meeting. Special thanks to Jodi McKelvin and Teresa Watson for the suggestion of the location and for handling planning and logistics for the meeting.

John Craft provided an excellent presentation on the Uniform Power of Attorney Act for our CLE segment. John's printed materials are attached here and will also be posted on the ELS Yahoo Group site for future reference. This information is important to every member, so take advantage of these resources. A question raised in the discussion about the origin, development and enactment of this legislation: How could this legislation have been enacted largely without our knowledge and involvement as a section or as individual practitioners? This is something our section should have been involved with, but it was driven by other constituencies and largely without our knowledge. We should work to take a higher profile and more active role in legislative matters that impact our clients and the elder law bar in the future.

Our section's financial situation continues to be solid with \$17,996.81 in the section account. Membership is down somewhat. Jodi McKelvin has taken extra steps to ensure that changes in the membership procedures made by ASB (email notices rather than mailed section membership forms) have not resulted in members forgetting to join the section. (I have since the meeting touched base with Rita Gray at ASB and additional members have now responded—thanks, Jodi!) If you login to the ASB site with your member ID and click your name, you can enroll and pay section dues by credit card or download a paper application for payment by check. A great feature of the online enrollment and payment system is that if you have already paid your dues and belong to the section, the check box for Elder Law Section will not appear. Log onto the ASB website and check you status if you are not sure.

The section now has a Social Networking Committee to develop a strategy for using social networking resources both internally for our section members and as a service outreach to the public. There are more and better communication tools available now than ever before, but we have to decide exactly how to exploit them to achieve our objectives. The section has long had a Yahoo group (alaelderlaw). If you are not part of the the group, join the conversation by joining the group. This is a great resource that is restricted to use by dues paying members of the section. Our Social Networking Committee will be exploring new tools we may want to use such as Facebook, Twitter and Google+. Committee members in addition to myself are Steve Bailey, Chip Durham, John Holliman, Betty Shinn and Jodi McKelvin. I intend to use Skype for some online conference calling to accomplish the work of this committee, so make sure to get your Skype software loaded and establish a Skype ID!

I have attached a copy of the previously adopted Resolution of Enablement for our Litigation Support Committee. This committee (John Harris, Chip Durham and section officers along with added members Jim Zeigler and Clayton Davis) has been granted the authority to administer a program in support of litigation on matters of general interest and application regarding Medicaid eligibility. It was determined in a meeting of the committee following the section meeting that the following

procedure will be followed.

1. The committee will identify a panel of “experts” in Medicaid litigation to support the section generally in this effort. Ideally, there will be an expert for each Medicaid district office. Initially, persons identified are Chip Durham, John Harris and Steve Bailey. Interest from other members is solicited and will be appreciated.
2. The committee will follow up and evaluate potential cases submitted by section membership. To submit a case for litigation support, provide the following:
  - Fact summary of the case
  - Description of issue of general interest & application
  - Identify pending dates and deadlines
  - Provide the rule cited for denial
  - Attach a copy (redacted) of the denial notice
  - Estimate a budget for litigation (if known)

The committee has specifically identified Rule 560-X-25-.04 denials as an area of interest and general applicability. If you have a .04 denial that would be a good use of section resources that cannot otherwise be funded, notify committee members via email, the Yahoo group or contact myself or other section officers. Our section has made the commitment to support the litigation effort in appropriate cases, and the committee is prepared to move on the right cases. We have the resources and see this effort as an absolute benefit to our members and to the disabled seniors of our state.

