

BOSTON BAR ASSOCIATION

November 15, 2011

DURABLE POWER OF ATTORNEY

SAMPLE PROVISIONS

I. Gifting

A. Limits on Class –

1. Power to Make Gifts or Release Interests: To make gifts, grants, or other transfers, including the forgiveness of indebtedness and the completion of any charitable pledges I may have made, without consideration, either outright or in trust to such person(s) or organization(s) included as beneficiaries of my will or any trust I have or may in the future create. Such gifts, grants, or other transfers shall include, without limitation, the following actions: (a) transfer by gift in advancement of a bequest or devise to beneficiaries under my will or in the absence of a will to my spouse and descendants in whatever degree; and (b) release of any life interest, or waiver, renunciation, disclaimer, or declination of any gift to me by will, deed, or trust.

This power shall allow my attorney to make gifts to himself/herself, so long as my attorney is a beneficiary under my will or, in the absence of a will, my attorney is my spouse or descendant in whatever degree.

Trusts and Custodial Accounts. All such gifts may be made outright, in trust, or to any legal guardian or custodian under any applicable Uniform Transfers (or Gifts) to Minors Act, as my attorney-in-fact may deem appropriate, even if my attorney-in-fact is the trustee, guardian, or custodian.

2. Power to Make Gifts or Release Interests: To make gifts of any property, real or personal, tangible or intangible, to or for the benefit of [LIST OF SPECIFIC PERSONS], including my attorney appointed hereunder, so long as the attorney who is serving is my spouse or child.
3. Power to Make Gifts or Release Interests: My attorney shall not have the power to make gifts. My attorney shall have the power to release any life interest, or to authorize waiver, renunciation, disclaimer, or declination of any gift to me by will, deed, or trust;
4. Power to Consent to Gift Splitting: To consent to gift splitting between myself and my spouse pursuant to Section 2513 of the Internal Revenue Code, as amended, and to execute any gift tax return or other document on my behalf setting forth such consent;
5. Powers to Provide for My Dependents: To make such use of my personal and real property as is necessary to maintain the customary standard of living of my spouse, minor children and other dependents; to provide for them necessary medical, dental and surgical care, hospitalization and custodial care; and to provide for the education of my children, public or private, and at any level, including camp and extracurricular activities consistent with my children's needs, interests and abilities;

Notwithstanding the above, if a child of mine has a disability and is receiving Medicaid, SSI, or other government benefits (or would otherwise be eligible for such benefits), my attorney shall have the power to pay to or apply for the benefit of my child such amounts as my attorney, in my attorney's sole, absolute, and uncontrolled discretion, may from time to time determine desirable for my child's use and benefit. My attorney shall have the absolute right to refuse to make any payment to or for the benefit of my child, and neither my child nor any representative of my child shall have the right to demand any such distribution from my attorney. Payments by my attorney shall supplement (and not supplant) government benefits received by my child. In addition, my attorney may establish and fund with my assets an inter-vivos third-party discretionary nonsupport special needs trust with spendthrift provisions for the benefit of my child with a disability during his or her lifetime, and upon such child's death, the trust residue shall be distributed to the then trustees of or consistent with the terms of the [NAME OF FAMILY TRUST], executed immediately prior hereto.

B. Limits on Amount –

1. Power to Make Gifts. To make gifts of my property to any one or more of my wife [NAME] and my issue living from time to time; provided, however, that the aggregate fair market value of such gifts made to any such person during any calendar year shall not exceed twice the annual exclusion amount for federal gift tax purposes in effect for such calendar year; and provided, further, that gifts to any such person may be made (i) directly to such person regardless of his legal status, (ii) to the guardian of such person, (iii) to a custodian for such person under the Uniform Transfers to Minors Act or the Uniform Gifts to Minors Act of any jurisdiction or (iv) to the trustee or trustees of any trust of which such person is a beneficiary;
2. Gift Making Powers. To make gifts, by deed or otherwise, to my spouse without restriction; to make gifts from my property to one or more charitable organizations, the choice of such organizations and the amount of such gifts to be determined in the sole discretion of my attorney, taking into account the desirability of income-tax deductions for the current year and my prior charitable-giving practices; to make gifts of present interests from my property to any of my children and grandchildren or to any trust for the exclusive benefit of any one or more of them, not to exceed in any case the maximum amount which I might give to the donee without making a taxable gift for federal gift tax purposes, and it shall not be necessary that such donees receive equal amounts; to give any item or items of my property to any person named
3. To make gifts of any real or personal property as my attorney shall see fit, but only, however, if such gifts qualify for the federal gift tax annual exclusion; to make qualified transfers pursuant to section 2503(e) of the Internal Revenue Code, provided that no attorney shall participate in making a gift that would discharge that attorney's legal obligation of support; to consent to split gifts with my spouse pursuant to section 2513 of the Internal Revenue Code; and to make such gifts to charities in amounts not exceeding the percentage limitations (including carryovers of excess contributions) as set forth in section 170 of the Internal Revenue Code;

