

**“HE’S INCAPACITATED?”  
POWERS OF ATTORNEY**

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- "Divorce: Effect Upon Life Insurance and Non Probate Assets," 1988, Probate & Property, magazine of the Real Property, Probate and Trust Section, ABA
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By  
JERRY FRANK JONES

## 1. Introduction

a. **The Lowly Power of Attorney: The Step Child of Estate Planning.** Almost every estate plan from the most simple to the most sophisticated includes statutory durable powers of attorney. Unfortunately, they are generally an afterthought and not carefully discussed.

b. **The Most Powerful Document.** Without question, a power of attorney is the most powerful and potentially most harmful document that an estate planning lawyer prepares. With a power of attorney, a person’s estate can be looted with great ease.

c. **Focus on Statutory Powers of Attorney.** While common law powers are discussed the focus of this article is on the statutory durable powers of attorney found in Texas Probate Code Sections 481 *et seq.* All further references, unless otherwise stated are to the Texas Probate Code.

2. **Common Law Powers of Attorney.** Texas common law has always allowed a principal to appoint an agent under a power of attorney.

a. Those powers of attorney are strictly construed, F.M. Stigler, 595 S.W.2d 158 (Tex.Civ.App–Dallas), *rev’d* on other grounds 609 S.W.2d 754 (Tex.

1980); and McKaughan v. Baldwin, 153 S.W 660 (Tex.Civ.App.– Austin 1913, no writ).

b. The courts give a more liberal construction when the power is a “general” power. See Comments following Standard 8.10 “Texas Title Examinations Standard” and the cases cited there.

c. Further, the common law powers of attorney terminated not only on death or revocation but also upon incapacity of the principal. See Comerica v. Texas Commerce Bank NA, 2 S.W.3d 723 (Tex.App. Texarkana 1999) (Opinion Withdrawn on Overruling of Rehearing Sept. 23, 1999; not reported).

d. Generally these powers of attorney did not permit gifts unless specifically authorized. See RESTATEMENT (SECOND) OF AGENCY Section 65(1) (1958). There are some tax cases to contrary where it was established that the principal had a history of gift giving. Estate of Gagliardi v. Comm, 89 T.C. 1207 (1987); Estate of Council v. Comm, 65 T.C. 594 (1975), *acq.*, 1976-2 C.B.1; and Estate of R. Neff v. Comm., 73 T.C.M. 2606, T.C. Memo. 1997-186 (1997). There is no Texas case on point. For a good general discussion see, Bay, “Tax,

Fiduciary, and Other Issues Regarding A Financial Power of Attorney,” State Bar of Texas Advanced Estate Planning and Probate Course 2002, Chapter 39.

e. Title companies have preferred, if not insisted, that these powers refer to the specific real estate being insured. See Stewart Title, Manual, Section 15.48, last paragraph under “Requirements.”

### 3. **Statutory Durable Powers of Attorney: The Basics.**

a. **Probate Code Statute.** In 1971 the Texas legislature authorized powers of attorney to be created that endured past a persons’s incapacity. A brief history of those statutes are attached as Appendix A. It was originally enacted as Section 36A of the Probate Code which was subsequently repealed and in its place came Section 481 et seq of the Probate Code.

See the excellent discussion and collection of cases and articles after Probate Code Section 481 in Stanley Johanson’s **Texas Probate Code Annotated.**

b. **Requirements.** Section 482 says a durable power of attorney must be

- i. in writing,
- ii. Acknowledged by a notary principal and
- iii. signed by an adult
- iv. Have words such as

“This power of attorney is not effect by subsequent disability or incapacity of the principal,” or

“This power of attorney becomes effective on the disability or incapacity of the principal.” or

“...similar words showing the principal’s intent...”

c. **Statutory Form.** Section 490 sets out a statutory form, see Appendix B below. This form is not exclusive, Section 490(a), second paragraph. However, the great value of a power of attorney is in the eye of the beholder. There is a risk of significant lose if the power of attorney is not readily easily recognized by third parties.

d. **Not Stale.** Banks and title companies have often refused to accept powers of attorney because they are several years old. Section 483 says that a power does not lapse because of the passage of time unless specifically so provided in the instrument. Despite this language, title companies continue to be reluctant to accept old powers, see Stewart Title Manual, Section 15.48.9, “Care should be taken when dealing with older powers of attorney, e.g., those over two years old.” While caution is always appropriate when dealing with an agent, this is unfortunate, many powers of attorney sit unused for years until a principal becomes incapacitated and the power is needed.

