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Power of Attorney (TN)

by Michael S. Goode, Lewis Thomason, P.C., with Practical Law Trusts & Estates

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A Standard Document that outlines the Tennessee Durable General Power of Attorney, which allows an individual to authorize a third party to manage their financial and property affairs. This document discusses Tennessee's Uniform Durable Power of Attorney Act, providing comprehensive powers to the attorney-in-fact, including managing real and personal property, conducting financial transactions, and handling digital assets under the Revised Uniform Fiduciary Access to Digital Assets Act. It emphasizes the importance of selecting a trustworthy attorney-in-fact due to the broad powers granted, which can also include buying, selling, or leasing property, managing retirement accounts, and accessing safe deposit boxes. The document also discusses specific powers, such as making gifts or changing beneficiary designations, which require explicit authorization. It emphasizes the durable nature of the power of attorney, ensuring its effectiveness even if the principal becomes incapacitated, thereby avoiding the need for a conservatorship. The document explains the execution requirements for powers of attorney, including the necessity for the principal's signature and the benefits of having the document witnessed and notarized to ensure acceptance by third parties.

This Standard Document has integrated notes and drafting tips, which contains explanations of rules and practical considerations associated with powers of attorney.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Unlike many states, Tennessee does not have a standard statutory form for a durable power of attorney. Therefore, power of attorney forms used in Tennessee often vary. This Standard Document generally tracks the requirements of Tennessee's Uniform Durable Power of Attorney Act (T.C.A. §§ 34-6-101 to 34-6-112).

This power of attorney authorizes a third party to manage an individual's property and financial matters. All references to a power of attorney in this Standard Document are to this power of attorney for property unless otherwise stated.

This Standard Document refers to the person:

- Executing the power of attorney as the principal.
- Appointed by the principal to make financial and property decisions as the attorney-in-fact or agent.

This Standard Document does not give an attorney-in-fact authority to make health care decisions for the principal, although it does authorize the attorney-in-fact to obtain medical records in case they are needed (generally, to determine the principal's incapacity if that is an issue). To authorize a third party to make health care decisions, an individual must use a valid health care power of attorney. For more

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information on health care powers of attorney, see Standard Document, Advance Directive for Health Care (TN).

Other Forms of Powers of Attorney

Depending on the principal's needs, additional forms of powers of attorney may be used instead of or with this form. These can include:

- Powers of attorney for other states.
- Internal powers of attorney for financial institutions.
- Military powers of attorney.
- Separate powers of attorney for tax purposes.
- Health care powers of attorney (advance directives for health care)
- Powers of attorney that become effective in the future. These are sometimes called springing powers of attorney. Springing powers of attorney are generally effective in Tennessee if they defer the effective date until a time the principal is determined to be disabled or incapacitated. (T.C.A. §§ 34-6-111 and see Drafting Note, Effective Date).
- Limited powers of attorney. If the principal does not wish to grant an attorney-in-fact broad fiduciary powers and instead wishes to limit an attorney-in-fact's authority to one particular transaction, counsel should consider preparing a separate special or limited power of attorney for that purpose.

Caution to Counsel

The power of attorney typically grants the attorney-in-fact broad powers over the principal's financial and property matters. Counsel should warn the principal of the risks associated with authorizing an attorney-in-fact to act as to these matters. Counsel should review with the principal the powers granted in the power of attorney before the power of attorney is drafted and executed.

The principal should also understand the potential for abuse by an attorney-in-fact before selecting an attorney-in-fact (see Drafting Note, Appointing Attorneys-in-Fact). Third parties are generally not required to inquire about the purpose or motives of an attorney-in-fact and do not typically look beyond the powers in the document itself (see Drafting Note, Third-Party Reliance Provision).

Capacity to Execute a Power of Attorney

A principal may execute a power of attorney if the principal has the power to contract. The principal must reasonably know and understand the nature, extent, character, and effect of executing the power of attorney (*Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296-97 (Tenn. Ct. App. 2001)).

Termination or Revocation of the Power of Attorney

The termination of a power of attorney may occur:

- By revocation or death of the principal.
- During disability if the power of attorney is not durable.
- By termination provisions in the power of attorney itself that mention a termination due to an expiration of a time period or the occurrence of a specified event.

(T.C.A. § 34-6-105.)

If the principal expressly revokes the power of attorney (or the power of attorney is otherwise terminated under its express terms by , for example, the principal's death or disability under a non-durable power of attorney), the attorney-in-fact's authority to act under the power of attorney is not terminated until the attorney-in-fact, has actual knowledge of the revocation (T.C.A. § 34-6-105).

The principal may want to add additional language revoking previous powers of attorney to minimize confusion as to which power of attorney document or which provisions are operative. For more information on revoking prior powers of attorney, see Drafting Note, Revocation of Previous Powers of Attorney.

