

POWERS OF ATTORNEY:

Pitfalls and Best Practices

Susan Dawson-Tibbits, Attorney at Law
JOHNSON, BUNCE & NOBLE, P.C.
7800 N. Sommer Street
Peoria, IL 61615
Phone: (309) 691-9650
E-mail: susan@peorialawyers.com

This presentation will focus on problematic areas and best practices used in the preparation of various types of powers of attorney, primarily looking at the durable powers of attorney for property found in the Illinois Power of Attorney Act, 755 ILCS 45/3-1 *et seq.* A financial Power of Attorney has been described by many as “a license to steal.” It may lead to many problems, both for the principal and the agent. A health care Power of Attorney comes with its own set of ethical issues and lack of guidance for agents. Therefore, it is important for us as attorneys to know the legal background of these documents, to anticipate common problems and to draft the document so as to alleviate these problems in advance.

A. PROPERTY AND FINANCIAL

1. Power of Attorney for Property

In 1987, Illinois adopted the Illinois Power of Attorney Act. This Act explicitly states that all Powers of Attorney would be considered "durable" -- in other words, they would continue to be valid even after the principal became incapacitated within the meaning of the Illinois Probate Act and even after a guardian was appointed for the principal. 755 ILCS 45/2-5.

The 1987 Power of Attorney Act provides for a Power of Attorney for Property and a Power of Attorney for Health Care. In each document, the principal may designate an agent to make and carry out financial decisions for the principal. 755 ILCS 45/3-1 *et seq.* The document is designated a “durable” power as it survives the disability or incapacitation of the principal, the appointment of a guardian for the principal, and any lapse of time between when the power is executed and when it is actually used. 755 ILCS 45/2-5.¹

The statute itself explicitly the agent has no duty to act for the principal in any way, but if she does act under the agency, she must act “in good faith for the benefit of the principal using

¹ A copy of the statutory short form Power of Attorney for Property is attached as Exhibit A.

due care, competency and diligence in accordance with the agency.” 755 ILCS 45/2-7(a).² A third party who in good faith relies on a copy of the Power of Attorney is protected and released just as if he had dealt with the principal. 755 ILCS 45/2-8. That third party may request that the agent provide an affidavit that the Power of Attorney is still valid and in effect. 755 ILCS 45/2-8. The statute now provides an affidavit for the agent to sign that certifies that the power of attorney is still in effect, that the principal is still alive and was competent when the POA was executed, and that the agent’s powers have not been revoked or terminated. 755 ILCS 2-8(b).

A court has no authority to grant any powers or decision-making authority to a guardian if there is a valid delegation of authority to an agent in a Property Power of Attorney. 755 ILCS 5/11a-18(e) and 45/2-10.

Unlike the Health Care Power, however, there are risks inherent in the Power of Attorney for Property which the attorney should carefully consider. First of all, there is a potential financial risk to the principal. This author always tells clients that a Power of Attorney for Property is like handing the agent a blank check. If the Power of Attorney is in effect, any third party, such as a bank, brokerage or realtor, has the right to rely on the validity of the Power of Attorney. The agent can then wipe out a bank account, sell the principal’s home, or take other actions that the principal did not anticipate and would not authorize. It is critical to select an agent that the principal trusts. In the situation of most married couples who appoint each other as agents, this is usually not a problem. To give the most protection to the principal, you may consider actions such as the following:

² In the recent case of *Guardianship of Spinnie*, 2016 IL App (5th) 150564-U, the Fifth District Appellate Court held that the fiduciary duty between the principal and agent began when the power of attorney was created, even though the agent had no knowledge of the agency. This holding could create problems for the agent if the principal, as in this case, made gifts to the agent after the document was executed but before the agent began to act. However, the Court found that the agent rebutted the presumption of undue influence, and so had no liability to the principal’s estate. This was also a Rule 23 decision, and therefore its precedential value is limited.

1. Carefully consider the person who is bringing the principal to your office, and consider his or her motivations in doing so. Much financial exploitation could be prevented before it happens, if the attorney is familiar with the red flags of undue influence and takes the time to consider the client's situation before automatically preparing documents. Pay close attention as to whether your directions from this client differ from previous contacts with him or her, or if the client suddenly makes allegations against previously-trusted children or agents without good cause.

2. Help the principal select the agent (and/or successor agent) with great care, and only appoint someone whom the principal trusts completely. Point out to the client that being the oldest child should not be the only qualification for being named as the agent, and that different children may have different skills which would support being named for different tasks. Make sure that the client does not name a particular child as agent only because his or her feelings would be hurt if not named.

3. Make the beginning date of the agency as contingent on some future condition (i.e. "when my treating physician certifies in writing that I am no longer able to handle my own financial affairs, and that certification is presented to any entity along with this Power of Attorney for Property".) This is called a "springing" power of attorney, and the agent will have to present the written certification from the doctor along with the power of attorney document to the bank, brokerage or other entity with whom she is dealing.

4. Include additional language in the document that the principal retains the right to use, manage, and give away his or her own funds, despite the fact that an agent has been appointed or is acting for him or her. Only a plenary guardianship will take away the right of the

ward to use his own funds. Many times the agent will “hide” the principal’s money, or even commingle it with one of the agent’s own accounts, so that the principal cannot access it.

5. Include a provision where the agent is required to sit down with the principal and explain all decisions made and actions taken. Even a person with dementia may be able to understand explanations given in simple language, and many older persons resent having information on their own finances withheld from them because “it’s easier that way” or “Mom would get upset.”

6. Include a provision whereby the named agent has to account for his actions to another person or persons (i.e. “My agent shall provide a full accounting to his three siblings of all receipts, expenses and disbursements on at least a quarterly basis.”)

7. Carefully consider the list of categories of powers contained within the statutory form, and strike out any powers that the principal does not want the agent to have. This author always strikes out “commodity and options transactions” and “borrowing transactions.” If the principal does not own a business, then it may be prudent to strike out “business operations.” Make sure that your client understands that “real estate transactions” means that her agent may sell her home without her knowledge or consent, and she may not find out about it until the day comes to move to the nursing home.

8. Instruct the principal to deposit the Power of Attorney with another person or to keep it in a safe place with restricted access, where the agent can only obtain the document upon the happening of some future condition.

Although the Power of Attorney for Property is said to convey broad powers to the agent, there are a few powers that the agent will not have unless those powers are explicitly spelled out in the document. These include the creation, amendment or revocation of trusts; the power to

exercise powers of appointment; and the power to name or change beneficiaries or joint tenants. See *Ft. Dearborn Life Ins. Co. V. Holcomb*, 249 Ill. Dec. 384 (1st Dist. 2000); *In re Estate of Romanowski*, 265 Ill. Dec. 7 (1st Dist. 2002); and *Hoopingarner v. Stenzel*, 263 Ill. Dec. 691 (3rd Dist. 2002).

Furthermore, the agent has no authority to make gifts out of the principal's income or assets unless the power to make such gifts is explicitly included in the document. Any transfer of assets of the principal to the agent is presumed to be fraudulent. *In re Estate of Rybolt*, 191 Ill. Dec. 570 (4th Dist. 1994). A grant of a Power of Attorney gives rise to a fiduciary relationship, and a breach of that fiduciary relationship can lead to an award of actual and punitive damages against the agent. *Pottinger v. Pottinger*, 179 Ill. Dec. 116 (2nd Dist. 1992); and *Central Bank-Granite City v. Ziaee*, 136 Ill. Dec. 346 (5th Dist. 1989.)