e. **Revocation** A power of attorney is terminated by:

- i. Revocation. The



power of attorney can provide for revocation either only by actual notice (making the power of attorney easier to use but harder to revoke) or by recording in the deed records (harder to use but easier to revoke). Most estate planners recommend actual notice to facility ease of use. See discussion under "Protection of Third Parties," infra.

ii. Death.

iii. Incapacity. Unless otherwise provided, a power of attorney terminates when the principal becomes incapacitated.

iv. Divorce. If the principal and agent are husband and wife. Otherwise, divorce does not revoke the power of attorney.

v. Guardianship.

Since September 1, 2001

f. **Protection of Third Parties.** When the Real Estate, Probate and Trust Law Section of the State Bar drafted and submitted the durable power of attorney statute, their main goal was to provide an economical alternative to guardianships. (In fact, durable powers of attorney are sometimes referred to as a "poor man's trust.") In drafting the proposed statute the Section realized that third party acceptance was crucial to making these powers effective. The entire Act is drafted with third party acceptance in mind.

i. Section 486 states that the power of attorney is still effective (even if otherwise revoked) as to anyone using or relying on it in good faith and without knowledge of the revocation. This is a clear deviation from the common law. This was placed into the statutes specifically to make them

more acceptable by third parties.

ii. Further Section 487 says that an affidavit of the attorney stating that he does not have any actual knowledge of the termination of the power is conclusive proof as to a third party that the power of attorney has not been revoked or terminated. A sample of that affidavit is attached as Appendix C. Stewart Title provides an affidavit form, but it should be compared to Appendix C.

iii. Comment 2 following Standard 8.20 of the Texas Title Examination Standards, refers to the use of this affidavit.

iv. Also Section 488 says that a revocation is not effective as to third parties until the third party receives actual notice.

(1) It is not clear what this means when the notice of revocation has been recorded in the deed records. Is it not binding in a real estate transaction?

(2) The Texas Title Examinations Standards, while preaching caution, concludes that this protects third parties even when the revocation is recorded.

" Apparently, constructive notice of the revocation of a durable power of attorney, as by virtue of its recordation, would not defeat the conclusiveness of the authority of the attorney in fact. It is recommended, however, that caution be observed in relying on a durable power of attorney where a revocation actually has been executed and filed for

record before the deed of the attorney in fact.” Standard 8.20, Texas Title Examinations Standard.

v. However, notice that Section 488 says that the instrument may provide otherwise. So, if the power says it shall only be revoked by recording in the deed records, Section 488 does not provide any protection.

g. **Divorce.** Section 485A. if the principal and agent are husband and wife, divorce revokes the power of attorney unless the instrument specifically states otherwise. However, a third party is protected if they rely, in good faith, on the continued validity of the power of attorney. Section 486(b)

h. **Guardianship.**

i. If a permanent guardian is appointed, the power of attorney terminates, Section 484(a).

ii. However, if the court appoints a temporary guardian, the court has the discretion as to whether or not to suspend the power of attorney. If the court suspends it, it is revived when the temporary guardianship expires; if a permanent guardianship is not established. Section 484(b). The statute does not discuss, but it is consistent with the least restrictive alternative principals, that the court should be able to suspend some parts of the power without suspending the whole instrument.

iii. While the statute does not explicitly so state, the power of

attorney is probably not revived if the permanent guardianship is dissolved and the principal’s capacity is restored. There is no case law but the difference in language between a permanent guardian (“the power...terminates...”) and a temporary guardianship (“...may suspend...”), suggests there is no revival after a permanent guardianship.

iv. Again, a third party is protected by a Section 487 affidavit

4. **Bankruptcy.** The power of attorney is not revoked by the filing of a bankruptcy by or against the principal. Any actions of the agent or subject to the bankruptcy court just like the principal. Section 487A, added in 2001.

5. **Agent as a Fiduciary.** In 2001 the enactment of Section 489B made clear that an agent under a power of attorney is a fiduciary. Section 489B(a) says “The attorney in fact or agent is a fiduciary...” Also see Vogt v Warnock, 107 S.W.3d 778 (Tex.App. El Paso, 2003).