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Bracketed Items

The drafting party should replace bracketed language in ALL CAPS with case-specific facts or other information. Bracketed language in sentence case is optional language that the drafting party may include, modify, or delete in its discretion. A forward slash between words or phrases indicates that the drafting party should include one of the words or phrases contained in the brackets in the document

Tennessee Durable General Power of Attorney

I, [PRINCIPAL NAME], of [PRINCIPAL COUNTY OF RESIDENCE NAME] County, Tennessee (the "principal"), do hereby constitute and appoint [ATTORNEY-IN-FACT NAME] to be my attorney-in-fact to act for me, in my name, and on my behalf:

DRAFTING NOTE: APPOINTING ATTORNEYS-IN-FACT

In this section counsel should identify:

- The principal.
- The attorney-in-fact or attorneys-in-fact.

Counsel should also indicate in the title of this Standard Document whether the power of attorney is durable. This form provides that the principal names successor attorneys-in-fact at the end of the section on attorney-in-fact powers (see Drafting Note, Designating Successor Attorneys-in-Fact).

An attorney-in-fact must be trustworthy. If an attorney-in-fact cannot be trusted to immediately and properly exercise the powers granted in this document, then that attorney-in-fact is also not an appropriate party to act during a principal's disability. Counsel should include the full names of the principal and the named attorneys-in-fact, so that they match what is on a person's identification, as institutions may reject an attorney-in-fact if the document lists their name in a way that is too dissimilar from their identification. This form provides that the principal names successor attorneys-in-fact at the end of the section on attorney-in-fact powers (see Drafting Note, Designating Successor Attorneys-in-Fact).

Designating Co-Attorneys-in-Fact

A principal may designate two individuals to serve at the same time as co-attorneys-in-fact. If a principal designates co-attorneys-in-fact, the principal should identify the co-attorneys-in-fact in this section. Co-attorneys-in-fact generally must act jointly unless the principal provides otherwise in the power of attorney. For example, using the word "and" when listing co-attorneys-in-fact means they must act jointly unless the context or other language fairly compels a different result. (*Davis v. Kindred Healthcare Operating, Inc.*, 2011 WL 1467212, *4-*5 (Tenn. Ct. App. 2011).)

Though it is permissible to do so, the principal generally should be discouraged from naming co-attorneys-in-fact. Naming co-attorneys-in-fact may result in confusion and delay in acting under a power of attorney. Some financial institutions also are wary of accepting accounts from co-fiduciaries because of the increased likelihood of dissent and potential litigation. Even if there are provisions that require unanimous consent of the co-attorneys-in-fact, an institution might not adequately uphold those provisions.

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To generally transact any and every kind of business; to make, sign, endorse, and execute any contracts, deeds, checks, stock powers, and other writings; to act for me with respect to any property, real or personal, tangible or intangible, owned by me at any time; to act for me in regard to any rights or obligations that I now have or may later acquire; and to do anything that I could personally do, including all powers specifically enumerated in Tenn. Code Ann. § 34-6-109:

(1) Generally do, sign or perform in the principal's name, place and stead any act, deed, matter or thing whatsoever, that ought to be done, signed or performed, or that, in the opinion of the attorney-in-fact, ought to be done, signed or performed in and about the premises, of every nature and kind whatsoever, to all intents and purposes whatsoever, as fully and effectually as the principal could do if personally present and acting. The enumeration of specific powers hereunder shall not in any way limit the general powers conferred here;

(2) Receive from or disburse to any source whatever moneys through checking or savings or other accounts or otherwise, endorse, sign and issue checks, withdrawal receipts or any other instrument, and open or close any accounts in the principal's name alone or jointly with any other person;

(3) Buy, sell, lease, alter, maintain, pledge or in any way deal with real and personal property, and sign each instrument necessary or advisable to complete any real or personal property transaction, including, but not limited to, deeds, deeds of trust, closing statements, options, notes and bills of sale;

(4) Make, sign, and file each income, gift, property, or any other tax return or declaration required by the United States or any state, county, municipality or other legally constituted authority;

(5) Acquire, maintain, cancel, or in any manner deal with any policy of life, accident, disability, hospitalization, medical or casualty insurance, and prosecute each claim for benefits due under any policy;

(6) Provide for the support and protection of the principal, or of the principal's spouse, or of any minor child of the principal or of the principal's spouse dependent upon the principal, including, without limitation, provision for food, lodging, housing, medical services, recreation, and travel;

(7) Have free and private access to any safe deposit box in the principal's individual name, alone or with others, in any bank, including authority to have it drilled, with full right to deposit and withdraw from the safe deposit box or to give full discharge for the safe deposit box;

(8) Receive and give receipt for any money or other obligation due or to become due to the principal from the United States, or any agency or subdivision of the United States, and to act as representative payee for any payment to which the principal may be entitled, and effect redemption of any bond or other security in which the United States, or any agency or subdivision of the United States, is the obligor or payor, and give full discharge therefor;

(9) Contract for or employ agents, accountants, advisors, attorneys, and others for services in connection with the performance by the principal's attorney-in-fact of any powers in this section;

(10) Buy United States government bonds redeemable at par in payment of any United States estate taxes imposed at principal's death;

(11) Borrow money for any of the purposes described in this section, and secure the borrowings in the manner the principal's attorney-in-fact deems appropriate, and use any credit card held in the principal's name for any of the purposes described in this section;

(12) Establish, utilize, and terminate checking and savings accounts, money market accounts, and agency accounts with financial institutions of all kinds, including securities brokers and corporate fiduciaries;