The attorney should explore the possibility that the principal may apply for Medicaid payment for long-term care at some point in the future. The Medicaid eligibility rules have recently changed to make it harder to qualify for Medicaid, but the agent may need to have certain powers granted in the Power of Attorney for Property in order to do certain things to qualify the principal for Medicaid. Any power to make gifts, even those of nominal amounts, must be explicitly stated in the Power of Attorney, and the issue of whether the agent is acting fraudulently if he or she makes a gift to himself or herself from the principal's assets, must also be thought through carefully.

2. Misuse of a Power of Attorney for Property

Section 2-7 of the Power of Attorney Act was amended in 2011 to add a court-sanctioned remedy for a misbehaving agent. The prior act included a directive that the agent "shall keep a record of all receipts, disbursements, and significant actions taken under the authority of the

agency” (Section 2-7(c)), but there was no directive as to whom this record should be given or when.

After the amendments, this record may be requested by:

- (1) the principal, a guardian, another fiduciary acting on behalf of the principal, and, after the death of the principal, the personal representative or successors in interest of the principal’s estate;
- (2) a representative of a provider agency under the Adult Protective Services Act, when investigating a complaint of elder abuse or neglect under that Act;
- (3) a representative of the Office of State Long Term Care Ombudsman, when investigating a complaint of financial exploitation of a nursing home resident;
- (4) a representative of the Office of Inspector General for the Department of Human Services, when investigating a complaint of financial exploitation of an adult with disabilities;
- (5) a court under Section 2-10 of the Power of Attorney Act; or
- (6) a representative of the Office of State Guardian or public guardian when investigating whether to file a petition for guardianship of the principal.

755 ILCS 45/2-7(c).

Under Section 2-10, “any interested person” may petition the court to construe a power of attorney, review the agent’s conduct, and grant appropriate relief (including compensatory damages.) The Court must find that the principal lacks the capacity to control the agency, or the capacity to revoke the agency, before it can do any of the preceding actions regarding the power of attorney. 755 ILCS 45/2-10(a). The Court may also require the agent to provide that record of “receipts, disbursements, and significant actions”, so that the agent’s conduct and actions may be reviewed. If the agent is shown to have acted in a way contrary to the power of attorney, and has caused or threatened to cause substantial harm to the principal’s person or property, the agent

may be order to provide restitution to the principal or his/her successors, and may be ordered to pay court costs and attorneys' fees. 755 ILCS 45/2-7(f), 2-10(e).

These new remedial provisions are not exclusive, and do not limit any other legal or equitable remedies which may be available. 755 ILCS 2-7(f), 2-10(f).

3. **Other Means of Substitute Decision-Making for Financial Affairs**

When discussing means of substitute decision-making for persons who are incapacitated, a Power of Attorney is usually the best answer, as is designates someone whom the principal has chosen and the specific powers in the areas in which the principal wants the agent to act. However, the principal may not have had the foresight to execute a Power of Attorney prior to the onset of incapacity. Also, there are some additional options that may be of use in certain circumstances.

a. **Joint Ownership of Property**

Joint ownership is more ordinarily viewed as an estate-planning device, as such property will pass directly to the other joint owner upon the death of one joint owner. During the lifetime of both, however, each joint owner has the authority to handle all financial matters relating to the jointly-owned property.

Placing individually-owned property in joint ownership is not always a good idea, even if the sole owner wishes the property to go to the other person upon the owner's death. The joint owner may mortgage or sell the property, or use it as collateral for a loan. Attorneys who represent older persons need to carefully examine any such change of ownership, and may be able to recommend to their clients a more appropriate option, such as transferring the property subject to a life estate.

b. **Representative Paveeships**

Government benefits may be paid to a “representative payee”, which is an agent who is charged with the duty of handling the money of a recipient. A nursing home may be a representative payee for a person’s Social Security benefits, which is often a good solution so that the nursing home is assured of being paid and does not have to depend on an agent or family member to write a check every month.

c. Trusts

A trust is an alternative to a Power of Attorney. It is also an estate-planning device. Many persons place their assets into a revocable living trust, naming themselves as trustee. As trustee, they can then retain control of those assets and use them as they wish. The trust should spell out the circumstances under which the trustee would be determined to be incapacitated, so that a successor trustee can take over. Commonly, this determination is either a finding of disability by the Probate Court, or the written certification by a treating physician that the trustee can no longer handle her financial affairs.

B. HEALTH CARE

1. Durable Powers of Attorney for Health Care

The specific sections of the Power of Attorney Act that apply to health care decision-making are found at 755 ILCS 45/4-1 *et seq.* A Power of Attorney for Health Care is very broad, as an agent may be delegated, without limitation, "all powers that an individual may have to be informed about and to consent to or refuse or withdraw any type of health care for the individual and all powers a parent may have to control or consent to health care for a minor child." 755 ILCS 45/4-3. The agent's powers may also extend after the death of the principal if necessary to permit an anatomical gift, to authorize an autopsy, and to dispose of the principal's remains. *Ibid.*

As of January 1, 2015, the Power of Attorney Act contains a new statutory form for a Health Care Power of Attorney. The proponents of this new form felt that the former statutory form was too “legalistic” and too complicated for physicians and patients to comprehend and use. One portion of the new form is a lengthy section in question and answer form, similar to an FAQ on the internet. The new form is not required, and practitioners are free to tailor the form or to draft their own form, and many Illinois elder law attorneys are doing just that.³

Unlike a Living Will, the Health Care Power of Attorney can be tailored to a particular person's situation, in terms of the beginning and ending dates, the mode of any future revocation or amendment, and the specific rights, powers, duties or limitations of the agent. While the statutory form is most familiar to many health care providers, the use of that form is not required, and other forms of the Power of Attorney that are similar in scope and protection may be used. 755 ILCS 45/4-1. As a practical matter, an attorney should not rely on the generic statutory form, but should instead be able to customize that document for her client.

That customization might include an instruction that the agency includes the authority of the agent to make health care decisions for the principal's minor or disabled child. In some situations, the principal may want the agent to seek out and enroll the principal in clinical studies, if that would be in the principal's best interests. Special provisions based on the religious tenets of the principal's chosen faith are commonly used.

The Act provides that the principal of a Health Care Power of Attorney has the right to revoke the agency “at any time”, even after the principal becomes mentally incompetent. 755 ILCS 45/4-6. This sometimes leads to a difficult situation, as the principal is not competent to execute a new Power of Attorney. A guardianship may then become necessary, especially if

³ A copy of the new statutory short form power of attorney for health care is attached as Appendix B. The use of this form is not mandatory. A copy of the previous statutory short form power of attorney for health care is attached as Exhibit C.

there are competing and antagonistic family members who cannot agree on health care decisions that need to be made. One elder law attorney recommends including protective provisions in the Power of Attorney stating that it is the principal's intent **not** to revoke the Power of Attorney, thus making it irrevocable upon a finding of incapacity by the principal's attending physician.

The issue of when the Health Care Power of Attorney should go into effect is usually easy to resolve. There are no negative side effects of having it go into effect immediately, rather than some future date or event, as the principal retains all powers to make health care decisions for herself as long as the attending physician believes that she has decisional capacity, as defined in the Health Care Surrogate Act, 755 ILCS 40/1 *et seq.* The medical provider is ethically and legally obligated to follow the wishes of his patient if she understands what is happening, understands the consequences of the decision to be made, and is able to make and communicate an informed decision.