6. **Capacity To Execute.** It is generally believed that the capacity to execute a power of attorney is contractual capacity. See Daugherty v. McDonald, 407 S.W.2d 954 (Tex.Civ.App.–Ft. Worth 1966, no writ) This is distinguished from testamentary capacity which requires a lower level of capacity. Despite Daugherty, there is a good argument that the capacity to execute a durable power of attorney is different from (and less than) contractual capacity: That the principal only needs sufficient capacity to select an appropriate person to manage his or her affairs. This does not mean that just

because the principal made a bad selection of agent that they are incapacitated.

Note that the statutory safeguards afforded third parties for revocation are not in place if the principal did not have capacity in the first place.

7. **Gifts** There is no authority for a power of attorney holder to make gifts set out in the statute.

a. However, the statutory form allows the agent to make gifts up to the federal gift tax annual exclusion amount (currently \$11,000 per donor, per donee, per year; formerly \$10,000). The gifting authority only applies if the provision is initialed.

b. There is nothing in the form or statute that says that is the only gifting standard available.

c. An unlimited gifting power is not recommended. Sophisticated estate planners debate whether or not a general gifting authority is a taxable power. Anyone considering a gifting power beyond the annual exclusion amount should proceed with great caution. The argument is that such a power a general power of appointment under IRA Code Section 2514 and 2041. if it includes as one of the donees of the gift the agent. If the gifting power is a general power of appointment it would mean

i. That any and all gifts would be treated as gifts of the agent for purposes of taxation.

ii. That if the principal died before the agent, the principal's

death would be deemed a release of the power and thus all of the principal's assets would be treated, for tax purposes, as gifts of the agent.

iii. Finally, if the agent dies before the principal, that all of the principal's estate was taxable in the agent's estate, IRS Code Section 2041.

d. This problem can be avoided by:

i. Restricting the gifts to the annual exclusion amount; or,

ii. Prohibiting the agent from making gifts to himself, his creditors, his estate or the creditors of his estate.

## 8. **Springing Powers.**

a. **Statutory Authority.** Since 1993, the statute allows for a springing power of attorney, Section 482(3) and the statutory form. A springing power means the power does not become effective until the principal is incapacitated.

b. **Prior to the 1993.** There is substantial question about the validity of springing powers of attorney before 1993. Between the opinion and the dissent, there is an good discussion of the problem in Comerica v. Texas Commerce Bank NA, 2 S.W.3d 723 (Tex.App. Texarkana 1999) (Opinion Withdrawn on Overruling of Rehearing Sept. 23, 1999; not reported).

c. **Fools' Gold?** Springing powers are very appealing to clients at first glance: They do not want anyone using the power of attorney until they are incapacitated.

On reflection, there are problems to be considered. First, how does an agent satisfy a third party that the principal is now incapacitated. The statutory form says the power is activated when a physician certifies to the incapacity. Doctors have been reluctant to give these certificates in the past. Now with HIPPA more resistance may be seen. It also means that a third party has to consider the validity and authenticity of two documents rather than one.

The greater problem is the selection of agent issue. It is folly for a principal to select as his asset manager someone he does not trust with the power while the principal has capacity. If you do not trust them while you have capacity, why would you trust them when you are incapacitated and completely vulnerable? See Johanson, supra, to the same effect.

9. **Trusts.** Estate planners frequently authorize the agent to transfer the principal's assets to an existing trust. In fact Section 499(6) specifically allows an agent to transfer the principal's assets to "...the trustee of a revocable trust created by the principal as settlor." Other than that, without specific authorization the agent has no authority to create a trust or to make a transfer to any trust other than a revocable trust created by the settlor.

10. **Wills.** A power of attorney cannot authorize the agent to prepare and sign a will for the principal. The right to create a will is personal and cannot be delegated to anyone. Section 59 states that a will "...shall be...signed by

the testator in person or by another person for him by his direction and in his presence..."

11. **Compensation.** The statute makes no provision for compensation of agents and very few documents prepared by estate planners have any provision for compensation. Most odd is that there have been no reported cases on the topic.

12. **Reimbursement.** Section 491(11) does allow for reimbursement of expenditures incurred in exercising the powers.

13. **Co-Attorneys.** If two or more attorneys in fact are named, and there is no specific authorization for one to act without the joinder of the others, all must sign. Musquiz v. Marroquin, 124 S.W.3d 906 (Tex.App.—Corpus Christi 2004).

