ANNOTATED COMMON LAW POWER OF ATTORNEY FORM

POWER OF ATTORNEY
OF
JANE DOE

ARTICLE I
APPOINTMENT

1.1 I, Jane Doe of Ramsey County, Minnesota, revoke all prior powers of attorney executed by me and appoint my spouse John Doe of Ramsey County, Minnesota, to serve as my attorney-in-fact with the power to act on my behalf as authorized by this instrument.

COMMENT. The SSF POA form does not provide any language to deal with prior powers of attorney. Some attorneys believe that execution of a new power of attorney revokes the old, but this is not clear. I can find no authority that prevents a principal from having multiple powers of attorney. Theoretically these powers of attorney could overlap without conflicting with each other. (If they conflict, I believe the later in time prevails.) I prefer to explicitly revoke prior powers of attorney much like a new will explicitly revokes all prior wills. In some instances I might want to keep old powers of attorney in place, in which case I remove the language revoking prior powers.

1.2. If John Doe is unwilling, unable or unavailable to serve as my attorney-in-fact while this power is still in effect, as shown by a duly executed successor's affidavit, I appoint my sister Mary Roe of St. Paul, Minnesota, as successor attorney-in-fact with all of the powers and duties given to my attorney-in-fact by this instrument.

COMMENT. A common law POA allows the principal to appoint as many successor attorneys-in-fact as the principal desires. The SSF POA form does not include enough room for more than two initial agents and two successors.

1.3 If Mary Roe is unwilling, unable or unavailable to serve as my attorney-in-fact while this power is still in effect, as shown by a duly executed successor's affidavit, I appoint my sister Ann Smith of Madison, Wisconsin, as successor attorney-in-fact with all of the powers and duties given to my attorney-in-fact by this instrument.

COMMENT. This language provides for succession but does not deal with temporary inability or unavailability of the first choice agent, where the principal would like the first choice to resume power upon restoration of ability and availability. Some banks have taken the position that power can only descend to successors and cannot return back to the prior choices. The same problem exists in the SSF POA form. In a common law POA the drafter can craft language to deal with this issue if the client so desires.

OPTIONAL OPENING PARAGRAPHS 1.1 TO 1.5 FOR MULITPLE ATTORNEYS-IN-FACT ACTING TOGETHER:

1.1 I, Jane Doe, of Ramsey County, Minnesota, revoke all prior powers of attorney executed by me and appoint my daughter Mary Smith of Dakota County, Minnesota, and my son Richard Doe of Hennepin County, Minnesota, to serve jointly as my attorneys-in-fact with the power to act on my behalf as authorized by this instrument.

1.2 If one of the above named attorneys-in-fact fails or ceases to serve as my attorney-in-fact while this power is still in effect, as shown by a duly executed successor's affidavit, I appoint my son James Doe of Ramsey County, Minnesota, as first successor attorney-in-fact to serve jointly as provided my attorney-in-fact as provided in this instrument, with all of the powers and duties given to my initial attorneys-in-fact by this instrument.

1.3 If both of the attorneys-in-fact first named above fail or cease to serve as my attorneys-in-fact, I appoint my daughter Betty Doe, of Washington County, Minnesota, as second successor attorney-in-fact to serve jointly as my attorney-in-fact, with all of the powers and duties given to my initial attorneys-in-fact by this instrument.

1.4 My attorneys-in-fact shall take no action or course of actions under this power of attorney except by agreement between them, after consultation as appropriate, but either attorney-in-fact acting alone may execute documents and take such other actions or course of actions as he or she may deem necessary or expedient to implement any action or course of actions approved in advance by agreement of my attorneys-in-fact. A third party may rely conclusively on the verbal or written statement or signature of either attorney-in-fact as certification that any proposed action or course of actions to be taken by the attorney-in-fact acting alone is authorized by agreement of my attorneys-in-fact, unless the third party has actual knowledge that the action or course of actions is not so authorized. My attorneys-in-fact may approve retroactively any action or course of actions taken by either attorney-in-fact in the belief or expectation that the action or course of actions has been or will be approved by agreement of my attorneys-in-fact. Failure to object in a timely manner to an action or course of actions shall be considered retroactive approval of the action or course of actions.

COMMENT. The above paragraph attempts to deal with the problems that arise when the principal wants two or more agents to act together.

The SSF POA form allows two choices when more than one agent is named, either: 1) both agents must act together; or 2) each agent is authorized to act independently.

This language takes a different approach. It allows two or more agents to act separately, but they must act by agreement between them. Third parties are allowed to rely on the written signature

of each agent as certification that the signing agent is acting by agreement with the other agent or agents.

Minn. Stat. Sec. 523.13 applies to this situation. Except as otherwise provided in the power of attorney, any action taken by any one of several attorneys-in-fact binds the principal whether or not the other attorneys-in-fact consent or object to the action.

Conversely, Minn. Stat. Sec. 523.15 provides that an attorney-in-fact who did not join in or consent to the action of one or more co-attorneys-in-fact is not liable for that action.

Under Sec. 523.15, failure to object to an action is not consent. My language takes a different approach. It allows retroactive consent to past actions and treats failure to object in a timely manner as the equivalent of retroactive consent. Query whether the statute controls over my language.

Sec. 523.22 subjects an attorney-in-fact to treble damages for knowingly executing a false affidavit or for signing on behalf of the principal while knowing that the power has terminated. The agent is also liable for fraudulent or negligent actions under a common law POA. The same liabilities exist under a SSF POA.

[ALTERNATIVE CLAUSE] 1.5 I intend that my above named children shall serve at all times as my attorneys-in-fact while this power of attorney is in full effect, unless only one of my above named children is willing, able and available to serve, as shown in a duly executed successor's affidavit, in which case the one child may serve alone and may exercise by himself or herself all of the powers and be subject to all of the duties given to my attorneys-in-fact by this instrument.

[OPTIONAL] 1.6 I ratify and confirm any and all actions taken by my attorney-in-fact pursuant to my durable power of attorney dated March 24, 1998, using the statutory short form then set forth in Minnesota Statutes, whether or not such actions were within the scope of the authority conferred by Minnesota Statutes with respect to a power of attorney using the statutory short form, it being my intention at the time of execution of that instrument to confer all possible powers upon my attorney-in-fact which could be conferred upon an attorney-in-fact under the common law of the State of Minnesota, to the same extent as provided in this instrument, including any such powers beyond the powers specified by Minnesota Statutes, Section 523.24.

COMMENT. Sometimes an attorney-in-fact comes in with a SSF POA and reports that he or she has been using it to make substantial gifts in the belief that the power allowed unlimited gifting. Few clients in this situation realize that there are limits on the gifting powers granted by a SSF POA.