It is important to note that an agent who is nominated in a Health Care Power of Attorney has no legal duty to do anything. 755 ILCS 45/4-10(b). Thus, it is crucial for the principal to talk to the prospective agent to make sure that that person is indeed willing and able to act for the principal. If the agent does act under the agency, he has a duty to act "in good faith for the benefit of the principal using due care, competence, and diligence". *Ibid.* The agent must also act in accordance with the terms of the agency, and in accordance with the principal's wishes to the extent he or she is aware of those wishes.

It is important to name at least one successor agent in the Health Care Power of Attorney, who will become the decision-maker in the event that the primary agent dies, becomes incompetent, resigns or otherwise refuses to act.

Unless the agent's powers are limited on the face of the document, she has all of the authority that the principal himself would have to consent to or refuse any type of treatment, including medication, surgery, life-sustaining treatment and the provision of food and fluids. The agent can admit or discharge the principal from any hospital, institution, residential or nursing facility, or any other type of treatment facility. The agent can contract for any type of health care services in the name of the principal, and bind the principal to pay for such services. The agent has the right to examine and copy medical records, and to consent to the release of such records. The agent may act through others, but may not delegate the authority to make medical decisions. *Ibid.*

A third party, such as a medical provider or nursing home, has the right to rely on the Health Care Power of Attorney, unless they have actual knowledge that the document is invalid or no longer in effect. 755 ILCS 45/2-8. As with a Living Will, the principal of a Health Care Power of Attorney or the agent has the responsibility to supply the principal's health care providers with a copy of the Power of Attorney, and the provider must make it part of the principal's medical record. 755 ILCS 45/4-7(a). The provider is then under the obligation to consult with the agent if the provider believes that the principal lacks the capacity to give informed consent.

The provider also must notify the principal and/or agent if the provider is unwilling to comply with the provisions of the Power of Attorney, and must assist in the transfer of the patient to another health care provider. 755 ILCS 45/4-7(b). A provider must also comply with the decisions of the agent if such decisions are in accordance with the Power of Attorney, although the provider does have the right to administer comfort care to the patient and alleviate pain. *Ibid.*

Neither the attending physician nor any other health care provider may act as the agent under a Health Care Power of Attorney. 755 ILCS 45/4-5. This does not limit the ability of such a person to act as agent for a principal to whom they are not providing health care, such as a doctor acting as agent for one of her family members.

As of July 1, 2011, there are also limitations as to who can witness a Health Care Power of Attorney. The following cannot be witnesses: (1) any attending physician or mental health service provider, or any relative of same; (2) any owner, operator, or relative of same of a health care facility in which the principal is a resident or patient; (3) any parent, sibling, descendant, or spouse of the same, of either the principal OR the agent, whether the relationship is by blood, marriage, or adoption; and (4) the agent or successor agent named in the document. 755 ILCS 45/4-5(a).

There is often a question of how a Living Will interacts with a Health Care Power of Attorney. The latter act specifically states that a Living Will shall not be effective so long as an agent is available who is authorized under a Health Care Power of Attorney to deal with life-sustaining or death-delaying procedures for the principal. 755 ILCS 45/4-11. The former statutory form includes three statements dealing with life-sustaining treatment. The principal may indicate that she agrees with one of these statements which give basic guidance of the principal's desires on these issues.⁴ If the Power of Attorney specifies agreement with one of these statements, or if more specific guidance is written into the document, then a Living Will would have no effect if the agent is available to make a decision in accordance with the provision of the agency.

⁴ The current statutory form presents a false choice in choosing an end-of-life statement, in this author's opinion. The two choices presented are to continue to do everything to preserve life, OR to discontinue life-sustaining treatment based on the treating physician's determination that one will not recover the ability to think, to communicate, and to "experience life." This appears to be a choice between "do everything" or "let the doctor decide."

There are some situations, however, where this might not be the case. For example, the terms of the Power of Attorney may exclude from the agent's authority any decision-making with respect to these issues. If the physician is aware of a valid Living Will, the latter document would control. Another situation may arise where the agent is not necessarily available to the medical provider at the time that the decision may have to be made. In these situations, the knowledge of a valid Living Will may give guidance as to the principal's wishes to a medical provider.

In some situations, a guardianship is sought by one family member when another family member was appointed as agent for the principal. In Illinois, the Power of Attorney supercedes the guardianship. In fact, the Probate Court has no authority to appoint a guardian to make any decision which has been delegated to an agent under a duly-executed Power of Attorney. 755 ILCS 5/11a-17(c) and 45/2-10. The Court may be asked to interpret the Power of Attorney or to dissolve it, if the agent is not acting for the principal in accordance with the terms of the agency. However, the Court has no authority to execute or authorize a new Power of Attorney. 755 ILCS 45/2-10.

As of July 1, 2011, the Court now has the right to review the conduct of any agent, and to order that agent to provide an accounting of his or her actions under the Power of Attorney. 755 ILCS 45/2-10. This section of the statute has been significantly changed to give the Court a remedy to grant appropriate relief in the event of agent misconduct, including compensatory damages.

2. Health-Care Surrogate Decision-Making

Although many people now utilize Living Wills and Powers of Attorney as an expression of their wishes as to medical treatment, there are many others who have neither document. If a

decision as to life-sustaining treatment needed to be made for a person who was unable to make this decision for herself, the medical provider often refused to act without an authorizing court order if family members believed that the person would not want such treatment. This only added to the emotional distress felt by everyone involved at such a traumatic time.

In 1991, Illinois enacted the Illinois Health Care Surrogate Act, found at 755 ILCS 40/1 *et seq.* The legislative purpose of this act is to provide a means by which private decisions can be made by patients with capacity, or their surrogates if they lack capacity, without judicial involvement of any kind. 755 ILCS 40/5(b).

If the patient has a valid Living Will or an authorized agent under a Health Care Power of Attorney, and the decision to be made falls under the purview of those documents, then this Act is inapplicable. 755 ILCS 40/15.

Until 1998, this Act applied only to decisions involving life-sustaining treatment. Still in effect is the requirement that certain “qualifying conditions” must be met before a surrogate can make a decision to forgo life-sustaining treatment on behalf of a person without decisional capacity. As of that year, however, the Act was amended to apply to all other types of medical decision-making for persons without decisional capacity.

“Decisional capacity” is defined in the Act as “the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-sustaining treatment and the ability to reach and communicate an informed decision in the matter as determined by the attending physician.” 755 ILCS 40/10. In other words, the person must understand what is involved in the decision, such as the pro and cons of the treatment decision; must be able to appreciate the consequences, such as his resulting death; must be able to reach an informed decision (which in itself suggests a certain level of capacity); and must be able to

communicate that decision. All of these abilities are “as determined by the attending physician”, making it a medical decision, not a legal one, as whether these conditions are met.