Alan Zeigler, Chair  
Elder Law Section  
(205) 879-3535  
azeigler@zeiglerlawfirm.com

Year Ending June 30, 2011

**Alabama State Bar Elder Law Section**

**Annual Financial Report**

July 1, 2010 – June 30, 2011

Beginning Balance – 7/1/2010	\$16,435.17
Income	
Section Dues Received from ASB	\$3,070.00
Total Income	\$3,070.00
Expenses	
Meeting Expenses	\$1,383.48
Awards, Plaque	\$124.88
Total Expenses	\$1,508.36
Ending Balance – 6/30/2011	\$17,996.81

Submitted by: s/John Craft  
Treasurer

Date: July 21, 2011

Elder Law Section Litigation Support Committee

RESOLUTION OF ENABLEMENT

WHEREAS, a primary purpose of the Elder Law Section of the Alabama State Bar is to enable cooperation among its members to promote legal advocacy in areas of the law that affect the elderly and disabled citizens of Alabama, and

WHEREAS, it is apparent to the members of the Elder Law Section of the Alabama State Bar that the Alabama Medicaid Agency, and perhaps other government agencies, being fully aware the persons they serve are ordinarily impoverished and unable to afford legal counsel, impose regulations and practices that unlawfully interfere with the enjoyment of rights by the elderly and disabled citizens of Alabama which are available to other citizens of these United States, and

WHEREAS, it is our duty as members of the elder law bar to oppose and resist those unlawful impositions by state and federal agencies which are charged with the implementation of government programs intended to alleviate economic hardship among the citizens of Alabama,

NOW THEREFORE, in order to forward this purpose and advocate on behalf of the rights of the elderly and disabled citizens of Alabama, we hereby adopt the following program to support necessary litigation on behalf of those citizens, to-wit:

1. There is hereby established an Elder Law Section Litigation Support Committee which is charged with the administration of this program. The committee shall be composed of the duly elected officers of the section and two members elected to the committee by the membership of the Elder Law Section. The first elected members of the committee shall be elected at the meeting at which this resolution is adopted, thereafter the elected members of this committee shall be nominated and elected at the same time and in the same process as the officers of the section.

2. The committee shall have the authority to seek out situations with the potential to have a positive effect for the elderly or disabled residents of Alabama and to determine, on behalf of the entire section, which cases are appropriate for financial support by the section and may authorize the expenditure of section funds up to \$2,500.00 in support of an individual case. The maximum annual combined amount authorized for litigation support shall be determined by the Section on a yearly basis, after taking into consideration the funds already on hand and expected revenues from all sources. The maximum combined amount for this administrative year is established as \$5,000.00.

3. The amount appropriated by the committee in support of a case shall be determined by the committee and shall not automatically be for the full amount of \$2,500.00, but may be in any amount not exceeding that sum as the committee may deem appropriate. It is contemplated that support for a case might be to reimburse a filing fee or other out of pocket expense, or might include the payment of legal fees in some amount.

4. The objective shall be to do the most good for the most people with the limited funds available, therefore, in determining the appropriate amount of financial support for a case, the committee shall consider the following factors.

A. The number of Alabamians the committee believes will be favorably impacted if the matter is brought to a successful conclusion.

B. The magnitude of injustice the imposition of the policy or practice has on persons who are affected by it.

C. The likelihood the issue can be resolved with a successful conclusion.

D. The effect an expenditure on a matter will have on the ability of the Section to support some other existing or potential meritorious matter.

E. Such other factor as the committee shall deem relevant to the decision.

# **The New Alabama Uniform Power of Attorney Act**

By:

John C. Craft  
Clinical Assistant Professor of Law  
Faulkner University, Jones School of Law  
5345 Atlanta Highway  
Montgomery, AL 36109  
334-386-7975  
jcraft@faulkner.edu

Elder Law Section CLE  
September 30, 2011

## **Applicability**

The new Alabama Uniform Power of Attorney Act (the “Act”) is found at Alabama Code (1975) sections 26-1A-101 through 404. This Act revises the current durable power of attorney law in Alabama found in only one code section, Ala. Code § 26-1-2. Alabama modeled the Act after the Uniform Power of Attorney Act (the “Uniform Act”) drafted by the Uniform Law Commission in 2006. However, the Act is not identical to the Uniform Act.