A major defect in the SSF POA form is that there are 22 pages of statutes to explain and limit the powers granted by the form, but these statutes are not included in the form and there is no warning that additional provisions might apply. See for example the provisions of Minn. Stat. Sec. 523.21 (the agent must act keeping

the interests of the principal "utmost in mind"). Minn. Stat. Sec. 523.24, Subd. 6 (agent may continue to follow patterns of gifting and fulfill pledges; to make gifts to spouse, children or descendants if the agent determines that such gifts are in the best interests of the principal; but agent cannot give more than $10,000 per calendar year to the agent or anyone that the agent owes a duty of support to).

This language clarifies that the principal intended to grant powers more consistent with the actual language of the SSF POA rather than with the statutory limitations. This language does not specifically address gifting, but it is intended to cover that situation. See Paragraph 3.12 at page 20 for the language I use to authorize gifting.

1.5 [or 1.7] A successor attorney-in-fact may execute an affidavit to establish that a person named as attorney-in-fact or prior successor attorney-in-fact is unwilling, unable or unavailable to serve or continue serving as attorney-in-fact. The affidavit shall be attached to this power of attorney and shall be considered a part of it. The affidavit shall be conclusive evidence, insofar as third parties are concerned, of the facts set forth in the affidavit. Any person acting in reliance upon the affidavit shall incur no liability to my estate because of the reliance. [OPTIONAL] A successor attorney-in-fact shall be empowered to act while the prior attorney-in-fact is unwilling, unable or unavailable to act. When a prior attorney-in-fact later becomes willing, able and available to serve again, the prior attorney-in-fact may execute an affidavit to re-establish his or her authority to act. In that event, the successor attorney-in-fact's authority shall termination in accordance with the terms of the prior attorney-in-fact's affidavit.]

COMMENT. Minn. Stat. Sec. 523.16 allows a successor attorney-in-fact who is exercising powers as a result of the death, incompetency or resignation of a prior attorney-in-fact, to execute an affidavit to set forth the conditions precedent to the attorney-in-fact's authority to act under the power of attorney and to state that these conditions have occurred. The affidavit is conclusive proof as to any party relying on the affidavit to establish the occurrence of those conditions.

Sec. 523.16 applies to both SSF POAs and common law POAs. This common law provision attempts to expand on that concept to establish other conditions precedent to the successor attorney-in-fact's powers.

This language is in my form for the benefit of third parties who might not have a copy of Ch. 523 handy for reference.

ARTICLE II
SCOPE AND DURATION

2. This power of attorney is:

2.1 A general power of attorney, effective from the date it is executed until my death unless revoked in writing by me while competent.

COMMENT. This paragraph is substantially the same as Paragraph 1.1 of the Drafting Wills and Trust Agreements form. The language makes clear that this POA is intended to be a general rather than a limited POA.

2.2 A durable power of attorney under Minnesota Statutes, Section 523.07. The authorizations and powers granted in this power of attorney shall continue during any period that I am disabled, incompetent or absent.

COMMENT. This paragraph is substantially the same as Paragraph 1.2 of the Drafting Wills and Trust Agreements form. This is the language that makes this common law POA durable under Minn. Stat. Sec. 523.07, allowing it to survive until the principal's death unless earlier revoked. Minn. Stat. Sec. 523.11, subd. 3, provides that a written instrument of revocation that purports to be signed by the principal is presumed to be valid, and a third party may rely on this presumption without incurring liability for refusing to accept the authority of the attorney-in-fact.

[REMOVE ¶2.3 TO MAKE THE POA EFFECTIVE IMMEDIATELY] 2.3 The powers granted by this power of attorney shall become effective only in accordance with a written instrument signed by me while competent, or upon certification by my personal or attending physician and one other physician, by affidavit or affidavits which shall be attached to this instrument and shall be deemed to be a part of it, that I am unable to manage my own affairs because of temporary or permanent physical or mental disease or disability. An instrument signed by me shall be deemed effective as of the date that I sign it, unless a different date is specified in the instrument, and an original copy or a photocopy of it shall be attached to each original copy of my Power of Attorney. Upon attachment to an original copy of my Power of Attorney, the instrument shall be deemed to be a part of my Power of Attorney from the effective date of the instrument forward. A presumption shall apply that I am competent to sign an instrument unless the presumption is overcome in accordance with Paragraph 5.6.

COMMENT. I use this language to turn the POA into a "Springing" POA. A number of commentators have suggested that a springing power of attorney is not permitted by Minnesota law. I have found nothing in Minnesota law to prevent a springing power of attorney. The usual objection is that third parties will refuse to accept it because of the difficulty of establishing that the springing event has occurred. I have used this language to transfer Torrens Property without serious difficulty in a number of Minnesota counties. On the other hand, I have had banks and brokerages object to a properly executed SSF POA. There is no guarantee that any POA will pass without question, but I have always been able to satisfy the questions or concerns raised by third parties.

This language allows the principal to activate the power of attorney by separate instrument. It also allows the agent to activate it by obtaining affidavits from two doctors. The last sentence attempts to provide guidance for dealing with capacity issues with respect to future amendments and purported attempts to revoke the POA.

ARTICLE III
POWERS

3. Except as specifically limited in this instrument, my attorney-in-fact shall have all the powers incident to a general power of attorney under the common law and statutes of Minnesota, and shall also have full authority to take any actions necessary or incident to the execution of these powers, as fully as I could do if personally present. For purposes of illustration, and not as a limitation of this grant of powers, these powers shall include:

COMMENT. This paragraph is substantially the same as Paragraph 2 of the Drafting Wills and Trust Agreements form. This language attempts to confer the broadest possible authority upon the attorney-in-fact. Even though it purports to grant all of the principal's powers to the agent, Minnesota law does not allow delegation of certain powers, such as the power to cast a vote in an election, or the power to make a will. But to the extent that a power can be delegated, this language attempts to delegate that power to the agent. The language in Paragraphs 3.1 to 3.17 is merely illustrative of these powers, and not a limitation on the agent's power, except as specifically provided. Some third parties require specific language granting a power before accepting that the power has been granted. For example, the I.R.S. requires that the power to make gifts be specified in the power of attorney; a general grant of authority is not sufficient. See Form 2868 in Appendix A.

3.1 Disposition of Real Estate. The power to lease, exchange, sell, convey, mortgage, pledge or otherwise dispose of any or all my real estate, including but not limited to the following described parcels:

Parcel A:

Real property commonly known as , in County, , and legally described as follows:

[legal description]

P.I.N.

Parcel B:

Real property commonly known as , in County, , and legally described as follows:

[legal description]

P.I.N. ;

COMMENT. I include the legal descriptions of all parcels of real property owned by the principal at the time the power is executed. This helps abstractors identify the parcels affected by the power. The real estate power is not limited to described parcels; it includes parcels not described in the instrument.

The SSF POA form provides space to include a legal description to limit the power of attorney to the described real property. See Minn. Stat. Sec. 523.23, Subd. 1 (the suggested form); and 523.24, Subd. 1, last paragraph (the description of the power). But there is no space to include legal descriptions without limiting the power of attorney to those parcels. If you include current legal descriptions, the SSF POA cannot be used for after-acquired real property or other parcels.