II. Tax Powers

A. Example Sections –

1. Tax Powers: To prepare, execute and file all income tax, gift tax, social security or unemployment insurance and information returns required by the laws of the United States, or of any state or subdivision thereof, to confer with revenue agents, to prepare, execute and file refund claims, to collect any tax refunds from the United States or any state or subdivision, to execute agreements extending the statute of limitations, to execute Internal Revenue Service and/or any state department of revenue powers of attorney, to represent me or obtain representation for me before the Tax Court of the United States, any other court or any administrative agency, including the Internal Revenue Service or any state department of revenue, in connection with any of said tax matters, and to do anything whatsoever requisite or necessary in connection with all income tax, gift tax, social security and unemployment insurance taxes required by the laws of the United States or any state or subdivision that I could do in my own person;
2. Power with Respect to Tax Matters. To appear for me and represent me before the United States Treasury Department, the Internal Revenue Service or any other taxing authority in connection with any matter involving taxes in which I am a party; to prepare and execute any tax returns for me; to join with my wife [NAME] in filing any tax returns and to consent to gift-splitting with my wife [NAME]; to execute any claims for refund, protests, applications for abatement and consents to and waivers of determination and assessment of taxes, agreeing to a later determination and

assessment of taxes than is provided by any statute of limitations; to receive and endorse and collect any checks in settlement of any refund of taxes; to examine and to request and receive copies of any tax returns, reports and other information from the United States Treasury Department or any other taxing authority in connection with any of the foregoing matters;

3. Tax Powers

To prepare, execute and file all income tax, gift tax, social security or unemployment insurance and information returns required by the laws of the United States, or of any state or subdivision thereof, to confer with revenue agents, to receive confidential information, to exercise any elections I may have under federal, state or local tax law, pay taxes due, to prepare, execute and file refund claims, to receive and negotiate any tax refunds from the United States or any state or subdivision, to execute agreements extending the statute of limitations, to represent me or to obtain representation for me in any examination, audit, hearing, conference or litigation before the Tax Court of the United States or any other court in connection with said tax matters; to engage, compensate and discharge attorney, accountants and other tax and financial advisors and consultants to represent and/or assist me in connection with any and all tax matters involving or in any way related to me or any property which I have or may have any interest or responsibility, and do anything whatsoever requisite or necessary in connection with all income tax, gift tax, social security or unemployment insurance taxes required by the laws of the United States or any state or subdivision that I could do in my own person;

- 4. Tax Powers.** To prepare, sign and file joint, separate or single income tax returns or declarations of estimated tax for any year or years; to apply for and receive any refund due me, to receive any communications with respect to any tax, and to appear for me and represent me before any federal, state or municipal or other agency in connection with any tax matter; to prepare, sign and file gift tax returns with respect to gifts made by me or by my attorney hereunder for any year or years; to consent to any gift and to utilize any gift-splitting provisions or other tax election; and to execute any Power of Attorney designation on forms required by the Internal Revenue Service or any state department of revenue or taxation for three tax years prior to the date of this instrument and for all tax years hereafter;
- 5.** To prepare, execute and file such income and other tax returns, claims for refund or other documents as may be provided for by the laws of the United States, the Commonwealth of Massachusetts or any other lawful authority; to represent me before the Treasury Department of the United States Government, the Department of Revenue of the Commonwealth of Massachusetts or any other lawful authority in the matter of my individual income tax liability, or any other tax liability, for any year, and to compromise any claims made by such tax authorities;
- 6.** To make and sign all federal, state and local income, gift, excise, property and other tax returns that I may be required to file for the years 2004 through 2029, including but not limited to IRS Forms 1040 and 709; to receive and inspect confidential tax information; to receive and endorse refund checks; and to perform any and all acts that I can perform with respect to tax matters, including the execution from time to time of IRS Form 2848 (designating an attorney for federal tax matters) and the equivalent state or local forms, and the negotiation and execution of agreements, consents and other documents;