The Act makes it clear that a person with decisional capacity has the right to make a decision to forgo life-sustaining treatment. 755 ILCS 40/20(a). A patient is presumed to have decisional capacity unless the medical provider has actual notice to the contrary, and advanced age, mental illness or mental retardation may not be in itself the determinant of the lack of decisional capacity. 755 ILCS 40/20(c). The determination as to decisional capacity has to be made to a reasonable degree of medical certainty, and the attending physician must document this determination in writing and include specific facts, such as the cause, nature and duration of the lack of capacity. Before any decision of the surrogate to forgo life-sustaining treatment is implemented, at least one other qualified physician must concur in the determination that the patient lacks decisional capacity. *Ibid.*

The Act includes many due process rights for the patient, such as the right to be informed of the determination as to decisional capacity, and that a surrogate will be making the decision as to life-sustaining treatment. The patient must also be informed of the identity of the surrogate, and the nature of any decisions that the surrogate has made. If the patient objects to the surrogate or to any decision made by the surrogate, and if the surrogate is not a court-appointed guardian, then the Health Care Surrogate Act becomes inapplicable, and the surrogate (or any other person) must apply to the court for a guardianship with the right to make such a decision. 755 ILCS 40/20(c).

There are many other requirements of the Act that must be met, such as the expression of the surrogate’s decision before the attending physician and an additional adult witness; the

written documentation of that decision; and the prompt implementation of that decision by the attending physician. 755 ILCS 20/40(d)-(g).

The health care provider must make a “reasonable inquiry” into the availability and authority of a health care agent under a Health Care Power of Attorney. If no agent has been appointed or can be found, then the medical provider must make a reasonable inquiry into the availability of a health care surrogate under this Act. 755 ILCS 40/25(a). The medical provider has an affirmative duty to examine the patient’s personal effects and medical record to identify a health care agent or family member, and must contact that person by telephone within 24 hours of the determination that the patient lacks decisional capacity. *Ibid.*

The Act sets forth a priority scheme for surrogate health-care decision-makers:

1. the patient’s guardian of the person;
2. the patient’s spouse;
3. any adult son or daughter of the patient;
4. either parent of the patient;
5. any adult brother or sister of the patient;
6. any adult grandchild of the patient;
7. a close friend of the patient; and
8. the patient’s guardian of the estate.

755 ILCS 40/25(a). The medical provider only needs to identify an available and willing surrogate at the highest level possible. If there are multiple surrogates at one level and no higher level surrogates (such as sometimes happens where there is no spouse but several adult children), and if those surrogates cannot reach a consensus on the decision to be made, then the decision of the majority of those surrogates will rule, unless the surrogate(s) in the minority seek a guardianship from the court. *Ibid.* The Act does allow a surrogate in any level to seek a guardianship from the court if she challenges either the priority of or the decision made by the identified surrogate. 755 ILCS 40/25(d).

The surrogate has certain specified obligations under the Act. That surrogate shall make decisions that are as close as possible to what he believes the patient would have made under the circumstances. He must consider such factors as the patient's personal, philosophical, religious and moral beliefs and ethical values relative to the purpose of life, sickness, medical procedures, suffering, and death. 755 ILCS 40/20(b)(1) and (b-5)(1). If the patient's own wishes cannot be determined after an investigation by the surrogate, then the decision can be made on the basis of the patient's best interest as determined by the surrogate, but the surrogate must weigh the benefits and the burdens of any proposed treatment against the benefits and burdens of not taking that treatment, and also must take into account any other discoverable information, such as the views of family and friends of the patient. *Ibid.*

As with the Living Will Act and the Health Care Power of Attorney Act, the Health Care Surrogate Act spells out the right of medical providers to rely upon the surrogate's decision, and the obligation of the surrogate to act with due care. 755 ILCS 40/30. The medical provider also has the obligation to notify the patient and/or the surrogate if she has personal views or beliefs that make her unable to comply with the patient's or surrogate's decision, and to assist in transferring the patient to another health care provider. 755 ILCS 40/35.

3. Declaration for Mental Health Treatment

Illinois law also provides for a Declaration for Mental Health Treatment⁵, in which a competent adult can designate, in advance of any need, what types of mental health treatment he or she gives consent to. The principal can also designate an attorney-in-fact to make those decisions on his or her behalf. 755 ILCS 43/15. The Mental Health Treatment Preference Declaration Act can be found at 755 ILCS 43/1 *et seq.*

⁵ This form can be found at <http://www.idph.state.il.us/public/books/MntH.PDF>.

4. Physician's Order for Life-Sustaining Treatment

Lastly, the Illinois Department of Public Health has recently revised its Do Not Resuscitate form, and incorporated the key components of a Physicians Order for Life-Sustaining Treatment form.⁶ The POLST movement has spread nationwide, with many states now considering such detailed forms as to specific treatments a patient would or would not want at the end of his or her life. If a patient is able to designate his or her wishes for end of life care prior to its necessity, this can be of great help to the guardian of the person in determining what treatments to authorize for the ward.

C. CONCLUSION

While Powers of Attorney and other advance directives may look simple, an attorney must nonetheless consider and anticipate common issues and problems, and attempt to minimize those problems with careful drafting of the document. The use of such advance directives must be carefully tailored to each client's particular family circumstances and situation, in order to provide the maximum protection for each client.

⁶ The POLST form can be found at <http://www.idph.state.il.us/public/books/dnrform.pdf>.

APPENDIX A

Illinois Statutory Short Form Power of Attorney for Property

.....

NOTICE TO THE INDIVIDUAL SIGNING THE ILLINOIS STATUTORY SHORT FORM POWER OF ATTORNEY FOR PROPERTY

PLEASE READ THIS NOTICE CAREFULLY. The form that you will be signing is a legal document. It is governed by the Illinois Power of Attorney Act. If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.

The purpose of this Power of Attorney is to give your designated "agent" broad powers to handle your financial affairs, which may include the power to pledge, sell, or dispose of any of your real or personal property, even without your consent or any advance notice to you. When using the Statutory Short Form, you may name successor agents, but you may not name co-agents.

This form does not impose a duty upon your agent to handle your financial affairs, so it is important that you select an agent who will agree to do this for you. It is also important to select an agent whom you trust, since you are giving that agent control over your financial assets and property. Any agent who does act for you has a duty to act in good faith for your benefit and to use due care, competence, and diligence. He or she must also act in accordance with the law and with the directions in this form. Your agent must keep a record of all receipts, disbursements, and significant actions taken as your agent.

Unless you specifically limit the period of time that this Power of Attorney will be in effect, your agent may exercise the powers given to him or her throughout your lifetime, both before and after you become incapacitated. A court, however, can take away the powers of your agent if it finds that the agent is not acting properly. You may also revoke this Power of Attorney if you wish.

This Power of Attorney does not authorize your agent to appear in court for you as an attorney-at-law or otherwise to engage in the practice of law unless he or she is a licensed attorney who is authorized to practice law in Illinois.

The powers you give your agent are explained more fully in Section 3-4 of the Illinois Power of Attorney Act. This form is a part of that law. The "NOTE" paragraphs throughout this form are instructions.

You are not required to sign this Power of Attorney, but it will not take effect without your signature. You should not sign this Power of Attorney if you do not understand everything in it, and what your agent will be able to do if you do sign it.

Please place your initials on the following line indicating that you have read this Notice:

Principal's initials

**ILLINOIS STATUTORY SHORT FORM
POWER OF ATTORNEY FOR PROPERTY
755 ILCS 45/3-3**

1. I, _____, of _____, Illinois, hereby revoke all prior powers of attorney for property executed by me, other than excluded powers of attorney as defined in the Illinois Power of Attorney Act, and appoint _____, of _____, as my attorney-in-fact (my "agent") to act for me and in my name (in any way I could act in person) with respect to the following powers, as defined in Section 3-4 of the "Statutory Short Form Power of Attorney for Property Law" (including all amendments), but subject to any limitations on or additions to the specified powers inserted in paragraph 2 or 3 below:

(NOTE: You must strike out any one or more of the following categories of powers you do not want your agent to have. Failure to strike the title of any category will cause the powers described in that category to be granted to the agent. To strike out a category you must draw a line through the title of that category.)