3.2 My Obligations. The power to pay, compromise, settle and satisfy any bills or other obligations of mine or any demands made on me as my attorney-in-fact deems advisable;

COMMENT. This paragraph is substantially the same as Paragraph 2.5 of the Drafting Wills and Trust Agreements suggested form.

3.3 Obligations of Others. The power to collect, demand, sue for, and receive all debts, moneys, security for money, goods, chattels or other personal property to which I am entitled, and to settle or compromise the same as my attorney-in-fact deems advisable;

COMMENT. This paragraph is substantially the same as Paragraph 2.6 of the Drafting Wills and Trust Agreements suggested form.

3.4 Employment of Agents. The power to employ any agents, servants, or other persons in the administration of my affairs, conferring on such person both ministerial and discretionary powers and duties, and to pay them reasonable compensation for their services;

COMMENT. This paragraph is substantially similar to Paragraph 2.7 of the Drafting Wills and Trust Agreements suggested form. The power to employ agents and delegate authority to them is a problematic issue. Can an agent under a power of attorney delegate the agent's authority to a "sub-agent." This language makes clear that the principal intends to allow the attorney-in-fact to delegate both "ministerial" and "discretionary" acts to others.

3.5 Tax Obligations. The power to prepare, verify and file federal and state income tax, gift tax, property tax, generation-skipping tax and any other tax returns, claims for refunds, requests for extension of time, petitions to any court regarding tax matters, and any other tax-related documents including receipts, offers, waivers, consents, powers of attorney, closing agreements and declarations of all kinds; to receive confidential information and generally to act on my behalf in all tax matters of all kinds, for all periods before any officer of the Internal Revenue Service or any other tax authority;

COMMENT. Using a power of attorney to deal with the IRS used to be extremely problematic because the IRS used to require that the principal use an IRS form to grant power of attorney for specific returns and years. Now IRS Form 2848 allows the attorney-in-fact to attach a copy of the general power of attorney to Form 2848 and then use Form 2848 to designate the returns and years covered by the power of attorney.

3.6 Insurance. The power to make application for insurance policies, to pay any fee or premium for the same out of my funds and, in regard to any life insurance policies, to exercise any and all rights or incidents of ownership in such policies, including the power to assign ownership of such policies to the named beneficiaries and to change beneficiaries to accomplish the principal's testamentary plan and other estate planning objectives such as avoidance of probate expense and succession taxes;

COMMENT. In combination with Paragraph 3.12 regarding gifting and other applicable provisions of this form, this language permits the agent to change beneficiaries on insurance policies.

3.7 Miscellaneous Powers. The power to make application for licenses or any matter or thing on my account and to pay any fee for the same out of my funds, and to vote any shares of stock and to issue proxies and consents with respect thereto; to continue any business in which I have any interest, for whatever period of time my attorney deems advisable; this power shall include the power (a) to invest additional sums in any such business, (b) to act as or to select other persons to act as directors, officers or other employees of any such business, and (c) to make other arrangements with respect to the business as my attorney deems advisable;

COMMENT. This paragraph is substantially the same as Paragraph 2.11 of the Drafting Wills and Trust Agreements suggested form.

3.8 Payments. The power to disburse funds to pay for my support, maintenance and medical care and the support, maintenance and medical care of my spouse;

COMMENT. This paragraph is substantially the same as Paragraph 2.12 of the Drafting Wills and Trust Agreements suggested form. Minn. Stat. Sec. 519.05 now provides that a spouse is not generally liable to a creditor for any debts of the other spouse, except that a husband and wife are jointly and severally liable for all "necessary household articles and supplies furnished to and used by the family" where the husband and wife are living together. Paragraph 3.8 goes beyond what the statute requires.

3.9 U.S. Saving Bonds; Treasury Notes, Bills and Bonds. The power to purchase, exchange, replace, reissue, register in my name alone or in co-ownership with others, designate beneficiaries, or otherwise exercise any other power of ownership in any bond, bill, note or other security which has been issued or will be issued in my name as owner or co-owner, or which upon issuance has designated or will designate me as a beneficiary, by the United States of America or any of its instrumentalities, as my attorney-in-fact deems advisable; and the power to do all acts necessary or incidental to exercise of such powers;

COMMENT. I added this paragraph after one of our "local" banks, now headquartered on the West Coast, questioned whether an attorney in fact could use my common law POA form to redeem a United States Savings Bond owned by the principal. The bank official insisted that specific language regarding savings bonds had to be included. After adding this paragraph to my form to avoid this problem in the

future, I located the following Treasury Department regulation which applies to this situation:

31 C.F.R. Sec. 353.40 Special provisions for payment.

(d) Attorneys-in-fact.

A request for payment, reinvestment, or exchange executed by an attorney-in-fact will be recognized if it is accompanied by a copy of the power of attorney which meets the following requirements:

(1) The power of attorney must bear the grantor's signature, properly certified or notarized, in accordance with applicable State law;

(2) The power of attorney must grant, by its terms, authority for the attorney-in-fact to sell or redeem the grantor's securities, sell his or her personal property, or, otherwise contain similar authority; and

(3) In the case of a grantor who has become incapacitated, the power of attorney must conform with pertinent provisions of State law concerning its durability. Generally, in such circumstances, the power of attorney should provide that the authority granted will not be affected by the subsequent incompetence or incapacity of the grantor. Medical evidence or other proof of the grantor's condition may be required in any case.

3.10 Employment Benefits. The power to do any act relating to my current or former employment or my spouse's including election of options under any benefit or retirement plans, group insurance plans, group health plans and the like;

COMMENT. Retirement plans governed by ERISA generally require the owner's spouse to consent to beneficiary changes. Minnesota law permits a spouse to name the other spouse as attorney-in-fact. In case a plan administrator balks at allowing the attorney-in-fact spouse to sign on behalf of the principal spouse, I usually designate at least one or two successor attorneys-in-fact who can act in place of the attorney-in-fact spouse in situations where the attorney-in-fact spouse might be disqualified to act.

3.11 Trusts. The power to create and fund revocable or irrevocable trusts in my name conforming to or incorporating by reference the provisions of my latest validly executed Will, and to transfer assets to any revocable or irrevocable trust established by me even though the holder of this power may be a trustee or beneficiary of the trust, including the power to designate the trust as the beneficiary of any life insurance policy and to transfer to the trust the incidents of ownership of any insurance policy;

OMMENT. This language goes beyond the language recommended by the authors of Drafting Wills and Trust Agreements in Minnesota, Fifth Edition Minn. CLE, August 1999. Paragraph 2.13 of their suggested

common law POA form allows creation and funding of revocable trusts only and transfers to revocable trusts created by the principal. This language purports to allow creation and funding of either revocable or irrevocable trusts conforming to the principal's last Will, and transfers to revocable or irrevocable trusts created by the principal. I have never advised an attorney-in-fact to create or fund any such irrevocable trusts, but I do not want to preclude such a possibility if the circumstances dictate.