(13) Invest or reinvest each item of money or other property and lend money or property upon the terms and conditions and with the security the principal's attorney-in-fact may deem appropriate, or renew, extend, or modify loans, all in accordance with the fiduciary standards of Tenn. Code Ann. § 35-3-117;

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(14) Engage in and transact any and all lawful business of whatever nature or kind for the principal and in the principal's name, whether as partner, joint adventurer, stockholder, or in any other manner or form, and vote any stock or enter voting trusts;

(15) Pay dues to any club or organization to which the principal belongs, and make charitable contributions in fulfillment of any charitable pledge made by the principal;

(16) Transfer any property owned by the principal to any revocable trust created by the principal with provisions for the principal's care and support;

(17) Sue, defend, or compromise suits and legal actions, and employ counsel in connection with the suits and legal actions, including the power to seek a declaratory judgment interpreting this power of attorney, or a mandatory injunction requiring compliance with the instructions of the principal's attorney-in-fact, or actual and punitive damages against any person failing or refusing to follow the instructions of the principal's attorney-in-fact;

(18) Reimburse the attorney-in-fact or others for all reasonable costs and expenses actually incurred and paid by that person on behalf of the principal;

(19) Create, contribute to, borrow from, and otherwise deal with an employee benefit plan or individual retirement account for the principal's benefit, select any payment option under any employee benefit plan or individual retirement account in which the principal is a participant or change options the principal has selected, make "roll-overs" of plan benefits into other retirement plans, and apply for and receive payments and benefits;

(20) Execute other power of attorney forms on behalf of the principal that may be required by the internal revenue service, financial or brokerage institutions, or others, naming the attorney-in-fact under this section as attorney-in-fact for the principal on such additional forms;

(21) Request, receive, and review any information, verbal or written, regarding the principal's personal affairs or the principal's physical or mental health, including legal, medical and hospital records, execute any releases or other documents that may be required in order to obtain that information, and disclose that information to persons, organizations, firms or corporations the principal's attorney-in-fact deems appropriate;

(22) Make advance arrangements for the principal's funeral and burial, including the purchase of a burial plot and marker, if the principal has not already done so; and

(23) Access any catalogue of electronic communications sent or received by the principal, and any other digital asset in which the principal has a right or interest, pursuant to the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA"), compiled in title 35, chapter 8. For purposes of this subdivision (23), "catalogue of electronic communications" and "digital asset" have the same meaning as defined in the RUFADAA;

To serve as my personal representative for any and all purposes of the Health Insurance Portability and Accountability Act of 1996, as amended, from time to time, and its regulations ("HIPAA"), with the power, authority, and ability to access my medical records, physicians, other medical personnel, and to discuss my health situation; and

Giving and granting unto my attorney full power and authority to do, execute and perform all and every other act and thing whatsoever, without any limitation whatever and without being confined to the specific acts hereinabove set out, requisite or necessary to be done in and about the premises as fully and to all intents and purposes as I might or could do and I hereby ratify and confirm all that my attorney shall lawfully do or cause to be done by virtue of these presents, and for me and in my name and on my behalf.

My attorney-in-fact, as a fiduciary, shall exercise the powers granted under this Durable Power of Attorney only for my use and benefit and/or the benefit of my dependents, including my spouse and/or any minor child.

[If my said attorney-in-fact is, for any reason, unwilling or unable to serve or continue serving as my attorney-in-fact, I appoint [FIRST SUCCESSOR ATTORNEY-IN-FACT NAME], to act as my successor attorney-in-fact

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hereunder. If [FIRST SUCCESSOR ATTORNEY-IN-FACT NAME] is for any reason unwilling or unable to serve or continue serving as my attorney-in-fact, I appoint [SECOND SUCCESSOR ATTORNEY-IN-FACT NAME] to act as my second successor attorney-in-fact. The reasonable availability of any agent may be determined by anyone relying on this power in his, her, or its sole discretion.]

DRAFTING NOTE: ATTORNEY-IN-FACT GENERAL POWERS

This power of attorney specifically incorporates all powers granted to the attorney-in-fact as stated under Tennessee's Uniform Durable Power of Attorney Act (T.C.A. § 34-6-109). These powers include the most common powers necessary to administer assets in the principal's name.

In Tennessee, unlike many other states (including states adopting the uniform Durable Power of Attorney Act), the statutes governing creating and executing durable powers of attorney do not specifically identify the specific types of these common powers the principal may grant to an attorney-in-fact or the scope of those powers (T.C.A. §§ 34-6-101 and 34-6-112). When creating a general power of attorney for estate planning purposes, the principal generally includes in the power of attorney:

- A general grant of authority for the agent to act in all respects as the principal could as it relates to financial matters.
- Specific language specifically identifying the desired powers and their scope, which commonly include authority regarding the subjects below.

These authorizations enable the attorney-in-fact to act as to those matters with the broad authority under T.C.A. § 34-6-109, except as otherwise specifically provided under the power of attorney (T.C.A. § 34-6-108(a), (b)(2)).

Counsel may want to review the powers in this section with the principal and revise them as the principal prefers.