This is an example of language that would allow one of two or more named agents to act alone,

"Either of my co-attorneys may act without the joinder of the other. In addition, if both should fail or cease to act for any reason, then the person or persons named as successors or substitutes below, shall serve as attorney-in-fact in the order set out below."

14. **General Power of Attorney.** In 1997 the following language was added to the statutory form, Section 490,

“IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A **GENERAL POWER OF ATTORNEY** AND MY AGENT (ATTORNEY IN FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT. (Emphasis added)

**15. Real Estate Power.**

a. Section 491 (Construction of Powers Generally). By executing a statutory durable power of attorney, certain powers are conferred. Inter alia, Section 491(4) says this includes the authority to

“...execute, acknowledge, seal and deliver a deed, revocation, mortgage, lease, notice, check, release or other instrument...”

b. Section 491 (Construction of Power Relating to Real Property Transactions. If this power is not struck, it gives very broad authority.

c. Section 492 sets out the authority of the agent if the “Real Property Transactions” line of the form is not struck.

“(1) accept as a gift or as security for a loan or reject, demand, buy, lease, receive, or otherwise acquire an interest in real property or a right incident to real property;

“(2) sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition, consent to partitioning, subdivide, apply for zoning, rezoning, or other governmental permits, plat or consent to platting, develop, grant options concerning, lease or sublet, or otherwise dispose of an estate or interest in real property or a right incident to real property;

“(3) release, assign, satisfy, and enforce by litigation, action, or otherwise a mortgage, deed of trust, encumbrance, lien, or other claim to real property that exists or is claimed to exist;

“(4) do any act of management or of conservation with respect to an interest in real property, or a right incident to real property, owned or claimed to be owned by the principal, including power to:

“(A) insure against a casualty, liability, or loss;

“(B) obtain or regain possession or protect the interest or right by litigation, action, or otherwise;

“(C) pay, compromise, or contest taxes or assessments or apply for and receive refunds in connection with them;

“(D) purchase supplies, hire assistance or labor, or make repairs or alterations in the real property; and

“(E) manage and supervise an interest in real property, including the mineral estate, by, for example, entering into a lease for

oil, gas, and mineral purposes, making contracts for development of the mineral estate, or making pooling and unitization agreements;

“(5) use, develop, alter, replace, remove, erect, or install structures or other improvements on real property in which the principal has or claims to have an estate, interest, or right;

“(6) participate in a reorganization with respect to real property or a legal entity that owns an interest in or right incident to real property, receive and hold shares of stock or obligations received in a plan or reorganization, and act with respect to the shares or obligations, including:

“(A) selling or otherwise disposing of the shares or obligations;

“(B) exercising or selling an option, conversion, or similar right with respect to the shares or obligations; and

“(C) voting the shares or obligations in person or by proxy;

“(7) change the form of title of an interest in or right incident to real property; and

“(8) dedicate easements or other real property in which the principal has or claims to have an interest to public use, with or without consideration.”

16. **Oil and Gas.** A statutory durable

power of attorney that grants authority regarding real estate transactions also includes oil, gas and mineral transactions (Section 492(E)).

However, this power was added in 1997. Statutory durable powers of attorney before September 1, 1997 may not include the authority to deal with the mineral estate. See the second Caution in Standard 8.20 of the Texas Title Examination Standards.

17. **Life Insurance and Annuities: The Limitation.** Section 498 gives the agent broad authority to deal with life insurance and annuities. This includes, inter alia, the power to change beneficiaries. The agent can even name himself as a beneficiary but only to the extent he was previously designated a beneficiary in a contract procured by the principal before “executing the power of attorney.” Obviously this is intended to prevent the agent from increasing his interests in a policy. However, it may have some unfortunate results. For example, literally read, this would mean:

a. The agent could not purchase a better replacement policy;

b. The agent could not buy a policy, that was otherwise appropriate, in which the agent received the same benefits he would under the principal’s existing estate plan.

c. The agent could not even change the beneficiary designation and include himself in an existing policy purchased by the principal after the date of the power of attorney.

18. **Retirement Plan Transactions: The Limitation.** Section 503 also allows an agent to name himself as a beneficiary of a retirement plan but only

to the “extent the ...agent was a named beneficiary under the retirement plan before the durable power of attorney was established.