- (a) Real estate transactions.
- (b) Financial institution transactions.
- (c) Stock and bond transactions.
- (d) Tangible personal property transactions.
- (e) Safe deposit box transactions.
- (f) Insurance and annuity transactions.
- (g) Retirement plan transactions.
- (h) Social Security, employment and military service benefits.
- (i) Tax matters.
- (j) Claims and litigation.
- (k) Commodity and option transactions.
- (l) Business operations.
- (m) Borrowing transactions.
- (n) Estate transactions.
- (o) All other property transactions.

(NOTE: Limitations on and additions to the agent's powers may be included in this power of attorney if they are specifically described below.)

2. The powers granted above shall not include the following powers or shall be modified or limited in the following particulars: *(NOTE: Here you may include any specific limitations you deem appropriate, such as a prohibition or conditions on the sale of particular stock or real estate or special rules on borrowing by the agent.)*

NONE – PLENARY POWERS

3. In addition to the powers granted above, I grant my agent the following powers: (NOTE: Here you may add any other delegable powers including, without limitation, power to make gifts, exercise powers of appointment, name or change beneficiaries or joint tenants or revoke or amend any trust specifically referred to below.)

NONE

(NOTE: Your agent will have authority to employ other persons as necessary to enable the agent to properly exercise the powers granted in this form, but your agent will have to make all discretionary decisions. If you want to give your agent the right to delegate discretionary decision-making powers to others, you should keep paragraph 4, otherwise it should be struck out.)

4. My agent shall have the right by written instrument to delegate any or all of the foregoing powers involving discretionary decision-making to any person or persons whom my agent may select, but such delegation may be amended or revoked by any agent (including any successor) named by me who is acting under this power of attorney at the time of reference.

(NOTE: Your agent will be entitled to reimbursement for all reasonable expenses incurred in acting under this power of attorney. Strike out paragraph 5 if you do not want your agent to also be entitled to reasonable compensation for services as agent.)

5. My agent shall be entitled to reasonable compensation for services rendered as agent under this power of attorney.

(NOTE: This power of attorney may be amended or revoked by you at any time and in any manner. Absent amendment or revocation, the authority granted in this power of attorney will become effective at the time this power is signed and will continue until your death, unless a limitation on the beginning date or duration is made by initialing and completing one or both of paragraphs 6 and 7.)

6. _____ This power of attorney shall become effective immediately.

(NOTE: Insert a future date or event during your lifetime, such as a court determination of your disability or a written determination by your physician that you are incapacitated, when you want this power to first take effect.)

7. _____ This power of attorney shall terminate on my death.

(NOTE: Insert a future date or event, such as a court determination that you are not under a legal disability or a written determination by your physician that you are not incapacitated, if you want this power to terminate prior to your death.)

(NOTE: If you wish to name one or more successor agents, insert the name and address of each successor agent in paragraph 8.)

8. If any agent named by me shall die, become incompetent, resign or refuse to accept the office of agent, I name the following (each to act alone and successively, in the order named) as successor(s) to such agent:

For purposes of this paragraph 8, a person shall be considered to be incompetent if and while the person is a minor or an adjudicated incompetent or disabled person or the person is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician.

(NOTE: If you wish to, you may name your agent as guardian of your estate if a court decides that one should be appointed. To do this, retain paragraph 9, and the court will appoint your agent if the court finds that this appointment will serve your best interests and welfare. Strike out paragraph 9 if you do not want your agent to act as guardian.)

9. If a guardian of my estate (my property) is to be appointed, I nominate the agent acting under this power of attorney as such guardian, to serve without bond or security.

10. I am fully informed as to all the contents of this form and understand the full import of this grant of powers to my agent.

11. The Notice to Agent is incorporated by reference and included as part of this form.

Dated this ____ day of _____, 2017.

Principal

(NOTE: This power of attorney will not be effective unless it is signed by at least one witness and your signature is notarized, using the form below. The notary may not also sign as a witness.)

The undersigned witness certifies that _____, known to me to be the same person whose name is subscribed as principal to the foregoing power of attorney, appeared before me and the notary public and acknowledged signing and delivering the instrument as the free and voluntary act of the principal, for the uses and purposes therein set forth. I believe him to be of sound mind and memory. The undersigned witness also certifies that the witness is not: (a) the attending physician or mental health service provider or a relative of the physician or provider; (b) an owner, operator, or relative of an owner or operator of a health care facility in which the principal is a patient or resident; (c) a parent, sibling, descendant, or any spouse of such parent, sibling, or descendant of either the principal or any agent or successor agent under the foregoing power of attorney, whether such relationship is by blood, marriage, or adoption; or (d) an agent or successor agent under the foregoing power of attorney.

Dated: _____

(Witness Signature)

(NOTE: Illinois requires only one witness, but other jurisdictions may require more than one witness. If you wish to have a second witness, have him or her certify and sign here:)

The undersigned witness certifies that _____, known to me to be the same person whose name is subscribed as principal to the foregoing power of attorney, appeared before me and the notary public and acknowledged signing and delivering the instrument as the free and voluntary act of the principal, for the uses and purposes therein set forth. I believe him to be of sound mind and memory. The undersigned witness also certifies that the witness is not: (a) the attending physician or mental health service provider or a relative of the physician or provider; (b) an owner, operator, or relative of an owner or operator of a health care facility in which the principal is a patient or resident; (c) a parent, sibling, descendant, or any spouse of such parent, sibling, or descendant of either the principal or any agent or successor agent under the foregoing power of attorney, whether such relationship is by blood, marriage, or adoption; or (d) an agent or successor agent under the foregoing power of attorney.

Dated: _____

(Witness Signature)

State of Illinois)
) ss
County of Peoria)

The undersigned, a notary public in and for the above county and state, certifies that _____, known to me to be the same person whose name is subscribed as principal to the foregoing power of attorney, appeared before me and the witnesses SUSAN DAWSON-TIBBITS and _____ in person and acknowledged signing and delivering the instrument as the free and voluntary act of the principal, for the uses and purposes therein set forth.

Dated: _____

(Notary Public)
My commission expires _____

(NOTE: You may, but are not required to, request your agent and successor agents to provide specimen signatures below. If you include specimen signatures in this power of attorney, you must complete the certification opposite the signatures of the agents.)

Specimen signatures of agent (and successors)

I certify that the signatures of my agent (and successors) are genuine.

(agent)

(principal)

(successor agent)

(principal)

(successor agent)

(principal)

Prepared by:

Susan Dawson-Tibbits, Attorney at Law
JOHNSON, BUNCE & NOBLE, P.C.
7800 N. Sommer Street, Suite 425
Peoria, IL 61615
Phone: (309) 691-9650
Fax: (309) 691-9651

AGENT'S CERTIFICATION AND ACCEPTANCE OF AUTHORITY

I certify that the attached is a true copy of a power of attorney naming the undersigned as agent for [PRINCIPAL]. I certify that to the best of my knowledge the principal had the capacity to execute the power of attorney, is alive, and has not revoked the power of attorney; that my powers as agent have not been altered or terminated; and that the power of attorney remains in full force and effect.