3.12 Gifts by Attorney-in-Fact; Consent to Gifts by Spouse. The power to continue to make gifts consistent in frequency and amount to any persons or organizations to whom I have made gifts in the past, and the power to make extraordinary gifts as my attorney-in-fact deems advisable;

COMMENT. This paragraph and the following subparagraphs are among the most important in this form. If gifting is authorized, the SSF POA allows an attorney-in-fact to make gifts to organizations to whom the principal has made gifts in the past and to make gifts to the principal's spouse, children and other descendants or to the spouse of any child or other descendant, outright or in trust. Minn. Stat. Sec. 523.24, subd. 8. If the SSF POA authorizes the principal to transfer property to himself or herself, the gifting power includes authority to make gifts to the attorney-in-fact. id. But these gifts are limited as described below. If these gifting powers are sufficient for the client situation, the SSF POA is perfectly adequate. If, however, the principal wants to permit the attorney-in-fact greater latitude to make gifts, either for future estate planning or medical assistance planning purposes, the common law POA allows you to draft language to deal with the problems inherent in gifting.

If the attorney-in-fact is given too much control over the principal's property so that the attorney-in-fact could gift the property to himself or herself, the POA will be treated as a general power of appointment under I.R.C. Sec. 2041. If the attorney-in-fact dies first, a general power of appointment will pull the principal's estate into the attorney-in-fact's estate for federal estate tax purposes. In many cases, this would not be a problem. But where the principal and the attorney-in-fact have substantial assets if combined, the power of attorney must be drafted to avoid general power of appointment treatment. The SSF POA solves this problem by limiting the amount that an attorney-in-fact can give to himself or herself or to anyone to whom the attorney-in-fact owes a duty of support. The amount is limited to $10,000 per calendar year per person (even though the annual gift tax exclusion increased to $11,000 per year effective January 1, 2002). Gifting to anyone else is limited only by the standard that the attorney-in-fact must determine that the gifting is in the "best interests" of the principal.

This form does not impose a dollar limit on the amount the attorney-in-fact can give to himself or herself or to persons to whom the attorney-in-fact owes a duty of support. Instead, this power of attorney imposes the following restrictions on exercise of

the power to gift. These restrictions are intended to make this power of attorney a limited power of appointment rather than a general power of appointment.

First, gifts must conform to the principal's testamentary plan. "Testamentary plan" as defined in Paragraph 3.12.5, includes probate assets and assets that will pass outside of probate. This language also settles the question whether an attorney-in-fact can alter a testamentary plan by the order in which the attorney-in-fact liquidates assets to pay for the principal's needs. This language freezes the beneficiary designations in effect at the time the power is signed. As assets are reduced to pay for the principal's needs or to engage in gifting activities, the relative balance among potential beneficiaries of the testamentary plan must be maintained.

Second, gifts must not unduly favor the attorney-in-fact over other beneficiaries similarly situated under the principal's testamentary plan.

Third, the attorney-in-fact must follow the guidelines of Paragraph 3.12 in determining whether gifts are warranted. This should be sufficient to prevent the gifting power from turning this power of attorney into a general power of appointment.

Caveat. If the attorney-in-fact is the only beneficiary of the principal's testamentary plan, additional restrictions might be advisable to avoid this problem, if the problem is considered sufficiently important to take additional precautions.

3.12.1 Such gifts may be made, continued or expanded only if my attorney-in-fact determines that my reasonable and foreseeable financial needs can be met from other funds or benefits, the gifts are consistent with my testamentary plan, the gifts do not unduly favor my attorney-in-fact over other beneficiaries similarly situated under my testamentary plan, and such gifts are prudent given relevant estate or income tax planning considerations and the availability of other financial resources and/or governmental benefits to otherwise meet my foreseeable needs;

COMMENT. This paragraph establishes the general standards for gifting under this power of attorney. It places restrictions on the ability of the attorney-in-fact to gift to himself, thereby making this a limited power of appointment under I.R.C. Sec. 2041, instead of a general power of appointment. (But see the Caveat in the previous Comment.)

3.12.2 In considering the advisability of making gifts, my attorney-in-fact shall give full effect to the provisions of Paragraphs 5.3 and 5.4 of this instrument.

COMMENT. This paragraph deals with the potential problem that gifting might be viewed as a breach of the fiduciary obligation owed by the attorney-in-fact to the principal. See Minn. Stat. Sec. 523.21:

In exercising any power conferred by the power of attorney, the attorney-in-fact shall 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 shall have the interests of the principal utmost in mind. (emphasis added)

The foregoing section applies to both common law and SSF POAs.

The Minnesota Vulnerable Adults Act, Minn. Stat. Sec. 609.232, et seq., punishes maltreatment of vulnerable adults. Minn. Stat. Sec. 609.2335 establishes the crime of "financial exploitation of a vulnerable adult." That section provides as follows:

Whoever does any of the following acts commits the crime of financial exploitation:

> **(1) in breach of a fiduciary obligation recognized elsewhere in law, including pertinent regulations, contractual obligations, documented consent by a competent person, or the obligations of a responsible party under section 144.6501 intentionally fails to use the financial resources of the vulnerable adult to provide food, clothing, shelter, health care, therapeutic conduct, or supervision for the vulnerable adult; (emphasis added) or**
> **(2) in the absence of legal authority:**
> **(i) acquires possession or control of an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, or duress; or**
> **(ii) force, compels, coerces, or entices a vulnerable adult against the vulnerable adult's will to perform services for the profit or advantage of another.**

The punishment for violating clause (1) or (2) is severe, depending on the value of the property involved. See Minn. Stat. Secs. 609.2335, subd. 3, which cross-references to Sec. 609.52, subd. 1. (which details the penalties for theft).

The question that must be asked is: "Why is it in the principal's interests to transfer his or her property to someone else?" Most attorneys-in-fact would transfer property to a principal's spouse to protect the spouse, without giving much thought to it. What about transfers to adult children? What about transfers to adult children who have substantial assets of their own?

It seems to me that this issue should be clarified in the power of attorney. This form handles the problem by both authorizing and directing gifting under certain circumstances. See the comments to Paragraphs 5.3 and 5.4, below.

(Paragraph 3.12.2, continued) In addition to the effect of my attorney-in-fact's signature under Minnesota Statutes, Section 523.18, the signature of my attorney-in-fact on any instruction or other transfer request document shall be deemed to constitute an attestation by my attorney-in-fact that the instruction or transfer request complies with and is fully authorized by this

power of attorney and shall be deemed to constitute conclusive proof to any party relying on the instruction or other transfer request document that the instruction or transfer request complies with and is fully authorized by this power of attorney.