The Act is prospective in application and is effective with powers of attorney executed on and after January 1, 2012.<sup>1</sup> Current section 26-1-2 will continue to govern all powers executed prior to January 1, 2012. Section 26-1A-404 of the Act governs and applies to health care powers of attorney executed on and after January 1, 2012.<sup>2</sup> Section 26-1A-404 carries forward existing law as it relates to health care powers. The new Act does not affect the Natural Death Act.<sup>3</sup>

## **Definitions**

The new Act contains definitions in section 26-1A-102. Some of the terms defined are “good faith”, “incapacity”, and “sign”. Good faith means “honesty in fact”.<sup>4</sup> Incapacity is defined as the:

inability of an individual to manage property or business affairs because the individual: (A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (B) is: (i) missing; (ii) detained, including incarcerated in a penal system; or (iii) outside the United States and unable to return.<sup>5</sup>

---

<sup>1</sup> 26-1A-103.

<sup>2</sup> 26-1A-103(b).

<sup>3</sup> 26-1A-103(b).

<sup>4</sup> 26-1A-102(4).

<sup>5</sup> 26-1A-102(5).

“Sign” means with present intent to authenticate or adopt a record: (A) to execute or adopt a tangible symbol; or (B) to attach to or logically associate with the record an electronic sound, symbol, or process.<sup>6</sup>

### **Durability**

Durability means that a power of attorney is not terminated by the principal’s incapacity.<sup>7</sup>

Under current law, the default rule is for powers of attorney to be void when the principal becomes incapacitated unless the power of attorney contains specific language making it durable.<sup>8</sup> The new Act reverses the default to make a power of attorney durable unless it expressly provides that it is terminated by the incapacity of the principal.<sup>9</sup>

### **Execution/Validity**

Current section 26-1-2 does not contain specific formal requirements for the creation of a power of attorney, other than that it must be in writing.<sup>10</sup> The new Act includes a slightly more formal execution requirement:

A power of attorney must be signed by the principal or in the principal’s conscious presence by another individual directed by the principal to sign the principal’s name on the power of attorney.<sup>11</sup>

Furthermore, “[a] signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.”<sup>12</sup> A power of attorney executed in Alabama which complies with the execution requirements of section 26-1A-105 is “valid”.<sup>13</sup> The comments to the Uniform Act state that this section is not intended to abrogate the traditional grounds for contesting the

---

<sup>6</sup> 26-1A-102(12).

<sup>7</sup> 26-1A-102(2).

<sup>8</sup> 26-1-2(a).

<sup>9</sup> 26-1A-104.

<sup>10</sup> 26-1-2(a).

<sup>11</sup> 26-1A-105.

<sup>12</sup> 26-1A-105.

<sup>13</sup> 26-1A-106(a).

validity of execution such as forgery, fraud, or undue influence.

### **When Powers Effective**

The default rule under the new Act is that a power of attorney is immediately effective when executed.<sup>14</sup> In order to make a power of attorney “springing”, specific language must be included indicating that the power is effective at a future date or upon the occurrence of a future event or contingency.<sup>15</sup>

### **Determining Incapacity**

For springing powers of attorney, a principal may authorize one or more persons to determine in a writing or other record that the event (incapacity) has occurred.<sup>16</sup> That person may act as the principal’s personal representative pursuant to HIPAA to obtain access to the principal’s health care information and communicate with the principal’s health care provider.<sup>17</sup> If a principal has not authorized a person to determine whether the principal is incapacitated, or the person is unwilling or unable to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by a physician or licensed psychologist that the principal is incapacitated.<sup>18</sup>

### **Agents - Appointment**

As a default, if a principal designates two or more persons to act as co-agents, each co-agent may exercise its authority independently.<sup>19</sup> If a principal intends for co-agents to act jointly and together, the power of attorney must include language to that effect.<sup>20</sup> Of course, a

---

<sup>14</sup> 26-1A-109(a).