I accept appointment as agent under this power of attorney. This certification and acceptance is made under penalty of perjury.*

Dated: _____

(Agent's Signature)

(Print Agent's Name)

(Agent's Address)

*(NOTE: Perjury is defined in Section 32-2 of the Criminal Code of 1961, and is a Class 3 felony.)

NOTICE TO AGENT

When you accept the authority granted under this power of attorney a special legal relationship, known as agency, is created between you and the principal. Agency imposes upon you duties that continue until you resign or the power of attorney is terminated or revoked.

As agent you must:

1. do what you know the principal reasonably expects you to do with the principal's property;
2. act in good faith for the best interest of the principal, using due care, competence, and diligence;
3. keep a complete and detailed record of all receipts, disbursements, and significant actions conducted for the principal;
4. attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest; and
5. cooperate with a person who has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually in the principal's best interest.

As agent you must not do any of the following:

1. act so as to create a conflict of interest that is inconsistent with the other principles in this Notice to Agent;
2. do any act beyond the authority granted in this power of attorney;
3. commingle the principal's funds with your funds;
4. borrow funds or other property from the principal, unless otherwise authorized;
5. continue acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney, such as the death of the principal, your legal separation from the principal, or the dissolution of your marriage to the principal.

If you have special skills or expertise, you must use those special skills and expertise when acting for the principal. You must disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name "as Agent" in the following manner:

"(Principal's Name) by (Your Name) as Agent"

The meaning of the powers granted to you is contained in Section 3-4 of the Illinois Power of Attorney Act, which is incorporated by reference into the body of the power of attorney for property document.

If you violate your duties as agent or act outside the authority granted to you, you may be liable for any damages, including attorney's fees and costs, caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice from an attorney.

ILLINOIS POWER OF ATTORNEY FOR PROPERTY ACT
(755 ILCS 45/2-1 et seq.)

Section 3-4. Explanation of powers granted in the statutory short form power of attorney for property.

This section defines each category of powers listed in the statutory short form power of attorney for property and the effect of granting powers to an agent. When the title of any of the following categories is retained (not struck out) in a statutory property power form, the effect will be to grant the agent all of the principal=s rights, powers and discretions with respect to the types of property and transactions covered by the retained category, subject to any limitations on the granted powers that appear on the face of the form. The agent will have authority to exercise each granted power for and in the name of the principal with respect to all of the principal=s interest in every type of property or transaction covered by the granted power at the time of exercise, whether the principal=s interests are direct or indirect, whole or fractional, legal, equitable or contractual, as a joint tenant or tenant in common or held in any other form; but the agent will not have power under any of the statutory categories (a) through (o) to make gifts of the principal=s property, to exercise powers to appoint to others or to change any beneficiary whom the principal has designated to take the principal=s interest at death under any will, trust, joint tenancy, beneficiary form or contractual arrangement. The agent will be under no duty to exercise granted powers or to assume control of or responsibility for the principal=s property or affairs; but when granted powers are exercised, the agent will be required to use due care to act for the benefit of the principal in accordance with the terms of the statutory property power and will be liable for negligent exercise. The agent may act in person or though others reasonably employed by the agent for that purpose and will have authority to sign and deliver all instruments, negotiate and enter into all agreements and do all other acts reasonably necessary to implement the exercise of the powers granted to the agent.

(a) **Real estate transactions.** The agent is authorized to: buy, sell, exchange, rent and lease real estate (which term includes, without limitation, real estate subject to a land trust and all beneficial interests in and powers of direction under any land trust); collect all rent, sale proceeds and earnings from real estate; convey, assign and accept title to real estate; grant easements, create conditions and release rights of homestead with respect to real estate; create land trusts and exercise all powers under land trusts; hold, possess, maintain, repair, improve, subdivide, manage, operate and insure real estate; pay, contest, protest and compromise real estate taxes and assessments; and, in general, exercise all powers with respect to real estate which the principal could if present and under no disability.

(b) **Financial institution transactions.** The agent is authorized to: open, close, continue and control all accounts and deposits in any type of financial institution (which term includes, without limitation, banks, trust companies, savings and building and loan associations, credit unions and brokerage firms); deposit in and withdraw from and write checks on any financial institution account or deposit; and, in general, exercise all powers with respect to financial institution transactions which the principal could if present and under no disability.

(c) **Stock and bond transactions.** The agent is authorized to: buy and sell all types of securities (which term includes, without limitation, stocks, bonds, mutual funds and all other types of investment securities and financial instruments); collect, hold and safekeep all dividends, interest, earnings, proceeds of sale, distribution, shares, certificates and other evidences of ownership paid or distributed with respect to securities; exercise all voting rights with respect to securities in person or by proxy, enter into voting trusts and consent to limitations of the right to vote; and, in general, exercise all powers with respect to securities which the principal could if present and under no disability.

(d) **Tangible personal property transactions.** The agent is authorized to: buy and sell, lease, exchange, collect, possess and take title to all tangible personal property; move, store, ship, restore, maintain, repair, improve, manage, preserve, insure and safekeep tangible personal property; and, in general, exercise all powers with respect to tangible personal property which the principal could if present and under no disability.

(e) **Safe deposit box transactions.** The agent is authorized to: open, continue and have access to all safe deposit boxes; sign, renew, release or terminate any safe deposit contract; drill or surrender any safe deposit box; and, in general, exercise all powers with respect to safe deposit matters which the principal could if present and under no disability.

(f) **Insurance and annuity transactions.** The agent is authorized to: procure, acquire, continue, renew, terminate or otherwise deal with any type of insurance or annuity contract (which terms include, without limitation, life, accident, health, disability, automobile casualty, property or liability insurance); pay premiums or assessments on or surrender and collect all distributions, proceeds or benefits payable under any insurance or annuity contract; and, in general, exercise all powers with respect to insurance and annuity contracts which the principal could if present and under no disability.

(g) **Retirement plan transactions.** The agent is authorized to: contribute to, withdraw from and deposit funds in any type of retirement plan (which term includes, without limitation, any tax qualified or nonqualified pension, profit sharing, stock bonus, employee savings and other retirement plan, individual retirement account, deferred compensation plan and any other type of employee benefit plan); select and change payment options for the principal under any retirement plan; make rollover contributions from any retirement plan to other retirement plans or individual retirement accounts; exercise all investment powers available under any type of self-directed retirement plan; and, in general, exercise all powers with respect to retirement plans and retirement plan account balances which the principal could if present and under no disability.

(h) **Social Security, unemployment and military service benefits.** The agent is authorized to: prepare, sign and file any claim or application for Social Security, unemployment or military service benefits; sue for, settle or abandon any claims to any benefit or assistance under any federal, state, local or foreign statute or regulation; control, deposit to any account, collect, receipt for, and take title to and hold all benefits under any Social Security, unemployment, military service or other state, federal, local or foreign statute or regulation; and, in general, exercise all powers with respect to Social Security, unemployment, military service and governmental benefits which the principal could if present and under no disability.