COMMENT. This part of Paragraph 3.12.2 absolves a third party from liability for relying on the signature of an attorney-in-fact as certification that a proposed action is authorized by the power of attorney. Because this form describes specific conditions under which gifting can occur, one stock transfer agent has questioned how she could be sure that these conditions have been satisfied. This language was added to my standard form to deal with this issue. Ordinarily, the signature of an attorney-in-fact is certification that the POA has not terminated or been revoked. See Minn. Stat. Sec. 523.18 (signature of attorney-in-fact as conclusive proof of nontermination). But this certification does not include certification that the proposed action to be taken pursuant to the power of attorney is authorized. (Compare this to the affidavit by attorney-in-fact in real estate transactions under Minn. Stat. Sec. 523.17, which certifies that the attorney-in-fact's powers extend to the real estate involved in the transaction; compare also to the affidavit by attorney-in-fact under Minn. Stat. Sec. 523.16, which allows an attorney-in-fact who acquires authority by reason of death, incompetency or resignation of other attorneys-in-fact, to establish the conditions precedent to his or her exercise of authority under the power of attorney.)

This paragraph attempts to make the attorney-in-fact's signature serve as a certification that the proposed action is authorized by the power of attorney.

3.12.3 Unless the party relying on such signature has actual knowledge that a proposed transfer request by my attorney-in-fact does not comply with the requirements of this power of attorney, a party relying on such signature shall be held harmless by me, my heirs, legal representatives, successors and assigns from any loss suffered or liability incurred by me or my estate and shall be entitled to indemnification from me or my estate for any such loss or liability incurred by such party in acting in accordance with any such instruction or transfer request from my attorney-in-fact.

COMMENT. This paragraph holds a third party harmless from liabilities for relying in good faith on the signature of an attorney-in-fact as certification that a proposed action is authorized by the power of attorney.

3.12.4 My attorney-in-fact may give my consent for gift-splitting purposes to any gift that my spouse deems advisable to make to any person or persons included in my testamentary plan. In such an event, my attorney-in-fact shall have no obligation to consider the prudence of making the gift or the availability of other resources and/or benefits to meet my needs or any other requirement but may rely conclusively upon the judgment of my spouse or my spouse's duly appointed agent in determining the advisability of the making of any such gift and the advisability of giving consent to the gift;

COMMENT. This paragraph specifically authorizes the attorney-in-fact to give consent to gifts by the principal's spouse. In addition to facilitating gifting within the maximum annual exclusion for federal gift tax purposes ($11,000 per person per year; $22,000 per person per year if the spouse consents), this paragraph is intended to avoid problems with the Minnesota elective-share statute (Minn. Stat. Sec. 524.2- 202, et seq.). In calculating the value of the elective share, the augmented estate includes the value of any gifts made without the surviving spouse's consent within two years of the decedent's death to the extent the gifts exceed $10,000 per year to any donee. See Minn. Stat. Sec. 524.2-205, clause (3)(iii).

Minn. Stat. Sec. 523.24, subd. 7, clause (1)(a) specifically allows a SSF POA attorney-in-fact to disclaim any share in or payment from any trust, probate estate, guardianship, conservatorship, escrow, custodianship, qualified benefit plan, nonqualified benefit plan, individual retirement assets or other fund in which the principal has an interest, or consent to any reduction or adjustment of any share in any such fund. This power is limited by the requirement that the attorney-in-fact keep the principal's interests utmost in mind. Minn. Stat. Sec. 523.21. If consent to the spouse's gift is also viewed as a gift from the principal, the attorney-in-fact must determine that the gift is in the best interests of the principal. Minn. Stat. Sec. 523.24, subd. 8, clause (2).

Minn. Stat. Sec. 523.24, subd. 8, clause (3) permits a SSF POA attorney-in-fact to consent to gifts made under the power of attorney, but does not specifically authorize consent to gifts made by another.

3.12.5 For the purpose of determining consistency with my testamentary plan at any point in time, my testamentary plan means the totality of the provisions that I have made for transfer of probate and non-probate assets to my successors at the time of my death. My testamentary plan with respect to probate assets means the provisions for succession contained in my last will, or in the absence of a will, the provisions for succession contained in the Minnesota laws of intestate succession in effect at the date of execution of this power of attorney, as those statutes subsequently may be amended. My testamentary plan with respect to non-probate assets means the ownership or beneficiary designations that I have created or authorized with respect to the asset in question, including any subsequent changes directed by me;

COMMENT. Paragraph 3.12.1 requires that gifting must be consistent with the principal's testamentary plan. To clarify the meaning of this term, "testamentary plan" is defined in this paragraph. This definition includes the totality of the principal's plans for transferring property to others on his or her death. It includes both probate assets and assets with beneficiary designations to pass outside of probate. It also includes future changes in the testamentary plan as authorized by the principal. Nothing in this paragraph authorizes the attorney-in-fact to change the principal's testamentary plan.

3.13 Personal Care. The power to arrange and pay for medical, dental, or hospital care, the services of a companion, convalescent care, extended care or nursing home care for me or my spouse as my attorney-in-fact deems such care to be advisable;

COMMENT. This paragraph authorizes the attorney-in-fact to provide for the health care needs of the principal and the principal's spouse. It is slightly different from Paragraph 2.14 in the Drafting Wills and Trust Agreements suggested form.

3.14 Guardian/Conservator. The power to nominate in a probate court petition any person, even my attorney-in-fact himself or herself, to act as my guardian or conservator of my person, it being my intent that my attorney-in-fact shall retain full power over all of my personal and financial affairs;

COMMENT. This paragraph purports to allow the attorney-in-fact to nominate himself or herself as guardian or conservator of the principal in case one is needed. It is the same as Paragraph 2.15 in the Drafting Wills and Trust Agreements suggested form. This paragraph is intended to comply with the provisions of Minn. Stat. 525.544, which allows a proposed ward or conservatee with sufficient capacity to form a preference to nominate a conservator or guardian, provided the nomination is done by written instrument executed and attested in the same manner as a will. For this reason, this form is set up to be signed in the same manner as a will.

Please note that Minn. Stat. Sec. 523.01, applicable to both SSF POAs and common law POAs, does not require witnesses or other authentication of the principal's signature on a power of attorney. If the power of attorney will be used for real estate transactions, all signatures on the power of attorney will have to be acknowledged in front of a notary to allow recording. This form attempts to comply with all such requirements.

3.15 Disclaimer. The power to disclaim or renounce, in whole or in part, any assets, benefits or interests which would, but for the disclaimer, vest in me, even if the disclaimer constitutes a gift on my behalf;

COMMENT. This paragraph is the same as Paragraph 2.16 in the Drafting Wills and Trust Agreements suggested common law form. See the Comment to Paragraph 3.12.4, above.