<sup>15</sup> 26-1A-109(a).

<sup>16</sup> 26-1A-109(b).

<sup>17</sup> 26-1A-109(d).

<sup>18</sup> 26-1A-109(c)(1).

<sup>19</sup> 26-1A-111(a).

<sup>20</sup> 26-1A-111(a).

principal may appoint successor agents.<sup>21</sup> A principal may also grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function.<sup>22</sup>

### **Agents - Fiduciary Duties – Liability to Principal**

The Act provides certain mandatory fiduciary duties of an agent. At a minimum, and notwithstanding any provisions in the power of attorney, an agent must act:

- (1) in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
- (2) in good faith; and
- (3) only within the scope of authority granted in the power of attorney.<sup>23</sup>

The Act provides other fiduciary duties which can be modified or omitted by a principal.

Section 26-1A-114(b) lists the fiduciary duties of an agent "except as otherwise provided in the power of attorney". See Appendix A.

An agent that breaches a fiduciary duty ("violates this chapter") is liable to the principal or the principal's successors in interest for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred.<sup>24</sup> And, the agent is liable for the amount required to reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid by the principal on the agent's behalf.<sup>25</sup> Section 26-1A-114 provides some protection for agents from liability in certain circumstances:

- An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.<sup>26</sup>
- An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.<sup>27</sup>

---

<sup>21</sup> 26-1A-111(b).

<sup>22</sup> 26-1A-111(b).

<sup>23</sup> 26-1A-114(a)(1-3).

<sup>24</sup> 26-1A-117(1).

<sup>25</sup> 26-1A-117(2).

<sup>26</sup> 26-1A-114(c).

<sup>27</sup> 26-1A-114(d).

- Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.<sup>28</sup>
- An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.<sup>29</sup>

A principal, in a power of attorney, may exonerate or relieve an agent of liability for breach of duty.<sup>30</sup> Such a provision is binding on the principal and the principal's successors in interest except to the extent the provision:

- (1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or
- (2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.<sup>31</sup>

### **Agents - Liability for Actions of Other Agents**

An agent is generally not liable for a breach of fiduciary duty committed by another agent unless the agent participates in or conceals the breach of fiduciary duty.<sup>32</sup> However, a co-agent or successor agent may be liable for a breach of fiduciary duty by another agent if they have actual knowledge of a breach (or imminent breach) and fail to notify the principal or take action:

An agent that has accepted appointment and has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest.<sup>33</sup>

An agent accepts appointment by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.<sup>34</sup> As for liability under this section, an agent that fails to notify the principal or take action is liable for the reasonably foreseeable damages

<sup>28</sup> 26-1A-114(f).

<sup>29</sup> 26-1A-114(g).

<sup>30</sup> 26-1A-115.

<sup>31</sup> 26-1A-115(1,2).

<sup>32</sup> 26-1A-111(c).

<sup>33</sup> 26-1A-111(d).

<sup>34</sup> 26-1A-113.

that could have been avoided if the agent had notified the principal or taken such action.<sup>35</sup>

### **Judicial Relief**

A long list of persons may petition a court to construe a power of attorney, determine the validity of a power of attorney, or review the agent's conduct, and grant appropriate relief.<sup>36</sup>

### **Acceptance of, reliance upon, and liability for refusal to accept acknowledged power of attorney**

Sections 119 and 120 of the Act deal with acceptance of and reliance upon acknowledged powers of attorney, and liability for refusal to accept acknowledged powers of attorney. The Act reflects several changes to the Uniform Act. The Alabama comments state that the changes are intended to better promote the reliance upon powers of attorney. In section 119, two terms are defined. First, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgments.<sup>37</sup> Second, "reasonable time" shall not be deemed to be less than seven business days.<sup>38</sup>

A person that effects a transaction in reliance upon an acknowledged power of attorney may rely on the presumption under Section 26-1A-105 that the signature is genuine, unless the person has actual knowledge that the signature is not genuine.<sup>39</sup> Furthermore, Alabama fully exonerates a person from liability for effecting a transaction in reliance upon an acknowledged power of attorney unless the person has actual knowledge of one or more of the facts specified in subsection 119(c): that the power of attorney is void, invalid, or terminated; that the purported agent's authority is void, invalid, or terminated; or that the agent is exceeding or improperly

---

<sup>35</sup> 26-1A-111(d).