III. Trusts

A. Power to create, revoke, amend, fund

1. Powers to Transfer Assets to Inter Vivos Trust and to Revoke or Amend Trusts: To transfer any and all of my property, real or personal, to any trust created by me during my lifetime. My attorney shall not have the right to revoke or amend any trust instrument I have created, except that if my attorney is my wife, she may amend the [NAME OF TRUST] executed immediately prior hereto;
2. Powers to Transfer Assets to Inter Vivos Trust and to Revoke or Amend Trusts: To create any trust, revocable or irrevocable, for my benefit and that of my spouse and issue that I may have power to create myself; to transfer any and all of my property, real or personal, to any trust created by me during my lifetime; to revoke or amend any trust, which I may have created, and to remove assets from any existing trusts if I was granted such authority;
3. Powers to Transfer Assets to Inter Vivos Trust and to Revoke or Amend Trusts: To create any trust, revocable or irrevocable, for my benefit and that of my spouse and issue that I may have power to create myself; to transfer and convey any and all of my property, whether real or personal, tangible or intangible, to the trustee(s) of any revocable trust of which I am a beneficiary, or to the trustee(s) of any so-called “nominee trust” created to hold title to any of such property, whether created by me, by the trustee(s) of any revocable trust of which I am a beneficiary, or by any other person acting in my behalf or on behalf of any such trustee(s); to withdraw any property for my benefit from any such trust; and to exercise any of my powers under any such trust in a manner my Attorney shall reasonably understand to reflect my wishes regarding the disposition of my property, including, without limitation, any power to amend or revoke the trust;
4. Transfer Assets to Trusts/Revocation of Trust: To assign, set over, transfer or otherwise convey any of my property, real or personal, wherever situated, to the trustee or trustees of any trust created by me at any time; to execute, acknowledge and deliver any deed or other instrument of assignment, transfer or conveyance, for such purposes; to establish or create a trust or trusts for my benefit or the benefit of any person or entity whatsoever; and to revoke any trust under which I have such power;

IV. Health Care Decisions (Relationship to Health Care Proxy)

1. Institutional Care and Public Assistance

To authorize my admission to a medical, nursing, residential or similar institutional facility and to enter into agreements for my care; to enter into life care contracts for my care; to apply for the receipt or continuation of Medical Assistance or other public assistance programs and to complete, execute, and deliver any forms, documents or applications necessary to effectuate the receipt or continuation of such benefits;

2. Powers to Provide for my Care. To make such use of my personal and real property as is necessary to provide for my maintenance, transportation, and necessary medical, dental and surgical care, hospitalization and custodial care;
3. Health Care: To follow the instructions of the agent then acting under any health care proxy in effect for me with respect to any and all health care decisions on my behalf, to pay any expenses for health care incurred on my behalf by such agent which are not covered by insurance and to reimburse such agent for reasonable expenses arising from the performance of his or her duties as such agent; provided, however, if no such agent is acting on my behalf, or if there is such an agent, but such agent lacks

the authority, my attorney-in-fact shall have the power to admit or transfer me to or from any hospital, nursing home or other facility appropriate to my needs and to enter into contracts or other agreements relating to any such placement; my attorney-in-fact shall be empowered to provide and receive protected health information to and from any agent acting under any health care proxy in effect for me or to and from any physician, hospital or other health care provider whose care I am currently under or have been under in the past;

4. **HEALTH CARE DECISIONS AND FUNERAL PLANS.** To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care;
 - a) My agent may enter into mediation and/or arbitration with respect to any contracts for my care; but my agent SHALL NOT agree to binding arbitration with respect to any such contract(s).
 - b) If I have not separately designated an attorney to make such decisions on my behalf pursuant to a Health Care Proxy duly executed by me (which document shall supersede the following provisions of this Paragraph as long as such Proxy is in full force and effect), then I grant my attorney named herein the power to authorize all medical, therapeutical and surgical procedures, including the administration of drugs; provided, however, that if the situation should arise in which there is no reasonable expectation of my recovery from extreme physical or mental disability, I direct my said attorney to make whatever decision and take whatever steps are necessary to carry out my express wish that I be allowed to die and not be kept alive by medications, artificial means or heroic measures, subject, however, to the administration of medication or the performance of medical procedures that alleviate suffering and constitute comfort care even though that may shorten my remaining life;
 - c) To enter contracts for my funeral, burial, or cremation and to pay in advance for such funeral arrangements; to establish a bank account designated as a funeral account for purposes of my funeral arrangements.