3.16 Statutory Powers. Except as otherwise provided in this paragraph, all of the powers set forth in Minnesota Statutes, Section 523.24, as though and to the same extent as if this power of attorney qualified as a statutory short form power of attorney. Except as otherwise provided in this paragraph, the powers and provisions of the above cited section are incorporated in this instrument by reference as though fully set forth herein. These powers include powers relating to the following: real estate transactions; gift transactions (without regard to any restrictions on the amount of gifts to any one person in any one year, but subject to the gift limitations contained in this instrument); fiduciary transactions; tangible personal property transactions; bond, share and commodity transactions,

banking transactions; business operating transactions; insurance transactions; beneficiary transactions; claims and litigation; family maintenance; benefits from military service; records, reports and statements; and all other matters.

COMMENTS. Minn. Stat. Sec. 523.24 sets forth an extensive list of powers that can be included in a SSF POA. Because the SSF POA is widely accepted among real estate professionals in Minnesota, this paragraph attempts to take advantage of that lengthy list by incorporating those provisions by reference into this common law form, with the exception that the limitations on gifting in the SSF POA are not included. The SSF POA form therefore has no advantages over this common law POA form, at least insofar as the extent of the powers that can be granted.

3.17 [REMOVE IF NO MINOR CHILDREN] Parental Powers. All powers of mine as a parent with respect to the care, custody and property of my minor children, if any, to the fullest extent, and for the maximum six-month period, permitted by Minnesota Statutes, Section 524.5-505, if I am unwilling, unable or unavailable to exercise those powers myself; provided, however, that these delegated powers shall terminate with respect to the person or estate of a particular child to the extent these powers are given to a guardian or conservator of the person or estate of that child, as applicable.

COMMENT. Minn. Stat. Sec. 524.5-505 allows a parent to delegate parental powers for up to six months. This paragraph is intended for a principal with minor children. Parental powers can be delegated by court approval to a standby or temporary custodian for up to two years under Minn. Stat. Ch. 257B.

ARTICLE IV
HEALTH CARE DECISIONS

4.1 Contemporaneously with the signing of this durable Power of Attorney, I have signed a Health Care Directive which contains a Durable Power of Attorney for Health Care. I intend that my Health Care Directive be effective immediately and that it comply with the requirements of Minnesota Statutes, Sections 145C.01 to 145C.13. I intend that my Health Care Directive apply to supplement this instrument if I am unable, in the judgment of my attending physician, to make or communicate health care decisions. My Health Care Directive is attached to this instrument as an Addendum and shall be considered a part of it. My Health Care Directive may be detached and separated from this instrument and the original or any copy of it may be given separately to my health care providers without invalidating it or the remainder of this instrument or impairing its effectiveness or the effectiveness of the remainder of this instrument in any way.

COMMENT. I usually include a Health Care Directive as an addendum to each common law POA that I draft. I did not include such a form in these materials because there are so many health directive forms that could be used in such a situation, from very short simple health care directives that appoint health care agents only, to very lengthy, elaborate health care directives that include extensive discussion of health care preferences under a variety of circumstances.

Very often I use a common law POA to avoid the need for a guardianship or conservatorship for a principal who is suffering from progressive dementia. The combination of a financial power of attorney and a health care directive is usually sufficient to provide enough authority for most of the decision-making that will be needed in the client situation. There are some decisions, however, that fall between the cracks; they do not relate to property matters or to medical decisions. These types of decisions can include decisions of a more personal nature, such as preferences for companionship, visitation, social activities, living arrangements and the like.

Minn. Stat. Sec. 145C.01, Subd. 4, defines "health care" to include the establishment of a person's abode within or without the state and personal security safeguards to the extent decisions on these matters relate to the health care needs of the principal.

Paragraph 4.1 is intended to fill the gaps between the principal's financial power of attorney and health care power of attorney, at least to the extent such gaps can be filled under Minnesota law. No attempt is made to chart or predict the extent to which this language will be successful. The purpose of this language is to merely show the principal's intent.

4.2 If any provision of my Health Care Directive or any subsequent declaration or statement of mine which is deemed effective under then applicable law, is deemed to be inconsistent with the provisions of this power of attorney during any period when I am unable, in the judgment of my attending physician, to make or communicate health care decisions, the provisions of my Health Care Directive shall prevail. Except as expressly provided to the contrary in any written declaration of mine, the provisions of any Health Care Directive of mine shall not be deemed to revoke, suspend or alter any of the provisions of this power of attorney, except to the extent any such provision of this power of attorney is irreconcilable with the terms of any such Health Care Directive and then only to the extent of such inconsistency.

COMMENT. This paragraph is intended to coordinate the principal's common law POA with his or her health care directive. Some health care decisions involve both medical decisions and financial decisions. Most of the time, the same person will have authority over both financial matters and medical matters. This paragraph contemplates that sometimes two different persons might have authority to decide issues which touch on both financial matters and health care issues. This paragraph clarifies that the health care directive prevails over the common law POA, but only to the extent of any inconsistency. It also clarifies that unless the health care directive specifically provides otherwise, nothing in the health care directive revokes, suspends or alters any provision of the common law POA except to the extent of any inconsistency. The purpose for this language is to show the principal's intent.

ARTICLE V
GENERAL PROVISIONS

5.1 Limitations on Powers. Notwithstanding any provision of this instrument to the contrary, the powers given to my attorney-in-fact in Article Three shall be construed and limited so that no assets of my estate will be included in the estate of my attorney-in-fact in the event my attorney-in-fact predeceases me.

COMMENT. This paragraph is substantially the same as Paragraph 3 of the Drafting Wills and Trust Agreements suggested common law form.

5.1.1 Insurance. This instrument shall not be construed to grant my attorney-in-fact any incident of ownership in or powers over any life insurance policies on my life, except in his or her capacity as attorney-in-fact;

COMMENT. This paragraph is substantially the same as Paragraph 3.1 of the Drafting Wills and Trust Agreements suggested form.

5.1.2 Payments and Gifts. My attorney-in-fact shall not use my assets in any manner which discharges a legal obligation of such attorney-in-fact which is not also a legal obligation of mine. My attorney-in-fact may make disbursements to himself or herself as provided in this instrument.

COMMENT. This paragraph is substantially the same as Paragraph 3.2 of the Drafting Wills and Trust Agreements suggested form.

5.2 Duty to Act; Exculpation. Nothing in this power of attorney shall be construed to require my attorney-in-fact to exercise any of his or her powers under this instrument on my behalf, but with respect to any action voluntarily undertaken by my attorney-in-fact under this instrument, the power to take the action is conditioned upon my attorney-in-fact's agreement to accept a duty to attempt in good faith to complete the action as appropriate or to take such other actions as may be necessary to reasonably provide for appropriate completion of the action by some other responsible person. Under no circumstances shall my attorney-in-fact incur any liability to me or to my heirs, legal representatives, successors or assigns for acting or refraining from acting under this instrument, except for such attorney's own willful misconduct or gross negligence.

COMMENT. Minn. Stat. Sec. 523.21 specifically provides that an attorney-in-fact has no "affirmative duty" to exercise any power conferred upon the attorney-in-fact by the power of attorney. This statute applies to both SSF POAs and common law POAs.