However, Tennessee does not construe this broad grant of statutory powers to authorize certain specific powers (T.C.A. § 34-6-108(c)). If the principal wants to authorize the agent-in-fact to have any of these specific powers, the principal must include express language authorizing the power (see Drafting Note, Powers the Principal Must Specifically Include, if Desired). These powers include, for example, the power to change beneficiary designations.

Banking and Other Financial Transactions

These powers collectively give the agent broad authority for banking transactions, including:

- Depositing money into any account in the principal's name or in the name of the principal's trust.
- Paying the principal's everyday bills and expenses.
- Investing the principal's money.
- Managing the principal's retirement accounts.
- Transferring securities the principal owns, among other things.

Real and Personal Property

Paragraph 3 gives the agent broad authority to buy, sell, transfer, lease, convey, encumber, or dispose of the principal's real and personal property, which generally includes property whether owned when this power is executed or acquired later.

Insurance Transactions

Paragraph 5 authorizes the agent to manage all types of insurance policies for the principal. As with all powers in this Standard Document, this power is optional (in whole or in part). These powers do not include language permitting an agent to change beneficiary designations on insurance policies, which language must be specifically included, if desired (see Drafting

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Note, Power to Change Beneficiary Designations). Counsel should review these provisions with the principal and revise as the principal prefers.

Retirement Plan Transactions

Paragraph 19 authorizes the agent to manage all the principal's plans, including qualified or nonqualified pension, individual retirement account, profit sharing, deferred compensation, stock bonus, or any other type of employee benefit plan. As with the powers regarding insurance transactions, these powers do not include language regarding changing beneficiary designations on retirement plans, which language must be specifically included, if desired (see Drafting Note, Power to Change Beneficiary Designations). Counsel should review these provisions with the principal and revise as the principal preferences.

Electronic Communications and Other Digital Assets

Issues may arise when individuals cannot manage these communications or assets because of disability or incapacity. Under Tennessee's Revised Uniform Fiduciary Access to Digital Assets Act (T.C.A. §§ 35-8-101 to 35-8-118), a digital custodian may grant a designated recipient or fiduciary access to the principal's electronic communications and other digital assets by express provision (T.C.A. §§ 34-6-112 and 35-8-102(12)). Given the prevalence of electronic communication, banking, and other accounts, the principal generally should include this power in the power of attorney unless there are specific reasons the principal does not want to do so. Paragraph 23 authorizes the agent to manage the principal's digital assets.

Custodians of digital assets must also disclose to an agent designated under a power of attorney the content of electronic communications sent or received by the principal and other digital assets to the extent the custodian is permitted to disclose under the Electronic Communications Privacy Act (T.C.A. § 34-6-112 and 18 U.S.C. § 2702(b)).

Other Miscellaneous Powers

In addition to the major categories of powers outlined above, this power of attorney gives an agent the power to, for example:

- File taxes for the principal (Paragraph 4). However, certain taxing authorities may require separate powers of attorney for certain purposes (see, for example, the instructions for IRS Form 2848). Paragraph 20 gives the attorney-in-fact the power to execute these, and other forms.
- Become the representative payee or other similar fiduciary for the principal for managing and receiving any government benefits to which the principal is or may be entitled (Paragraph 8).
- Hire and compensate additional agents to assist the agent in performing the agent's fiduciary duties, as the circumstances justify (Paragraph 9).
- Borrow money for purposes authorized under the power of attorney (Paragraph 12).
- Act for the principal in relation to any businesses in which the principal has an interest, including generally creating entities for the principal (Paragraph 14).
- Appear in, prosecute, or defend litigation on the principal's behalf (Paragraph 17).
- Reimburse the attorney-in-fact or others for all reasonable costs and expenses incurred and paid for the principal (Paragraph 18).
- Make advance funeral arrangements for the principal (Paragraph 22).

Counsel and the principal should review all these powers and if necessary, revise any of them, to make sure they accord with the principal's preferences.

Removing or Revising General Powers

The principal may want to remove or revise some of the general powers included in this power of attorney. However, a principal rarely removes or revises the general powers from or in the power of attorney form unless the principal has a specific

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reason for doing so (for example, the principal does not wish to give the attorney-in-fact the power to administer a specific bank account). Granting broad authority to the attorney-in-fact and using certain specific statutory language makes it more likely that an institution will accept a power of attorney.

Limiting the attorney-in-fact's broad authority may not enable the attorney-in-fact to act in certain unanticipated circumstances. However, a principal does have the power to remove, revise, or add powers (T.C.A. § 34-6-108(b)). For example, if the principal desires, counsel should revise the clause above limiting use of the attorney-in-fact's powers "for my use and benefit and/or the benefit of my dependents, including my spouse and/or any minor child" to suit the circumstances.

Duties of the Attorney-in-Fact

An attorney-in-fact's specific duties depend on the authority granted in the power of attorney document and the principal's needs or requests. An attorney-in-fact acting for a principal is a fiduciary and owes the principal a duty of care in acting under the power of attorney. This duty includes the duty to account to the principal or the principal's legal representative for any actions taken by the attorney-in-fact when exercising their authority under the power of attorney. (T.C.A. § 34-6-107.)