V. Protective Proceedings

1. **PROTECTIVE PROCEEDINGS:** If protective proceedings for my person or my estate are hereafter commenced, I hereby nominate, for consideration by the court, my attorney named hereunder to serve as the conservator/guardian of my estate.
2. **Protective Proceedings**

If at any time subsequent to the execution of this instrument protective proceedings shall be brought in any court having jurisdiction for the appointment of a conservator or guardian of my estate, or a guardian of my person, I hereby nominate *agent* of *agent address* and *agent 2* of *agent 2 address* to be guardians and conservators of my person and estate.
3. In the event that protective proceedings for my estate and/or person are hereafter commenced, I hereby nominate, for consideration by the court, [NAME] to act as my conservator and [NAME] to act as my guardian. I hereby request and direct that each such person shall be exempt from furnishing any bond in such capacity or, if required by law to furnish bond, that the amount thereof shall be fixed at the minimum allowed by law and that each such person shall be exempt from furnishing any surety or sureties thereon or security for the performance thereof.

VI. Third Party Enforcement and Reliance

1. Enforcement: Should a third party refuse to recognize the exercise by my attorney of any authority hereunder, my attorney may use any of my resources as may be necessary to require such third party to abide by the exercise of such authority, including litigation.
2. THIRD PARTY RELIANCE: Revocation or termination of this power of attorney shall be ineffective as to any third party unless and until actual notice or knowledge of such revocation or termination shall have been received by such third party. Payment by any third party in reliance upon this power of attorney, and made prior to receipt by such third party of actual notice or knowledge of the revocation or termination of this power of attorney, shall constitute a release and discharge of said third party from all liability for all claims to the extent of such payment so made, and such third party making any such payment need not see to the application thereof.

Any third party may conclusively rely upon the fact that this power of attorney is in full force and effect notwithstanding the lapse of time since its execution (i.e., no matter how "old" it might be) (unless such third party has actual knowledge of its revocation or termination as aforesaid) and that my attorney was fully authorized to take a particular action or execute a particular document. Further, any third party may conclusively rely upon the representations of my attorney hereunder or any licensed attorney at law as to all matters pertaining to any power granted to my attorney, and/or as to all facts which may in any manner be germane to any matter or thing arising in connection with this power of attorney.

No third party who may act in reliance upon any of the foregoing or the authority granted to my attorney hereunder shall incur any liability to me or my estate as a result of permitting my attorney to exercise any power and I, for myself and for my heirs, executors, legal representatives and assigns hereby agree to indemnify, defend and hold harmless any such third party from and against any and all claims that may arise or be asserted against such third party by reason of such third party having relied on the provisions of this instrument. Any third party may rely upon a copy hereof certified by a Notary Public to be a true copy of this instrument.

3. INDEMNIFICATION AND THIRD PARTY RELIANCE

I hereby covenant and agree on behalf of myself and my estate to indemnify and hold harmless any and all persons from any and all liability resulting from such persons' actions in good faith reliance on this power of attorney. No third party shall be liable to see to the application of any payment and/or transfer made pursuant to this power of attorney. Third parties may rely upon the representations of my attorney-in-fact as to all matters pertaining to any power granted to my attorney-in-fact, and no person who may act in reliance on such representations or the authority granted herein shall incur any liability to me or my estate as a result of permitting the exercise of any power contained herein.

4. REFUSAL TO HONOR POWER

Should any third party, including bank, trust company, insurance company, brokerage firm, stock or bond company, or any other third party refuse to accept the validity of this Power of Attorney, and should I suffer any financial or personal damages as a result of such refusal, then I direct my attorney-in-fact to bring whatever legal action may be appropriate to compensate me, my spouse, or my heirs for the damages suffered due to such refusal.

5. THIRD PARTY RELIANCE. Third parties may rely upon the representations of my attorney as to all matters pertaining to any power granted to my attorney, and no person who may act in reliance upon the representation of my attorney or the authority granted to my attorney shall incur any liability to me or my estate as a result

of permitting my attorney to exercise any power. Failure to honor this appointment and to recognize the authority of my attorney hereunder shall be actionable.