<sup>36</sup> 26-1A-116(a).

<sup>37</sup> 26-1A-119(a).

<sup>38</sup> 26-1A-119(a).

<sup>39</sup> 26-1A-119(b).

exercising the agent's authority.<sup>40</sup>

A person that is asked to effect a transaction in reliance upon an acknowledged power of attorney may, of course, effect the transaction. The Act also provides three other options the person may pursue. The person may, but is not required to, request, and rely upon, without further investigation:

- (1) an agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;
- (2) an acknowledged or properly authenticated English translation of the power of attorney; and
- (3) an opinion of counsel as to any matter of law concerning the power of attorney.<sup>41</sup>

If a person requests a certification, translation, or opinion of counsel, the person shall effect the transaction within a reasonable time after receipt of the certification, translation, or opinion of counsel.<sup>42</sup> A person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.<sup>43</sup> Section 26-1A-120(b) provides several circumstances in which a person is not required to effect a transaction in reliance upon an acknowledged power of attorney. See Appendix B.

“A person that refuses in violation of this section to effect a transaction in reliance upon an acknowledged power of attorney is subject to, as its sole liability with respect to such a refusal notwithstanding Section 26-1A-123: (1) a court order mandating that the person effect such transaction in reliance upon the power of attorney; and (2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates that the person effect such transaction in reliance upon the power of attorney.”<sup>44</sup>

---

<sup>40</sup> 26-1A-119(c).

<sup>41</sup> 26-1A-119(d)(1-3).

<sup>42</sup> 26-1A-120(a)(2).

<sup>43</sup> 26-1A-120(a)(3).

<sup>44</sup> 26-1A-120(c)(1,2).

Section 26-1A-123 provides that the remedies available under this chapter are not exclusive and do not abrogate any right or remedy under Alabama law other than this chapter.

### **Grants of Authority**

First, the Act provides that certain types of authority which a principal may grant to an agent require a specific grant in the power of attorney. An agent may do the following on behalf of the principal only if the power of attorney expressly grants the authority:

- (1) Create, amend, revoke, or terminate an inter vivos trust;
- (2) Reserved;
- (3) Create or change rights of survivorship;
- (4) Create or change a beneficiary designation;
- (5) Delegate authority granted under the power of attorney;
- (6) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- (7) Exercise fiduciary powers that the principal has authority to delegate.<sup>45</sup>

Alabama deleted "make a gift" from the Uniform Act as one of the types of authority that require a specific grant in the power of attorney. The Alabama comments state that this deletion is significant, but is consistent with current Alabama Code Section 26-1-2.1(a). In the new Act, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 26-1A-204 through 26-1A-217, including the gifting authority described in Section 217.<sup>46</sup> See Appendix C, Section 217. A grant of gifting authority beyond the limits of Section 217 must be expressly granted in the power of attorney.<sup>47</sup>

Second, the Act delineates and defines the types of general authority which may be

---

<sup>45</sup> 26-1A-201(a)(1-7).

<sup>46</sup> 26-1A-201(c).

<sup>47</sup> 26-1A-201(d); 26-1A-217(b).

granted to an agent. These types of authority do not require an express grant in the power of attorney. In the optional statutory Power of Attorney Form, a principal has the option to grant all of the powers or choose among a list of the powers to grant. Sections 26-1A-204 through 26-1A-217 describe the following general powers which would be included in a general grant of authority or can be incorporated by reference:<sup>48</sup>

Real Property. 26-1A-204.