This paragraph acknowledges that the attorney-in-fact has no duty to act, but recognizes that if the attorney-in-fact chooses to act, the common law applicable to agents and other fiduciaries will probably hold the attorney-in-fact to account for that action, including the obligation to see the action through to completion or to transfer responsibility for completion of the action to a successor attorney-in-fact or other legally responsible party.

5.3 Acting in My Interests; Standard of Care. In exercising any power conferred by this power of attorney, my attorney-in-fact shall exercise the power in the same manner as an ordinarily prudent person of discretion and

intelligence would exercise in the management of that person's own affairs and shall have my interests utmost in mind. My interests include concern about my own safety, security and well-being, and deep and abiding concern about the present and future safety, security and well-being of my spouse, children and grandchildren. In weighing the importance of the various matters which touch upon my interests and are of concern to me, I direct my attorney-in-fact to give substantial weight to my concerns for my family, keeping in mind that the safety, security and well-being of my spouse, children and grandchildren have been and continue to be of paramount importance to me. In exercising any power conferred by this power of attorney, I direct my attorney-in-fact to make a good faith determination of what I would do in similar circumstances, taking into account my values, interests and concerns, and the totality of the circumstances then known to my attorney-in-fact, and then to act in accordance with that determination. My attorney-in-fact shall be deemed to be acting in good faith in my interests in accordance with the standards prescribed by this paragraph and impartially with respect to all persons interested in the assets of my estate unless there is clear and convincing evidence to the contrary. A conflict of interest, whether real or perceived, by itself is not evidence of violation of the standards prescribed by this paragraph. To the extent this power of attorney permits my attorney-in-fact to engage in self-dealing or to make gifts, whether to my attorney-in-fact or others, any such action by itself shall not be considered to be a violation of the standards prescribed by this paragraph, unless there is clear and convincing evidence that I would not have taken the action under the same set of circumstances.

COMMENT. This paragraph expands upon the provisions of Paragraph 4 of the Drafting Wills and Trust Agreements suggested common law form. In addition to setting a prudent person standard as the standard for decision-making by the attorney-in-fact, this paragraph attempts to resolve other concerns about the fiduciary standards to be applied in judging the attorney-in-fact's actions.

This paragraph attempts to impose a "substituted judgment" standard rather than a "best interests" standard in judging whether an action should be taken. Under Minn. Stat. Ch. 525, the actions of a guardian or conservator are judged under a best interests test, e.g., what are the advantages to the principal; what are the disadvantages; if there are more advantages than disadvantages, the action is in the best interests of the principal. Instead, this paragraph directs the attorney-in-fact to consider what the principal would want to do, if the principal was able to make the decision himself or herself. This standard focuses on the values of the principal and tries to carry out the imputed wishes of the principal rather than someone else's view of what is in the principal's interests. This standard is quite different from the best interests standard. Some states, such as California, take this latter approach. So does the Uniform Guardianship and Protective Proceedings Act.

If a substituted judgment standard is applied, there are other related issues that must be faced. For example, a principal might want his or her resources to be used for the benefit of his or her spouse and/or children. Many times the spouse or a child will be the attorney-in-fact authorized to make decisions that will benefit

the spouse or child. This raises questions about conflict of interest. This language clarifies that self-interest in a decision by itself will not be treated as a disqualifying conflict of interest. This paragraph also sets the standard of proof necessary to establish a violation of the fiduciary obligations imposed by this power of attorney. This is especially important in light of the Minnesota Vulnerable Adults Act, which can impose criminal penalties for violation of fiduciary obligations relating to use of the principal's property. See the Comment to Paragraph 3.12.2., above. This paragraph shows the principal's intention that a clear and convincing evidence standard be applied to establish a violation of fiduciary obligation under this power of attorney.

5.4 Governmental Benefits. I request my attorney-in-fact to identify programs that may be of social, financial, developmental or other assistance to me or my family, but my attorney-in-fact shall not be liable for failure to identify all programs or resources that may be so available. If no other authorized representative agrees to act on my behalf, I request my attorney-in-fact to seek support and maintenance for me and my family from all available public resources, including but not limited to Medical Assistance, Medicare, Supplemental Security Income (SSI), Minnesota Supplemental Income, Social Security Survivors and Disability Insurance or successor or similar programs. My attorney-in-fact shall take into consideration applicable resource and income limitations of any public assistance programs for which I or any member of my family might be eligible when determining whether or not to take any discretionary action permitted by this power of attorney. In carrying out the provisions of this paragraph, my attorney-in-fact shall be mindful of the probable future needs of my family and me and shall take all actions which my attorney-in-fact, acting in accordance with this instrument, and using his or her discretion, deems necessary or advisable to protect my interests as determined in accordance with Paragraph 5.3.

COMMENT. This is another important paragraph in this form. This paragraph directs the attorney-in-fact to seek all available governmental benefits for the principal and the principal's family and to take such actions as may be necessary to qualify the principal and the principal's family for governmental benefits at the earliest opportunity.

Minn. Stat. Sec. 523.24, Subd. 11 specifically allows an attorney-in-fact under a SSF POA to "do all acts necessary for maintaining the customary standard of living of the spouse and children, and other persons customarily supported by the principal." The SSF POA does not contemplate providing benefits in excess of the current customary standard of living. The SSF POA power does not appear to extend to grandchildren. It might not even extend to children who are not dependent on the principal. Yet the principal might prefer to engage in estate planning or medical assistance planning that could provide substantial benefits for these individuals. The courts appear willing to accept estate planning as a proper object of decision-making by an attorney-in-fact. Medical assistance planning does not enjoy equal acceptance. It might even be said that gifting of assets to family members to protect them against the need to expend them for the health care needs of the principal or the principal's spouse is viewed with hostility by many

politicians and health care program administrators. Experience has shown that the courts in some jurisdictions are equally hostile to planning of this type.

This paragraph, in conjunction with Paragraph 5.3, attempts to inoculate the attorney-in-fact against accusations that the attorney-in-fact is doing something improper by engaging in medical assistance planning that involves transfers of assets for less than fair value.

The SSF POA form might provide enough latitude for gift transactions so as to avoid an accusation of financial exploitation of a vulnerable adult, but there are enough prosecutors who are concerned about abuse of powers of attorney that an attorney-in-fact should want as much protection as possible against such an accusation. On the other hand, many families have used a SSF POA to transfer assets away from an aged parent to keep the assets within the family without anyone questioning what they are doing.

5.5 Revocability. I reserve the right to amend or revoke this power of attorney, while competent, by an instrument signed, witnessed, and acknowledged by me and delivered to my attorney-in-fact at any time.

COMMENT. This paragraph is the same as Paragraph 5 of the Drafting Wills and Trust Agreements suggested form. Minn. Stat. Sec. 523.11 establishes a presumption in favor of any instrument of revocation. By implication this statute appears to impose a presumption of competence to revoke. Paragraph 5.6 attempts to impose standards to resolve the competency issues raised by these presumptions.