**19. Other Powers, Limitations.**

The limitations on life insurance, annuities and deferred compensation do not show up for other assets. However, the fiduciary duty of loyalty and the prohibition on self dealing do apply

**a. Estates, Trusts and Other Beneficiary Transactions.**

Section 499 covers estates, trusts and other beneficiary transactions including the power to disclaim. A power which could result in a bequest or gift passing to the agent instead of the principal.

Even though not specifically stated, such conduct would probably breach the agent’s fiduciary duties.

**b. Banking Transactions.**

Section 496 does not give any guidance in this area either. However, multi party accounts are a common problem. Too often the power of attorney holder closing a bank account which would have survived to someone else, on the principal’s death.

This was the situation in Plummer v. Estate of Plummer, 51 S.W.3d 840 (Tex.App.–Texarkana 2001, writ denied). In that case after their mother became incapacitated the agents closed a CD in which their sister Sandra had a survivorship right and moved it to an existing checking account in which the agents had a survivorship right. they made the transfer after the doctors told them that she would require

long term care if she died. They said it was made to consolidate funds to pay medical and nursing home care. Their mother died several days later.

As a result, the agents received more from his estate and Sandra got less. The agents addressed the problem by renouncing in open court the survivorship benefit and allowing the account to pass to the children equally under the will. Apparently there were eight children.

Sandra complained that the agents were self dealing. The jury said the agents complied with their fiduciary duties to the mother.

On appeal the court made clear that the agents should be held to their in trial renunciation of benefit under the checking account.

This opinion does not address all of the issues and is more likely the first of these cases rather than the last.

**c. Real Estate Transactions.**

Despite their being no specific prohibition in Section 492, Stewart Title recognizes this. In their Manual Section 15.48.4, they list certain exercises of the power that are not insurable:

- i. Delegates his authority if not expressly authorized to do so in the power of attorney.
- ii. Deals with the principal’s property for his own benefit.
- iii. Conveys principal’s property to himself.
- iv. Releases a mortgage made by the agent in favor of principal.

- v. Mortgages principals' property to himself.
- vi. Executed a gift deed or principal's property.
- vii. Executes a mortgage or release of mortgage without valuable consideration.
- viii. Conveys or encumbers the principal's homestead property.
- ix. Partitions the principal's property.

20. **Caregivers Disease and Third Party Caution.** Most problems with powers of attorney spring from caregivers who decide they are entitled to more. This problem has resulted in numerous bills being offered to the Texas Legislature to solve the problem.

Other than eliminating powers of attorney, there is probably no legislative solution to these abuses. It is incumbent upon third parties to act with caution and concern for the principal, even when protected by a good faith affidavit.

21. **Whose The Client.** If you are assisting the agent, it is generally assumed that the agent is your client. There is no direct authority on this point but that conclusion is consistent with Texas law that a lawyer who represents an executor (or trustee) does not represent the beneficiary. See Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996).

Despite some comments to the contrary, Lydick v. Rachal (Unpublished Opinion, Dallas 2002) did not establish that an attorney who represents an

agent also represents and is liable to the principal. In that case, the jury made such a finding that the attorney represented the principal and no one appealed or objected. The appellate court specifically stated that it was merely accepting that as true because no one challenged the finding on appeal.

The greater danger is for the attorney who represents the principal, and probably prepared the power of attorney. And at some point switches and begins to represent the agent. This is very common and very reasonable. But the lawyer who does it is shifting a great deal of responsibility onto himself.

22. **NCCUSL.** On October 27, 2004, the National Conference of Commissioners on Uniform State Laws published a draft uniform durable power of attorney statute.

23. **Delegation** The Texas statute makes no reference to an agent's right to delegate. The 2004 NCCUSL draft allows delegation if authorized in the instrument. Section 217, NCCUSL.

24. **Future Acquired Property.** Section 505 provides that this power applies not only to property the principal currently owns but any property acquired in the future.

25. **Foreign Interests.** Section 505 also states that this power applies to property in and out of the State of Texas and whether or not the power is executed or exercised in or out of the State