Designating Successor Attorneys-in-Fact

The principal should name successor attorney-in-fact in this section of the power of attorney in case the named attorney-in-fact is unable or unwilling to act or continue to act in that capacity. If the principal cannot choose a suitable successor attorney-in-fact or does not want to name a successor attorney-in-fact, counsel may either:

- Exclude the section naming successor agents in its entirety.
- Include the section regarding successor agents with "N/A" rather than the agent's information to show that it was considered and that the principal declined to select a successor.

Counsel should advise the principal that without a named successor attorney-in-fact, a court might need to appoint a conservator if the principal becomes incapacitated and the named attorney-in-fact can no longer serve (see Drafting Note, Designating Conservator).

This Durable Power of Attorney is to be construed and interpreted as a general power of attorney. All questions pertaining to the validity, interpretation, and administration of this Durable Power of Attorney shall be determined in accordance with the laws of the State of Tennessee.

This Durable Power of Attorney shall not be affected by any subsequent disability or incapacity of mine, if such should occur. If a guardian or conservator must ever be appointed for me, I designate the attorney-in-fact who is then authorized to act under this instrument to serve in that capacity, and I wish to relieve that person of any duty to post bond.

All acts done by my attorney-in-fact pursuant to this Durable Power of Attorney during any period of my disability or incapacity shall have the same effect and insure to the benefit of and bind me and my successor(s) in interest as if I were competent and not disabled.

This Durable Power of Attorney shall be effective as of the date signed and executed.

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DRAFTING NOTE: DURABILITY OF POWER ATTORNEY FOR ESTATE PLANNING

In Tennessee, a power of attorney for financial and property matters may be durable or non-durable. A durable power of attorney remains effective during a principal's incapacity. This means that once the power of attorney is effective, the attorney-in-fact's authority is not terminated on the later incapacity or disability of the principal. (T.C.A. § 34-6-102.) A non-durable power of attorney terminates when the principal becomes incapacitated.

Powers of attorney used for estate planning purposes are generally durable because in the context of estate planning, the main purpose of a power of attorney is for the attorney-in-fact to have authority to act on the principal's behalf when the principal becomes incapacitated and, ideally, to help avoid the need for a conservatorship or a judicial determination of incapacity.

This Standard Document includes language making the power of attorney durable.

However, if the principal wants the agent's authority to terminate on the principal's incapacity, the principal can state that the power of attorney terminates on the principal's incapacity. If so, counsel should revise this section and any discussion of, and references to, durability throughout the document (for example, this document references durability also in the title and notary clause).

Designating Conservator

This form also nominates the attorney-in-fact as the conservator, without bond, in case it becomes necessary for the court to appoint a conservator for the principal (T.C.A. § 34-6-104(b)). A conservator makes decisions regarding an adult individual's property or person if there is no attorney-in-fact or health care agent to make those decisions (a guardian is makes decisions regarding a minor's property or person) (T.C.A. § 34-1-101(4), (9)). If appointment of a conservator becomes necessary, the court appoints the principal's most recent nominee in the principal's power of attorney except for good cause or disqualification (T.C.A. § 34-6-104(b)).

Counsel may revise this language if the principal wants to name a different person as conservator or successor conservators.

Effective Date

It is generally preferable that powers of attorney created for estate planning purposes be effective immediately on the principal's execution, as is the power of attorney in this Standard Document. Some principals may prefer that the power of attorney be effective only on the principal's incapacity or on the occurrence of some future date or event. This is called a "springing" power of attorney, which counsel can create by modifying the language making the power of attorney effective immediately. (T.C.A. § 34-6-111.)

Springing powers of attorney taking effect on the principal's incapacity can be problematic. Incapacity must be proven and the attorney-in-fact's actions under this power of attorney may be delayed as medical records are obtained and determinations of competence are made. An attorney-in-fact may obtain the principal's medical records for these purposes (T.C.A. § 34-6-111).

If the principal prefers a springing power of attorney that is effective only on the principal's incapacity, practitioners should ensure that the attorney-in-fact or someone else authorized under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Tennessee law can obtain any needed records and medical authorization to show that disability (42 U.S.C. §§ 1320d to 1320d-9 and T.C.A. § 68-11-304). Even though the power of attorney does not need to include this express language, this power of attorney contains language, after the general powers language, expressly authorizing the attorney-in-fact to obtain the principal's medical records, for clarity to the custodians of those records (see Drafting Note, General Powers).

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[I hereby direct that third parties who receive this Durable Power of Attorney may act under this Durable Power of Attorney, and no revocation is effective regarding a third party unless said third party is notified of the revocation of this Durable Power of Attorney. Provided said third party acts in good faith, I hereby agree to indemnify the third party against any claims arising due to such third party's reliance on this Durable Power of Attorney.]

[Any attorney-in-fact acting hereunder shall be entitled to reasonable compensation for services rendered as my attorney-in-fact.

OR

No attorney-in-fact acting hereunder shall be entitled to a fee for so acting.]