(i) **Tax matters.** The agent is authorized to: sign, verify and file all the principal's federal, state and local income, gift, estate, property and other tax returns, including joint returns and declarations of estimated tax; pay all taxes; claim, sue for and receive all tax refunds; examine and copy all the principal's tax returns and records; represent the principal before any federal, state or local revenue agency or taxing body and sign and deliver all tax powers of attorney on behalf of the principal that may be necessary for such purposes; waive rights and sign all documents on behalf of the principal as required to settle, pay and determine all tax liabilities; and, in general, exercise all powers with respect to tax matters which the principal could if present and under no disability.

(j) **Claims and litigation.** The agent is authorized to: institute, prosecute, defend, abandon, compromise, arbitrate, settle and dispose of any claim in favor of or against the principal or any property interests of the principal; collect and receipt for any claim or settlement proceeds and waive or release all rights of the principal; employ attorneys and others and enter into contingency agreements and other contracts as necessary in connection with litigation; and, in general, exercise all powers with respect to claims and litigations which the principal could if present and under no disability.

(k) **Commodity and option transactions.** The agent is authorized to: buy, sell, exchange, assign, convey, settle and exercise commodities futures contracts and call and put options on stocks and stock indices traded on a regulated options exchange and collect and receipt for all proceeds of any such transactions; establish or continue option accounts for the principal with any securities or futures broker; and, in general, exercise all powers with respect to commodities and options which the principal could if present and under no disability.

(l) **Business operations.** The agent is authorized to: organize or continue and conduct any business (which term includes, without limitation, any farming, manufacturing, service, mining, retailing or other type of business operation) in any form, whether as a proprietorship, joint venture, partnership, corporation, trust or other legal entity; operate, buy, sell, expand, contract, terminate or liquidate any business; direct, control, supervise, manage or participate in the operation of any business and engage, compensate and discharge business managers, employees, agents, attorneys, accountants and consultants; and, in general, exercise all powers with respect to business interests and operations which the principal could if present and under no disability.

(m) **Borrowing transactions.** The agent is authorized to: borrow money; mortgage or pledge any real estate or tangible or intangible personal property as security for such purposes; sign, renew, extend, pay and satisfy

any notes or other forms of obligation; and, in general, exercise all powers with respect to secured and unsecured borrowing which the principal could if present and under no disability.

(n) **Estate transactions.** The agent is authorized to: accept, receipt for, exercise, release, reject, renounce, assign, disclaim, demand, sue for, claim and recover any legacy, bequest, devise, gift or other property interest or payment due or payable to or for the principal; assert any interest in and exercise any power over any trust, estate or property subject to fiduciary control; establish a revocable trust solely for the benefit of the principal that terminates at the death of the principal and is then distributable to the legal representative of the estate of the principal; and, in general, exercise all powers with respect to estates and trusts which the principal could if present and under no disability; provided, however, that the agent may not make or change a will and may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust for the benefit of the principal to pay income or principal to the agent unless specific authority to that end is given, and specific reference to the trust is made, in the statutory property power form.

(o) **All other property powers and transactions.** The agent is authorized to: exercise all possible powers of the principal with respect to all possible types of property and interests in property, except to the extent the principal limits the generality of this category (o) by striking out one or more of categories (a) through (n) or by specifying other limitations in the statutory property power form.

APPENDIX B

Current Statutory Short Form Power of Attorney for Health Care

MY POWER OF ATTORNEY FOR HEALTH CARE

THIS POWER OF ATTORNEY REVOKES ALL PREVIOUS POWERS OF ATTORNEY FOR HEALTH CARE. (You must sign this form and a witness must also sign it before it is valid)

My name: 1*
My address: 2*

I WANT THE FOLLOWING PERSON TO BE MY HEALTH CARE AGENT
(an agent is your personal representative under state and federal law):

3*, whose current address is 4*, and whose current phone number is 5*.

_____ If a guardian of my person is to be appointed, I nominate the agent acting under this power of attorney as guardian.

SUCCESSOR HEALTH CARE AGENT(S) (optional):

If the agent I selected is unable or does not want to make health care decisions for me, then I request the person(s) I name below to be my successor health care agent(s). Only one person at a time can serve as my agent (add another page if you want to add more successor agent names):

6*, whose current address is 7*, and whose current phone number is 8*; then

9*, whose current address is 10*, and whose current phone number is 11*.

MY AGENT CAN MAKE HEALTH CARE DECISIONS FOR ME, INCLUDING:

(i) Deciding to accept, withdraw or decline treatment for any physical or mental condition of mine, including life-and-death decisions.

(ii) Agreeing to admit me to or discharge me from any hospital, home, or other institution, including a mental health facility.

(iii) Having complete access to my medical and mental health records, and sharing them with others as needed, including after I die.

(iv) Carrying out the plans I have already made, or, if I have not done so, making decisions about my body or remains, including organ, tissue or whole body donation, autopsy, cremation, and burial.

The above grant of power is intended to be as broad as possible so that my agent will have the authority to make any decision I could make to obtain or terminate any type of health care, including withdrawal of nutrition and hydration and other life-sustaining measures.

I AUTHORIZE MY AGENT TO (please initial one line below):

_____ Make decisions for me only when I cannot make them for myself. The physician(s) taking care of me will determine when I lack this ability.

(If no box is initialed, then the authorization above shall be implemented.) OR

_____ Make decisions for me only when I cannot make them for myself. The physician(s) taking care of me will determine when I lack this ability. Starting now, for the purpose of assisting me with my health care plans and decisions, my agent shall have complete access to my medical and mental health records, the authority to share them with others as needed, and the complete ability to communicate with my personal physician(s) and other health care providers, including the ability to require an opinion of my physician as to whether I lack the ability to make decisions for myself. OR

_____ Make decisions for me starting now and continuing after I am no longer able to make them for myself. While I am still able to make my own decisions, I can still do so if I want to.

The subject of life-sustaining treatment is of particular importance. Life-sustaining treatments may include tube feedings or fluids through a tube, breathing machines, and CPR. In general, in making decisions concerning life-sustaining treatment, your agent is instructed to consider the relief of suffering, the quality as well as the possible extension of your life, and your previously expressed wishes. Your agent will weigh the burdens versus benefits of proposed treatments in making decisions on your behalf.

Additional statements concerning the withholding or removal of life-sustaining treatment are described below. These can serve as a guide for your agent when making decisions for you. Ask your physician or health care provider if you have any questions about these statements.

SELECT ONLY ONE STATEMENT BELOW THAT BEST EXPRESSES YOUR WISHES (optional):

_____ The quality of my life is more important than the length of my life. If I am unconscious and my attending physician believes, in accordance with reasonable medical

standards, that I will not wake up or recover my ability to think, communicate with my family and friends, and experience my surroundings, I do not want treatments to prolong my life or delay my death, but I do want treatment or care to make me comfortable and to relieve me of pain.

_____ Staying alive is more important to me, no matter how sick I am, how much I am suffering, the cost of the procedures, or how unlikely my chances for recovery are. I want my life to be prolonged to the greatest extent possible in accordance with reasonable medical standards.

SPECIFIC LIMITATIONS TO MY AGENT'S DECISION-MAKING AUTHORITY:

The above grant of power is intended to be as broad as possible so that your agent will have the authority to make any decision you could make to obtain or terminate any type of health care. If you wish to limit the scope of your agent's powers or prescribe special rules or limit the power to authorize autopsy or dispose of remains, you may do so specifically in this form.

12*

The Notice to Individual Signing Health Care Power of Attorney is attached and made a part of this Health Care Power of Attorney.