5.6 Competency and Medical Privilege. If my competency to revoke this power of attorney or my condition is in doubt for any reason, my attorney-in-fact shall consult with my attending physician and may rely conclusively upon the physician's written medical opinion regarding my condition or my competency to manage my estate. If I fail or refuse to submit to any examination, the physician may rely solely upon observations and any written evidence in preparing the opinion. I waive any medical privilege in favor of my attorney-in-fact.

COMMENT. This paragraph is another of the most important paragraphs in this form. One of the major problems in a power of attorney is the danger of revocation of a valid and well-functioning power of attorney by a principal who is suffering from a dementing condition. A power of attorney is put in place to avoid the need for a guardianship or conservatorship. A principal can easily become unhappy with the attorney-in-fact if the attorney-in-fact is taking unwanted actions to deal with the principal's health care needs. Dementia is sometimes easy to conceal. If the principal revokes a longstanding power of attorney, it might be impossible to put a new power in place. This can cause no end of difficulties.

This paragraph attempts to overcome the presumption in favor of revocation by bringing the principal's physician into the picture.

The goal here is to persuade a third party who has received a purported notice of revocation that the revocation was not effective because the principal lacked capacity to revoke. This effort might or might not succeed with a third party. The effort is still important to resolve whether the attorney-in-fact can continue in good faith to treat the power of attorney as still in effect. The physician's opinion might not persuade the third party who received a purported notice of revocation, but it might allow the attorney-in-fact to disregard a notice of revocation given to the attorney-in-fact, thereby allowing the attorney-in-fact to continue acting on the principal's behalf with respect to other parties and matters. If it becomes necessary to litigate the effectiveness of the revocation, the chief purpose for having the power of attorney (avoiding court involvement in the principal's affairs) is defeated.

5.7 Inducement of Reliance. All persons dealing with my attorney-in-fact may rely exclusively upon the original or a photocopy of this document, which is intended to give my attorney-in-fact complete authority over my person and all of my assets and financial matters. For purposes of inducing any bank, broker, custodian, insurer, lender, transfer agent and any other party to act in accordance with the powers granted in this power of attorney, I represent, warrant, and agree that if this power is terminated or modified for any reason, I and my heirs, legal representatives, successors and assigns will hold such party or parties harmless from any loss suffered or liability incurred by me or my estate and will indemnify such party for any such loss or liability incurred by such party in acting in accordance with this power of attorney prior to such party's receipt of a written notice executed by me of any such termination or modification.

COMMENT. This paragraph is substantially the same as Paragraph 7 of the Drafting Wills and Trust Agreements suggested common law form. This is the test of a successful power of attorney: will third parties honor it?

5.8 Records. My attorney-in-fact shall keep complete records of all transactions that he or she enters into on my behalf and shall render such reports and accounts as are required by law or by me.

COMMENT. This paragraph warns the attorney-in-fact of the record-keeping requirements imposed on an attorney-in-fact by Minn. Stat. Sec. 523.21. This record-keeping requirement is the same for SSF POAs and common law POAs.

5.9 Self-dealing. Except as otherwise specifically provided in this instrument, this power of attorney authorizes my attorney-in-fact to transfer property directly to himself or herself. My attorney-in-fact shall be entitled to, and may pay from my estate, reasonable compensation for the services performed by him or her under this power of attorney and may reimburse himself or herself from my estate for all reasonable out-of-pocket expenses incurred by him or her on my behalf or for my benefit.

COMMENT. This paragraph unequivocally allows the attorney-in-fact to engage in self-dealing. Various other paragraphs put limitations on this self-dealing.

Minn. Stat. Sec. 523.23, Subd. 5, allows the attorney-in-fact to reimburse himself or herself for expenditures made on behalf of the principal, even if the principal does not allow self-dealing. Chapter 523 and the SSF POA form are silent as to compensation for the attorney-in-fact.

This paragraph explicitly allows the attorney-in-fact to claim reasonable compensation for the services rendered under the power of attorney. This is a definite improvement over the SSF POA.

5.10 Captions; Number; Gender. Captions are for convenience only and are not intended to alter any of the provisions of this instrument. Where appropriate, the masculine includes the feminine, the singular includes the plural, and vice versa. Unless the context clearly indicates the contrary, the term "attorney-in-fact" includes successor attorneys-in-fact.

COMMENT. This is standard language dealing with these topics.

5.11 Governing Law. This power of attorney shall be governed by the laws of the State of Minnesota in all respects including its validity, construction, interpretation and termination. If any provision is determined to be invalid, such invalidity shall not affect the validity of any other provision.

COMMENT. This is the same as Paragraph 8 of the Drafting Wills and Trust Agreements suggested common law form.

COMMENT. The remaining provisions of this form are substantially the same as the signature pages of the Drafting Wills and Trust Agreements suggested form.

As noted in the Comment to Paragraph 3.14 at page 26, above, this form is designed to be signed with the same witnessing requirements and formalities as a will.

All signatures on this form are set up to be acknowledged in front of a notary to allow this power of attorney to be recorded for real estate transactions. Minn. Stat. Sec. 507.24

IN WITNESS OF MY INTENT, I have signed this power of attorney on .

_____

Jane Doe

We, the undersigned witnesses, each certify that in our presence on the date appearing above in the State of Minnesota, Jane Doe signed the foregoing instrument and acknowledged it to be her power of attorney, that at her request and in her presence and in the presence of each other, we have signed our names below as witnesses, and that we believe Jane Doe to be a competent adult:

Witness

Witness' Address

Witness

Witness' Address

This instrument was drafted by:
Julian J. Zweber
Attorney at Law
1360 Energy Park Drive, Suite 310
St. Paul, MN 55108-5252
(651) 646-4354

COMMENT. To allow recording of this power of attorney, this form includes a drafting statement to comply with Minn. Stat. Sec. 507.091.

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

We, Jane Doe, _____, and _____, the principal, and the witnesses respectively, named in the foregoing instrument, being first duly sworn, declare to the undersigned authority that the principal signed and executed the foregoing instrument, that she signed it willingly, that she executed it as her free and voluntary act for the purposes expressed in the foregoing instrument, and that each of the witnesses, in the presence and hearing of the principal, signed the instrument as witnesses, and that to the best of their knowledge the principal was at the time 18 or more years of age, of sound mind, and under no contraint or undue influence.

_____
Principal

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by Jane Doe, the principal, and _____ and _____, witnesses, on [date] .

_____
Notary Public

ACCEPTANCE OF APPOINTMENT AS ATTORNEY-IN-FACT AND SPECIMEN SIGNATURE

The undersigned John Doe agrees to act as attorney-in-fact for Jane Doe pursuant to the provisions of this power of attorney.

_____
John Doe

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

On _____, before me, a Notary Public within and for said County, personally appeared John Doe to me known to be the person described as attorney-in-fact in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed for the purposes expressed in it.

_____
Notary Public