Tangible Personal Property. 26-1A-205.

Stocks and Bonds. 26-1A-206.

Commodities and Options. 26-1A-207.

Banks and Other Financial Institutions. 26-1A-208.

Operation of Entity or Business. 26-1A-209.

Insurance and Annuities. 26-1A-210.

Estates, Trusts, and Other Beneficial Interests. 26-1A-211.

Claims and Litigation. 26-1A-212.

Personal and Family Maintenance. 26-1A-213.

Benefits from Governmental Programs or Civil or Military Service. 26-1A-214.

Retirement Plans. 26-1A-215.

Taxes. 26-1A-216.

Gifts. 26-1A-217.

### **Statutory Forms**

Section 26-1A-301 provides an optional statutory Power of Attorney Form. See Appendix D. Section 26-1A-302 provides an optional statutory Agent's Certification form. See Appendix E.

---

<sup>48</sup> 26-1A-203

## APPENDIX A

### SECTION 26-1A-114(b). AGENT'S DUTIES.

(b) Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

- (1) act loyally for the principal's benefit;
- (2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- (3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
- (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and
- (6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
  - (A) the value and nature of the principal's property;
  - (B) the principal's foreseeable obligations and need for maintenance;
  - (C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
  - (D) eligibility for a benefit, a program, or assistance under a statute or regulation.

## **APPENDIX B**

### **SECTION 26-1A-120(b). LIABILITY FOR REFUSAL TO ACCEPT ACKNOWLEDGED POWER OF ATTORNEY.**

(b) A person is not required to effect a transaction in reliance upon an acknowledged power of attorney:

- (1) if the person would not be required to engage in the transaction with the principal if the principal was competent and acting on his or her own behalf;
- (2) if the person in good faith believes engaging in the transaction with the agent or the principal in the same circumstances would be inconsistent with law or any rule or regulation of any government or any governmental agency or instrumentality;
- (3) if the person has actual knowledge of the fact that the power of attorney is void, invalid, or terminated, that the agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority;
- (4) until after a certification, a translation, or an opinion of counsel requested under Section 26-1A-119(d) is provided to such person;
- (5) if the person in good faith believes that the power of attorney is void, invalid, or terminated, that the agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority, whether or not a certification, a translation, or an opinion of counsel under Section 26-1A-119(d) has been requested or provided; or
- (6) if the person makes, or has actual knowledge that another person has made, a report to the Department of Human Resources stating a belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

## APPENDIX C

### **SECTION 26-1A-217. GIFTS.**

(a) In this section, a gift “for the benefit of” a person includes a gift to a trust, an account under the Uniform Transfers to Minors Act, and a tuition savings account or prepaid tuition plan as defined under Internal Revenue Code Section 529, 26 U.S.C. Section 529, as amended.

(b) Unless the power of attorney otherwise expressly provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:

(1) make outright to, or for the benefit of, a person including the agent, a gift of any of the principal’s property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Internal Revenue Code Section 2503(b), 26 U.S.C. Section 2503(b), as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal’s spouse agrees to consent to a split gift pursuant to Internal Revenue Code Section 2513, 26 U.S.C. 2513, as amended, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(2) consent, pursuant to Internal Revenue Code Section 2513, 26 U.S.C. Section 2513, as amended, to the splitting of a gift made by the principal’s spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

(c) An agent may make a gift of the principal’s property only as the agent determines is consistent with the principal’s objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal’s best interest based on all relevant factors, including:

(1) the value and nature of the principal’s property;

(2) the principal’s foreseeable obligations and need for maintenance;

(3) minimization of taxes, including income, estate, inheritance, generation skipping transfer, and gift taxes;

(4) eligibility for a benefit, a program, or assistance under a statute or regulation; and

(5) the principal’s personal history of making or joining in making gifts.

## APPENDIX D

**SECTION 26-1A-301. POWER OF ATTORNEY FORM.** A document substantially in the following form may be used to create a power of attorney that has the meaning and effect prescribed by this chapter.