VII. Accounting

1. INVENTORY AND ACCOUNTINGS: My attorney shall not be required to file an inventory or account with any clerk of the court or any other person who may request such inventory or account.
2. INVENTORY AND ACCOUNTINGS: No inventory or account shall be filed with any clerk of the court, but an accounting shall be filed with [MYSELF, SPOUSE, AND/OR CHILDREN OVER THE AGE OF 18] and/or [NAME], of [CITY, STATE] each year and with my personal representative in the year of my death.
3. ATTORNEY-IN-FACT DISCLOSURE. Any person appointed hereunder as attorney-in-fact may request of any other duly appointed attorney-in-fact information and accountings of his or her acts or actions as such fiduciary, such information to be provided in writing or orally, as the parties may agree. Provided however, that my spouse acting as my attorney-in-fact hereunder shall not be required to comply with any such disclosure request; and any actions undertaken by my spouse as attorney-in-fact hereunder shall be conclusively presumed to be appropriate and performed with my full consent and approval.
4. At the request of [NAME], my attorney -in-fact shall prepare an accounting of his or her actions as fiduciary. In addition [S/HE] may request copies of statements for any accounts where I hold funds.

VIII. Delegation

1. My attorney may in writing from time to time appoint one or more substitute and additional attorneys to have all or any of my attorney's powers hereunder, including this power of appointment, and may revoke any such appointments. Such substitutes and any additional attorneys, as well as my attorney above named, are included in references to my "attorney" in this power of attorney.

This power of attorney shall not be affected by my subsequent disability or incapacity or by the lapse of time. Anyone may rely upon a copy certified by a notary public of this power of attorney or of any appointments of substitute and additional attorneys as fully as on the original instrument.

IX. Catch-All Provisions

1. To Do All Necessary Things: To do, take, and perform all and every act and thing whatsoever requisite, or necessary to be done, in the exercise of any of the rights and powers herein granted, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my attorney in fact shall lawfully do or cause to be done by virtue of this power of attorney and the right and powers herein granted
2. Other Powers. To do all things necessary to carry out the intent hereof as fully as I might do if I were personally present.

My attorney is authorized to delegate any powers hereunder; to revoke any such delegation; to pay herself reasonable compensation for services rendered by her hereunder from any property owned by me or to which I am now or may hereafter become entitled; and to deal with herself or with any concern in which she may be interested, as freely and effectively as though dealing with a stranger.

Any of my attorneys may resign at any time by a writing signed by her and attached hereto, written notice of which shall be given to me and anyone herein

named to succeed her as attorney. If my attorney hereinabove named shall for any reason cease to serve as an attorney hereunder, I hereby constitute and appoint [NAME] of [CITY, STATE], as my attorney hereunder to serve in her stead.

This power of attorney shall not be affected by my disability or incapacity arising after the execution of this instrument or by the lapse of time. My death shall not revoke or terminate this power of attorney if my attorney, without actual knowledge thereof, acts in good faith hereunder. No person dealing with my attorney hereunder shall be responsible for the application of any money or property paid or transferred to said attorney.

I also hereby nominate that person who at the time may be serving as my attorney hereunder to be the conservator of my estate and the guardian of my person if protective proceedings for my estate or person are hereafter commenced. I exempt said conservator and guardian, whether original or successor, from giving surety on any bond.

3. In addition to the foregoing, my attorney hereunder may act as my alter ego with respect to any and all possible matters and affairs not otherwise enumerated herein and which I as principal can do through an agent.
4. In general, to do all other acts, deeds, matters and things whatsoever in or about my estate, property and affairs, or to concur with persons jointly interested with myself therein in doing all acts, deeds, matters and things herein either particularly or generally described all as fully and effectually to all intents and purposes as I could do in my own proper person if personally present.

THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY MY SUBSEQUENT DISABILITY, INCAPACITY OR LAPSE OF TIME.

5. To do any one or more or all of the foregoing at discretion and from time to time, and to do any and all things, whether herein enumerated or not, which my attorney shall consider advantageous or proper in connection with my affairs.

My attorney is authorized to deal with <himself/herself> (or with any concern in which my attorney is interested) as freely and effectually as though dealing with a stranger.