[My attorney-in-fact[, and any [successor/successors] designated hereunder,] shall be indemnified for any claims arising hereunder for actions taken in good faith, and said attorney-in-fact[, and any [successor/successors] designated hereunder,] shall not be liable to me or any of my successors in interest for any action taken or not taken in good faith by my attorney-in-fact[, and any [successor/successors] designated hereunder], but shall be liable solely for any action taken or not taken my attorney-in-fact[, and any [successor/successors] designated hereunder, as the case may be,] which constitutes willful misconduct or gross negligence.]

[This Durable Power of Attorney revokes all previous powers of attorney executed by the principal [except for [POWERS OF ATTORNEY NAMES].]

DRAFTING NOTE: OPTIONAL PROVISIONS

Third-Party Reliance Provision

Counsel should consider adding a third-party reliance provision to minimize the possibility a third party rejects the power of attorney. This provision generally restates Tennessee statute providing that a third party is not liable for acting in good faith and in reasonable reliance on a power of attorney without notice that the power of attorney is revoked or no longer valid (T.C.A. § 34-6-105).

Attorney-In-Fact Compensation Provision

This optional provision provides that the attorney-in-fact is entitled to reasonable compensation while acting as attorney-in-fact. This type of compensation provision is common in Tennessee. However, the principal may include alternative specific compensation provisions, if desired (for example, the principal names a corporate fiduciary as attorney-in-fact and the power of attorney incorporates language that the attorney-in-fact is to be compensated according to their published fee schedule).

It is not common for an attorney-in-fact to receive compensation for acting under a power of attorney unless the attorney-in-fact is a corporate fiduciary, attorney, or accountant acting in a professional capacity. Family or friends named as agents may not want to be paid and, further, any compensation that is not reimbursement for expenses incurred in acting as attorney-in-fact is taxable income. Counsel should select:

- The first option in this section to provide that the attorney-in-fact is entitled to reasonable compensation.
- The second option in this section to indicate that no attorney-in-fact is entitled to compensation.

Paragraph 18 of the general powers section allows the attorney-in-fact to reimburse themselves for all reasonable costs and expenses incurred and paid for the principal (see Drafting Note,

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Other Miscellaneous Powers). It is typical for an attorney-in-fact to be entitled to reimbursement for reasonable expenses no matter who is acting as attorney-in-fact.

Attorney-in-Fact Indemnification Provision

Although the Tennessee Code regarding the Power of Attorney is silent as to indemnification provisions, Counsel should also consider whether to include a provision indemnifying the attorney-in-fact for actions taken in good faith to make the appointment more acceptable to the attorney-in-fact. However, the principal should weigh including this provision against the possibility of weakening liability protections for the principal. This optional provision is provided in an attempt to balance these concerns by requiring acts by the third party or attorney-in-fact to be made in good faith.

Revocation of Previous Powers of Attorney

The principal may want to add additional language revoking previous powers of attorney executed by the principal for clarity that the current power of attorney and its provisions are operative. This language can be a simple statement that the power of attorney revokes all previous powers of attorney executed by the principal. However, counsel should take care to exclude any limited powers of attorney (powers of attorney granted for a specific purposes) or other documents that the principal wants to continue to be operative despite the execution of this power of attorney.

If the principal revokes any previous powers of attorney, the principal must notify the attorneys-in-fact listed the previous power of attorney of the revocation. Otherwise, those attorneys-in-fact may continue to act under the power of attorney (T.C.A. § 34-6-105). An affidavit signed by the attorney-in-fact that the attorney-in-fact does not have actual knowledge of revocation may be used when, for example, an act of the attorney-in-fact requires recordation (T.C.A. § 34-6-105(c)).

For more information on revocation and termination of the power of attorney, generally, see Drafting Note, Termination or Revocation of the Power of Attorney.

[Nothing contained in this Durable Power of Attorney shall be construed to vest an attorney in fact with, or authorize an attorney in fact to exercise, any of the following powers/This power of attorney shall specifically incorporate the following powers]:

(1) Make gifts, grants, or other transfers without consideration, including in fulfillment of charitable pledges made by the principal while competent;

(2) Exercise any powers of revocation, amendment, or appointment that the principal may have over the income or principal of any trust;

(3) Act on behalf of the principal in connection with any fiduciary position held by the principal, including to renounce or resign the position;

(4) Exercise any incidents of ownership on any life insurance policies owned by the principal on the life of the attorney in fact;

(5) Change beneficiary designations on any death benefits payable on account of the death of the principal from any life insurance policy, employee benefit plan, or individual retirement account;

(6) Change, add or delete any right of survivorship designation on any property, real or personal, to which the principal holds title, alone or with others;

(7) Renounce or disclaim any property or interest in property or powers to which the principal may become entitled, whether by gift or testate or intestate succession; and

(8) Exercise any right, or refuse, release or abandon any right, to claim an elective share in any estate or under any will.]

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DRAFTING NOTE: POWERS THE PRINCIPAL MUST SPECIFICALLY INCLUDE, IF DESIRED

Tennessee statute does not vest in an attorney-in-fact certain powers, as specified under statute (these powers are not implied under the statutory general grant of authority in T.C.A. § 34-6-109) (T.C.A. § 34-6-108). The attorney-in-fact does not have these powers if the principal merely incorporates Tennessee statutory powers in the power of attorney.