### ALABAMA POWER OF ATTORNEY FORM

#### IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Alabama Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975.

This power of attorney does not authorize the agent to make health care decisions for you. Such powers are governed by other applicable law.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reimbursement of reasonable expenses and reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a co-agent in the Special Instructions. Co-agents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

#### DESIGNATION OF AGENT

I \_\_\_\_\_

(Name of Principal)

name the following person as my agent:

Name of Agent: \_\_\_\_\_

Agent's Address: \_\_\_\_\_

Agent's Telephone Number: \_\_\_\_\_

#### DESIGNATION OF SUCCESSOR AGENT(S)(OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent: \_\_\_\_\_

Successor Agent's Address: \_\_\_\_\_

Successor Agent's Telephone Number: \_\_\_\_\_

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent: \_\_\_\_\_

Second Successor Agent's Address: \_\_\_\_\_

Second Successor Agent's Telephone Number: \_\_\_\_\_

**GRANT OF GENERAL AUTHORITY**

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Alabama Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975:

If you wish to grant general authority over all of the subjects enumerated in this section you may SIGN here:

\_\_\_\_\_

(Signature of Principal)

OR

If you wish to grant specific authority over less than all subjects enumerated in this section you must INITIAL by each subject you want to include in the agent's authority:

\_\_\_\_\_ Real Property as defined in Section 26-1A-204

\_\_\_\_\_ Tangible Personal Property as defined in Section 26-1A-205

\_\_\_\_\_ Stocks and Bonds as defined in Section 26-1A-206

\_\_\_\_\_ Commodities and Options as defined in Section 26-1A-207

\_\_\_\_\_ Banks and Other Financial Institutions as defined in Section 26-1A-208

\_\_\_\_\_ Operation of Entity or Business as defined in Section 26-1A-209

\_\_\_\_\_ Insurance and Annuities as defined in Section 26-1A-210

\_\_\_\_\_ Estates, Trusts, and Other Beneficial Interests as defined in Section 26-1A-211

\_\_\_\_\_ Claims and Litigation as defined in Section 26-1A-212

\_\_\_\_\_ Personal and Family Maintenance as defined in Section 26-1A-213

\_\_\_\_\_ Benefits from Governmental Programs or Civil or Military Service as defined in Section 26-1A-214

\_\_\_\_\_ Retirement Plans as defined in Section 26-1A-215

\_\_\_\_\_ Taxes as defined in Section 26-1A-216

\_\_\_\_\_ Gifts as defined in Section 26-1A-217

**GRANT OF SPECIFIC AUTHORITY (OPTIONAL)**

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL the specific authority you

WANT to give your agent.)

\_\_\_\_\_ Create, amend, revoke, or terminate an inter vivos trust, by trust or applicable law

\_\_\_\_\_ Make a gift to which exceeds the monetary limitations of Section 26-1A-217 of the Alabama Uniform Power of Attorney Act, but subject to any special instructions in this power of attorney

\_\_\_\_\_ Create or change rights of survivorship

\_\_\_\_\_ Create or change a beneficiary designation

\_\_\_\_\_ Authorize another person to exercise the authority granted under this power of attorney

\_\_\_\_\_ Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan

\_\_\_\_\_ Exercise fiduciary powers that the principal has authority to delegate

LIMITATIONS ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

Limitation of Power. Except for any special instructions given herein to the agent to make gifts, the following shall apply:

(a) Any power or authority granted to my Agent herein shall be limited so as to prevent this Power of Attorney from causing any Agent to be taxed on my income or from causing my assets to be subject to a "general power of appointment" by my Agent as defined in 26 U.S.C. § 2041 and 26 U.S.C. § 2514 of the Internal Revenue Code of 1986, as amended.