## Appendix

### A. Statutory history of the durable power of attorney in Texas

- 1971 Section 36A of the Texas Probate Code established that a person could create a power of attorney that would continue upon disability.
- 1989 Section 36A was amended. It now required the power of attorney to be witnessed by two witnesses, and filed for record in the county in which the principal resides.
- 1993: Section 36A was repealed. Chapter XII of the Probate Code was created, Sections 481 et seq. A new statutory form was set out in Section 490. The requirement of two witnesses was eliminated. Section 482 Except for real estate transactions (Section 489), the requirement of recordation was eliminated. Section 482 That form provided for initialing the powers to be given to the agent. This new Chapter also gave a detailed, statutory list of what it meant when the form gives a one word or one phrase powers. For example, one line is "real estate transactions." The powers and authority that this give runs for over 50 lines of explanatory text.
- 1997 Authority regarding mineral interests was added to Section 492. The strikeout form replaced the initialing form. It was believed this form would be more difficult to forge. Language was added to the form to make the power of attorney general if no powers were struck. The requirement for social security numbers was eliminated. The affidavit and good faith provisions were extended to divorce under Sections 486(b) and 487(a). The automatic revocation on divorce provision was also enacted, see Section 485A.
- 1999: No changes
- 2001 The duty to inform and account was added, Section 489B. Bankruptcy does not terminate the power, Section 487A. Temporary Guardianship may suspend, but do not revoke, powers, Section 485.
- 2003: No Changes

### B. Statutory Durable Power of Attorney Form

## Statutory Durable Power of Attorney

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII OF THE TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, **[name and address]**, appoint **[name and address of person appointed]** as my agent (attorney-in-fact) to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out below.

TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD.

Real property transactions;

Tangible personal property transactions;

Stock and bond transactions;

Commodity and option transactions;

Banking and other financial institution transactions;

Business operating transactions;

Insurance and annuity transactions;

Estate, trust, and other beneficiary transactions;

Claims and litigation;

Personal and family maintenance;

Benefits from Social Security, Medicare, Medicaid, or other governmental programs or civil or military service;

Retirement plan transactions;

Tax matters.

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY AND MY AGENT (ATTORNEY-IN-FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT.

SPECIAL INSTRUCTIONS:

Special instructions applicable to gifts:

\_\_\_\_\_ I grant my agent (attorney-in-fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

YOU MAY GIVE SPECIAL INSTRUCTIONS BELOW LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

**[Specify any special instructions.]**

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

- (A) This power of attorney is not affected by my subsequent disability or incapacity.
- (B) This power of attorney becomes effective on my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED. IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action

taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor(s) to that agent: **[list name[s] and address[es]]**.

Date: \_\_\_\_\_

\_\_\_\_\_  
(Signature)

SIGNED under oath before me on \_\_\_\_\_.

\_\_\_\_\_  
Notary Public, State of Texas

THE ATTORNEY-IN-FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

**C. Section 487 Affidavit**

**SECTION 487 AFFIDAVIT REGARDING POWER OF ATTORNEY**

STATE OF TEXAS                      §  
  §  
COUNTY OF \_\_\_\_\_ §

Before me, the undersigned authority, on this day personally appeared \_\_\_\_\_, personally known to me to be the person whose name is subscribed hereto, and who, being duly sworn, on his oath swore that the following facts were true and correct:

1. Pursuant to that power of attorney dated \_\_\_\_\_, I have been named as agent and attorney in fact for \_\_\_\_\_ ("Principal").
2. This affidavit concerns the following transaction: \_\_\_\_\_  
(Optional: The following property \_\_\_\_\_)  
(Optional: The following promissory note \_\_\_\_\_)
3. I am authorized pursuant to the power of attorney to act on behalf of Principal by: \_\_\_\_\_  
(Optional: "Selling and conveying the Land, and/or borrowing of funds, executing the note, and mortgaging the Land")

I am authorized to execute any related documents to complete the transaction.

4. Principal was competent at the time of the execution of the power or attorney.
5. At the time of the execution of this power of attorney, I have no actual knowledge of the termination of this power of attorney by revocation by the principal. There has been no divorce or annulment between the Principal and me since the execution of this power of attorney. Further, I have no actual knowledge that the Principal has died or that a guardian has been appointed for the Principal. To the best of my knowledge the power of attorney has not been revoked by any means and I am fully authorized to act pursuant to it.
6. I make this affidavit pursuant to Section 487 of the Texas Probate Code.
7. I understand and agree the \_\_\_\_\_ Title Company, and \_\_\_\_\_ (purchaser/lender) are acting in good faith under and in

reliance on the power of attorney and on my authority to convey or mortgage the Land on behalf of Principal.

Date: \_\_\_\_\_

\_\_\_\_\_  
Name: \_\_\_\_\_

Sworn to and subscribed before me the undersigned authority on this the  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by  
\_\_\_\_\_.