If a principal wants to authorize an attorney-in-fact to have these powers, the principal must include express language accordingly. If so, counsel should include and amend the optional language, as desired. However, the principal should take care if including any of these powers in the power of attorney as they give the attorney-in-fact substantial power over the principal's assets and substantially affect the principal's asset planning.

These powers are typically listed, but expressly excluded, in Tennessee powers of attorney created for estate planning purposes as these powers may not only give the attorney-in-fact too much power over the principal's assets but may conflict with other documents or possibly cause tax issues.

Specific Powers

Power to Make Gifts

The attorney-in-fact may expressly authorize an agent to make gifts not including charitable pledges the principal made while competent (T.C.A. § 34-6-108(c)(1)). In addition, the principal may authorize gifting consistent with the principal's previous history of gifting if the principal, in the power of attorney or other writing:

- Authorizes the attorney-in-fact, in the power of attorney, to do, execute, or perform any act that the principal might or could do.
- Evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or to deal with the principal's property.

Making gifts that are not consistent with the principal's previous history of gifting requires additional express language. (T.C.A. § 34-6-110(a).)

The beginning of the general powers section generally authorizes gifting under T.C.A. § 34-6-110(a) by giving the attorney-in-fact the power to do anything the principal could personally do (see Drafting Note, General Powers). However, because of the significant power over the principal's assets an attorney-in-fact has when the principal grants gifting powers, counsel should include express language stating the principal's intent regarding the attorney-in-fact's gifting powers for clarity, as they do in the optional language in Paragraph 1 of this section. For example, the principal may want to specify, if desired, that gifts:

- Made to any one person may not exceed the amount of the gift tax annual exclusion (see Practice Note, Federal Gift Tax).
- Encompass only charitable gifts under the Internal Revenue Code.
- May include gifts to minors under any Uniform Transfers to Minors Act.

Gifting powers should be revised (or excluded) as necessary to fit the principal's objectives. However, like the other specific powers in this section of the power of attorney, principals typically do not authorize an attorney-in-fact to exercise this gifting power beyond what is authorized in the general powers section.

Trust Powers

The principal may grant the attorney-in-fact the authority to exercise powers of revocation, amendment, or appointment over trust principal or income (the power to amend or revoke the trust as to the rights of any beneficiary to receive certain trust principal or income) (T.C.A. § 34-6-108(c)(2)). A revocable trust instrument generally has provisions regarding trust amendment, revocation, or appointment. Therefore, it is important to coordinate the power of attorney and the trust instrument to ensure that there is no conflicting

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language and each document is clear about the authority of the power of attorney to amend or revoke the principal's trust instrument (or appoint trust income).

However, it is generally not advisable to authorize an agent under a power of attorney to have this power as it may create conflict with the express provisions of the trust instrument.

Though it is not required, if the principal has a trust and does not want to give the attorney-in-fact the power to amend that trust, the principal may want to include explicit language stating so for clarity. For more information on revocable trusts in Tennessee, including trust amendment and revocation, see State Q&A, Revocable Trusts: Tennessee.

Fiduciary Powers

The principal may grant the attorney-in-fact the power to act for the principal regarding any fiduciary position held by the principal, including the ability to renounce or resign the position (T.C.A. § 34-6-108(c)(3)). For example, if the principal is named trustee in a trust instrument not created by the principal, under this power, the attorney-in-fact may act as that trustee or renounce or resign the position. However, like the other specific powers in this section of the power of attorney, principals typically do not authorize an attorney-in-fact to exercise this power.

Life Insurance Powers

Under Paragraph 4 of this section, the principal may grant the attorney-in-fact the authority to exercise any incidents of ownership over life insurance policies on the attorney-in-fact (T.C.A. § 34-6-108(c)(4)). This authority, which can benefit the attorney-in-fact, is not granted to the attorney-in-fact under the broad general authority over life insurance granted under Paragraph 5 in the general powers section (see Drafting Note, Insurance Transactions). A presumption of undue influence can arise where an attorney-in-fact receives a benefit from a principal (see *Parish v. Kemp*, 179 S.W.3d 524, 531 (Tenn. Ct. App. 2005)). Therefore, the authority under Paragraph 4 of this section must be specifically granted, if desired. However, principals generally do not grant this authority to the attorney-in-fact.

Power to Change Beneficiary Designations

The principal may grant the attorney-in-fact the power to change beneficiaries on any property that names a beneficiary, including any retirement plan, annuity, or life insurance contract (T.C.A. § 34-6-108(c)(5)). A principal may include this power to add flexibility in the event of a birth, marriage, divorce, or death in the family or if the overall estate plan changes for other reasons. However, like the other specific powers in this section of the power of attorney, principals typically do not authorize an attorney-in-fact to exercise this power.

Power to Create or Change Rights of Survivorship

A principal may have:

- Designated a beneficiary to have a survivorship interest on a bank or brokerage account or other asset.
- Created a survivorship interest by creating a joint tenancy with right of survivorship with a joint owner.

