A DISCUSSION OF THE POWER OF ATTORNEY FOR PROPERTY MANAGEMENT

The durable power of attorney is a document by which an individual (called the **"principal"**) designates another individual (the **"attorney-in-fact"**) to act on the **principal**'s behalf in financial matters. This is an important tool in disability planning. Whenever a person is unable to handle financial matters, the durable power of attorney can be essential, especially when there are individually-owned assets such as IRAs, annuities, and insurance policies, as well as real estate. If no durable power of attorney exists and it is necessary to liquidate or transfer such assets or to enter into real estate transactions (including those of the spouse), it may be necessary to go into court to establish a guardianship or conservatorship before these matters can be undertaken. This can be a costly and time-consuming procedure.

A power of attorney can avoid the necessity of court proceedings. However, a power of attorney is not under the supervision of the court and it is more easily subject to abuse. Thus, when you are considering whom to name as your **attorney-in-fact**, you will want to select a person whom you trust implicitly, who will act in your best interests, and upon whom you can rely to give full accounting of any and all transactions undertaken on your behalf. Unless your power of attorney provides otherwise, it is effective as soon as you have signed it. You are not giving up your own authority to manage your finances; rather, you are adding someone else who can also manage them. That person will have as much access and control over your finances as you have yourself.

For convenience, you will want to sign several original powers of attorney. Our practice is to have our clients sign four or five originals of each document and to store one fully completed original in our files. You will want to place your original documents in a safe place. You may choose to give your agent or successor agent an original Power of Attorney now or tell them how to gain access if and when needed. If you keep them in a safe deposit box, you must be sure that someone else has access to that box if you become disabled.

Minnesota law provides for a statutory short form power of attorney. In this form, the **principal** can check off the powers the **principal** wants the **attorney-in-fact** to have. These powers include real property transactions; tangible personal property transaction; bond, share and commodity transactions; banking transactions; business operating transactions; insurance transactions; beneficiary transactions; gift transactions; fiduciary transactions; claims and litigation; family maintenance; benefits from military services; records, reports and statements; and all other matters. These powers are defined in Minnesota Statutes §523.24. The **principal** may select individual powers or all powers, depending on his or her goals. The **principal** should understand that these powers are far reaching and are meant to encompass all acts concerning the **principal**'s financial affairs that the **principal** could do.

When the statutory short form power of attorney is used, the **principal** may decide whether the power of attorney should be durable (that is, whether it continues to be effective if the **principal** becomes incapacitated or incompetent). Generally, the purpose of a power of attorney is to make sure that someone can manage the **principal**'s finances when the **principal** cannot, and so the power of attorney is made to be a durable power of attorney.

In addition, the statutory short form power of attorney allows the **principal** to state whether the **attorney-in-fact** has the authority to transfer the **principal**'s assets to the **attorney-in-fact**. It should be noted that the statutory power of attorney limits the gifts that the **attorney-in-fact** can make. The definition of "gift transactions" allows the **attorney-in-fact** to make charitable and other gifts to organizations to which the **principal** has made gifts and to satisfy pledges that the **principal** has already made. It also allows the **attorney-in-fact** to make gifts to the **principal**'s spouse, children, and other descendants or the spouse of any of these people, and if so stated in the power of attorney, also to the **attorney-in-fact**. However, the definition states specifically that "no **attorney-in-fact** nor anyone the **attorney-in-fact** has a legal obligation to support may be the recipient of any gifts in any one calendar year which, in the aggregate, exceed $10,000 in value to each recipient." Thus, even though the **attorney-in-fact** may be allowed to gift to an **attorney-in-fact**, the amount of gifts that any **attorney-in-fact** may receive is limited.

If the **principal** is designating as **attorney-in-fact** a person to whom the **principal** would want property to be transferred to in order to achieve the **principal**'s estate planning goals, the **principal** should execute a non-statutory (common law) power of attorney. This will avoid the $10,000.00 limitation of the statutory form. In addition, the common law power of attorney should allow the **attorney-in-fact** to make gifts to the **attorney-in-fact**.

An **attorney-in-fact** is required by law to keep complete records of all transactions entered into by the **attorney-in-fact** on behalf of the **principal**. The **attorney-in-fact** has no duty to render an accounting of those transactions, however, unless asked to do so by the **principal** or unless specified in the power of attorney. A written statement that gives reasonable notice of all transactions entered into by the **attorney-in-fact** on behalf of the **principal** is an adequate accounting. The **attorney-in-fact** also has no affirmative duty to exercise any power conferred under the power of attorney. In exercising any power conferred by the power of attorney, the **attorney-in-fact** is required to exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and must have the interests of the **principal** utmost in mind. The **attorney-in-fact** will have personal liability if any person, including the **principal**, is injured by an action taken by the **attorney-in-fact** in bad faith under the power of attorney.