(b) My Agent shall have no power or authority whatsoever with respect to any policy of insurance owned by me on the life of my Agent, or any trust created by my Agent as to which I am a trustee.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines. For your protection, if there are no special instructions write NONE in this section.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF [CONSERVATOR OR GUARDIAN] (OPTIONAL)

If it becomes necessary for a court to appoint a [conservator or guardian] of my estate or [guardian] of my person, I nominate the following person(s) for appointment:

Name of Nominee for [conservator or guardian] of my estate: \_\_\_\_\_

Nominee's Address: \_\_\_\_\_

Nominee's Telephone Number: \_\_\_\_\_

Name of Nominee for [guardian] of my person:

\_\_\_\_\_

Nominee's Address: \_\_\_\_\_

Nominee's Telephone Number: \_\_\_\_\_

**RELIANCE ON THIS POWER OF ATTORNEY**

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

**SIGNATURE AND ACKNOWLEDGMENT \_\_\_\_\_**

(Signature of Principal)

Your Signature Date: \_\_\_\_\_

Your Name Printed: \_\_\_\_\_

Your Address: \_\_\_\_\_

Your Telephone Number: \_\_\_\_\_

State of \_\_\_\_\_

[County] of \_\_\_\_\_

I, \_\_\_\_\_, a Notary Public, in and for the County in this State, hereby certify that \_\_\_\_\_, whose name is signed to the foregoing document, and who is known to me, acknowledged before me on this day that, being informed of the contents of the document, he or she executed the same voluntarily on the day the same bears date.

Given under my hand this the \_\_\_ day of \_\_\_\_\_, 2\_\_\_\_. \_\_\_\_\_ (Seal, if any)

Signature of Notary

My commission expires: \_\_\_\_\_

[This document prepared by:

\_\_\_\_\_

**IMPORTANT INFORMATION FOR AGENT**

**Agent's Duties**

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

- (1) do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) act in good faith;
- (3) do nothing beyond the authority granted in this power of attorney; and
- (4) disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's Name) by (Your Signature) as Agent

Unless the Special Instructions in this power of attorney state otherwise, you must also:

- (1) act loyally for the principal's benefit;
- (2) avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) act with care, competence, and diligence;
- (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
- (6) attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

#### Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- (1) death of the principal;
- (2) the principal's revocation of the power of attorney or your authority;
- (3) the occurrence of a termination event stated in the power of attorney;
- (4) the purpose of the power of attorney is fully accomplished; or
- (5) if you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

#### Liability of Agent

The meaning of the authority granted to you is defined in the Alabama Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975. If you violate the Alabama Uniform Power of Attorney Act, Chapter 1A, Title 26, Code of Alabama 1975, or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

**APPENDIX E**

**SECTION 26-1A-302. AGENT'S CERTIFICATION.** A document substantially in the following format may be used by an agent to certify facts concerning a power of attorney.

**AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY**

State of \_\_\_\_\_

[County] of \_\_\_\_\_

I, \_\_\_\_\_ (Name of Agent), [certify] under penalty of perjury that \_\_\_\_\_

(Name of Principal)

granted me authority as an agent or successor agent in a power of attorney dated \_\_\_\_\_.

I further [certify] that to my knowledge:

- (1) the Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;
- (2) if the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;
- (3) if I was named as a successor agent, the prior agent is no longer able or willing to serve; and
- (4) \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Insert other relevant statements)

**SIGNATURE AND ACKNOWLEDGMENT**

\_\_\_\_\_

Agent's Signature Date:

\_\_\_\_\_

Agent's Name Printed:

\_\_\_\_\_

Agent's Address:

\_\_\_\_\_

Agent's Telephone Number:

\_\_\_\_\_

This document was acknowledged before me on

\_\_\_\_\_.

(Date)

by \_\_\_\_\_.

(Name of Agent)

\_\_\_\_\_ (Seal, if any)

Signature of Notary

My commission expires: \_\_\_\_\_

[This document prepared by:

\_\_\_\_\_ ]