On the principal's death, if the designated beneficiary or joint owner survives the principal, title automatically passes to that person (T.C.A. § 34-6-108(c)(6)). For example, the attorney-in-fact may:

- Add or change the principal's child as a transfer-on-death beneficiary on a bank account.
- With the general power over real estate transactions (see Drafting Note, Real and Personal Property), sever a joint tenancy (eliminate the right of survivorship in property by conveying the principal's joint tenancy interest to the principal, as a tenant in common). In this case, the principal's estate, rather than any surviving joint tenant, receives the principal's interest in the property.

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If the principal includes this clause, the principal should inform the attorney-in-fact of all property in which the principal created or maintains a survivorship interest. However, like the other specific powers in this section of the power of attorney, principals typically do not authorize an attorney-in-fact to exercise this power.

Power to Disclaim Property

The principal may grant the attorney-in-fact the power to exercise the principal's right to disclaim property (T.C.A. § 34-6-108(c)(7)). Property includes an inheritance under a will or trust, life insurance proceeds, individual retirement accounts or employee benefit plans, jointly held property, or any pay on death account. A disclaimer of property can be beneficial in situations where the principal does not need the property or if receipt of the property or existence of the power of appointment would create significant adverse tax consequences or disqualify the principal for government aid.

However, like the other specific powers in this section of the power of attorney, principals typically do not authorize an attorney-in-fact to exercise this power.

Power to Exercise or Refuse an Elective Share

The principal may grant the attorney-in-fact the power to exercise or refuse any right to claim an elective share in a deceased spouse's estate (T.C.A. § 34-6-108(c)(8)). An attorney-in-fact may want to refuse an elective share for tax reasons or if, for example, the assets the principal would receive under the principal spouse's will would be of greater value than the value of the elective share. For more information on elective share rights in Tennessee, see State Q&A, Wills: Tennessee: Disinheriting a Testator's Spouse.

However, like the other specific powers in this section of the power of attorney, principals typically do not authorize an attorney-in-fact to exercise this power.

Power to Make Medical Decisions

The principal may grant the attorney-in-fact the power to make any medical decisions except as incidental to property or finance decisions (T.C.A. § 34-6-108(c)(9)). This power of attorney may include the power to make medical decisions in Tennessee. However, this is not recommended and is not standard in Tennessee. In Tennessee, an individual generally makes medical decisions for another under a power of attorney for health care. For more information on powers of attorney for health care, see Standard Document, Advance Directive for Health Care (TN).

Power to Amend or Create a Will Likely Prohibited

Although not specifically excluded under statute, a power of attorney likely does not include the power to create or change a will for the principal without the principal being of sound mind, being present, and directing the agent to create or change the will. An individual that is not the testator may generally execute a testator's will only if the individual acts both:

- At the testator's direction.
- In the testator's presence.
- In the presence of two or more attesting witnesses.

(T.C.A. §§ 32-1-102 and 32-1-104(a)(1).) For more information on executing a will and the mental capacity to do so in Tennessee, see State Q&A, Wills: Tennessee: Question 4, Question 6, and Standard Clause, Signature Pages for Will and Self-Proving Affidavit (TN).

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IN WITNESS WHEREOF, I have executed this durable power of attorney on this [DAY] day of [MONTH], [YEAR].

_____

[PRINCIPAL NAME]

WITNESSES	ADDRESSES
_____	_____
[FIRST WITNESS NAME]	First Witness Address
_____	_____
[SECOND WITNESS NAME]	Second Witness Address

STATE OF TENNESSEE)

COUNTY OF [COUNTY NAME])

)

I hereby certify that, on this [DAY] day of [MONTH], [YEAR], before me, the subscriber, a Notary Public in and for the State aforesaid, personally appeared [PRINCIPAL NAME], who acknowledged the foregoing Durable Power of Attorney to be his or her act, as well as [FIRST WITNESS NAME] and [SECOND WITNESS NAME], witnesses, who in the presence of said principal and before me and in the presence of each other signed the foregoing Durable Power of Attorney as witnesses, having witnessed the signature of said principal.

AS WITNESS my hand and notarial seal.

_____

Notary Public

My commission expires: _____

[NOTARY SEAL]

DRAFTING NOTE: EXECUTING THE POWER OF ATTORNEY

Before executing a power of attorney counsel should review all places throughout the document that require the principal's personalized information including the nomination of the attorney-in-fact, any co-attorney-in-fact, and successor attorneys-in-fact (see Drafting Note, Appointing Attorneys-in-Fact). Counsel should also ensure the power of attorney includes any additional powers that the principal wants to grant (or revises or removes powers, as the principal desires) (see Drafting Notes, Powers the Principal Must Specifically Include, if Desired or Removing or Revising General Powers).

Requirements for Executing the Power of Attorney

The Tennessee Attorney General determined that a Tennessee power of attorney should be executed by the principal. This execution can be the principal signing with an "X," or having another

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sign for the principal at the principal's direction. Electronic signatures are also acceptable. (See Op. Tenn. Att'y Gen. No. 10-89 (2010).)

Although not required, it is common and recommended in Tennessee that a power of attorney be both witnessed by two witnesses and notarized. Complying with these formalities minimizes the possibility that a third party will reject the power of attorney, particularly in stock and real estate transactions.

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