My signature: _____
13*

Today's date: 14*

THE WITNESSES BY SIGNING BELOW AGREE THAT:

They are at least 18 years old, and that they saw the principal sign this document, or the principal told them that the signature or mark on the principal signature line is his or hers.

I am not the agent or successor agent(s) named in this document. I am not related to the principal, the agent, or the successor agent(s) by blood, marriage, or adoption. I am not the principal's physician, advanced practice nurse, dentist, podiatric physician, optometrist, psychologist, or a relative of one of those individuals. I am not an owner or operator (or the relative of an owner or operator) of the health care facility where the principal is a patient or resident.

Witness printed name: _____

Witness address: 7800 N. Sommer Street, Suite 425 7800 N. Sommer Street, Suite 425
 Peoria, Illinois 61615 Peoria, Illinois 61615

Witness signatures: _____

Today's date: 15*

This document was prepared by: 16*
Johnson, Bunce & Noble, P.C.
Executive Offices – Parkway Plaza
7800 N. Sommer Street, Suite 425
Peoria, Illinois 61615-1994
Telephone No.: (309) 691-9650
Facsimile No.: (309) 691-9651

<p style="text-align: center;">NOTICE TO THE INDIVIDUAL SIGNING THE POWER OF ATTORNEY FOR HEALTH CARE</p>

No one can predict when a serious illness or accident might occur. When it does, you may need someone else to speak or make health care decisions for you. If you plan now, you can increase the chances that the medical treatment you get will be the treatment you want.

In Illinois, you can choose someone to be your "health care agent". Your agent is the person you trust to make health care decisions for you if you are unable or do not want to make them yourself. These decisions should be based on your personal values and wishes.

It is important to put your choice of agent in writing. The written form is often called an "advance directive". You may use this form or another form, as long as it meets the legal requirements of Illinois. There are many written and on-line resources to guide you and your loved ones in having a conversation about these issues. You may find it helpful to look at these resources while thinking about and discussing your advance directive.

**WHAT ARE THE THINGS I WANT MY
HEALTH CARE AGENT TO KNOW?**

The selection of your agent should be considered carefully, as your agent will have the ultimate decision making authority once this document goes into effect, in most instances after you are no longer able to make your own decisions. While the goal is for your agent to make decisions in keeping with your preferences and in the majority of circumstances that is what happens, please know that the law does allow your agent to make decisions to direct or refuse health care interventions or withdraw treatment. Your agent will need to think about conversations you have had, your personality, and how you handled important health care issues in the past. Therefore, it is important to talk with your agent and your family about such things as:

- (i) What is most important to you in your life?
- (ii) How important is it to you to avoid pain and suffering?
- (iii) If you had to choose, is it more important to you to live as long as possible, or to avoid prolonged suffering or disability?
- (iv) Would you rather be at home or in a hospital for the last days or weeks of your life?
- (v) Do you have religious, spiritual, or cultural beliefs that you want your agent and others to consider?

(vi) Do you wish to make a significant contribution to medical science after your death through organ or whole body donation?

(vii) Do you have an existing advanced directive, such as a living will, that contains your specific wishes about health care that is only delaying your death? If you have another advance directive, make sure to discuss with your agent the directive and the treatment decisions contained within that outline your preferences. Make sure that your agent agrees to honor the wishes expressed in your advance directive.

WHAT KIND OF DECISIONS CAN MY AGENT MAKE?

If there is ever a period of time when your physician determines that you cannot make your own health care decisions, or if you do not want to make your own decisions, some of the decisions your agent could make are to:

- (i) talk with physicians and other health care providers about your condition.
- (ii) see medical records and approve who else can see them.
- (iii) give permission for medical tests, medicines, surgery, or other treatments.
- (iv) choose where you receive care and which physicians and others provide it.
- (v) decide to accept, withdraw, or decline treatments designed to keep you alive if you are near death or not likely to recover. You may choose to include guidelines and/or restrictions to your agent's authority.
- (vi) agree or decline to donate your organs or your whole body if you have not already made this decision yourself. This could include donation for transplant, research, and/or education. You should let your agent know whether you are registered as a donor in the First Person Consent registry maintained by the Illinois Secretary of State or whether you have agreed to donate your whole body for medical research and/or education.
- (vii) decide what to do with your remains after you have died, if you have not already made plans.
- (viii) talk with your other loved ones to help come to a decision (but your designated agent will have the final say over your other loved ones).

Your agent is not automatically responsible for your health care expenses.

WHOM SHOULD I CHOOSE TO BE MY HEALTH CARE AGENT?

You can pick a family member, but you do not have to. Your agent will have the responsibility to make medical treatment decisions, even if other people close to you might urge

a different decision. The selection of your agent should be done carefully, as he or she will have ultimate decision-making authority for your treatment decisions once you are no longer able to voice your preferences. Choose a family member, friend or other person who:

- (i) is at least 18 years old;
- (ii) knows you well;
- (iii) you trust to do what is best for you and is willing to carry out your wishes, even if he or she may not agree with your wishes;
- (iv) would be comfortable talking with and questioning your physicians and other health care providers;
- (v) would not be too upset to carry out your wishes if you became very sick; and
- (vi) can be there for you when you need it and is willing to accept this important role.

WHAT IF MY AGENT IS NOT AVAILABLE OR IS UNWILLING TO MAKE DECISIONS FOR ME?

If the person who is your first choice is unable to carry out this role, then the second agent you chose will make the decisions; if your second agent is not available, then the third agent you chose will make the decisions. The second and third agents are called your successor agents and they function as back-up agents to your first choice agent and may act only one at a time and in the order you list them.

WHAT WILL HAPPEN IF I DO NOT CHOOSE A HEALTH CARE AGENT?

If you become unable to make your own health care decisions and have not named an agent in writing, your physician and other health care providers will ask a family member, friend, or guardian to make decisions for you. In Illinois, a law directs which of these individuals will be consulted. In that law, each of these individuals is called a "surrogate".

There are reasons why you may want to name an agent rather than rely on a surrogate:

- (i) The person or people listed by this law may not be who you would want to make decisions for you.
- (ii) Some family members or friends might not be able or willing to make decisions as you would want them to.
- (iii) Family members and friends may disagree with one another about the best decisions.

(iv) Under some circumstances, a surrogate may not be able to make the same kinds of decisions that an agent can make.

WHAT IF THERE IS NO ONE AVAILABLE WHOM I TRUST TO BE MY AGENT?

In this situation, it is especially important to talk to your physician and other health care providers and create written guidance about what you want or do not want, in case you are ever critically ill and cannot express your own wishes. You can complete a living will. You can also write your wishes down and/or discuss them with your physician or other health care provider and ask him or her to write it down in your chart. You might also want to use written or on-line resources to guide you through this process.

WHAT DO I DO WITH THIS FORM ONCE I COMPLETE IT?

Follow these instructions after you have completed the form:

- (i) Sign the form in front of a witness. See the form for a list of who can and cannot witness it.
- (ii) Ask the witness to sign it, too.
- (iii) There is no need to have the form notarized.
- (iv) Give a copy to your agent and to each of your successor agents.
- (v) Give another copy to your physician.
- (vi) Take a copy with you when you go to the hospital.
- (vii) Show it to your family and friends and others who care for you.

WHAT IF I CHANGE MY MIND?

You may change your mind at any time. If you do, tell someone who is at least 18 years old that you have changed your mind, and/or destroy your document and any copies. If you wish, fill out a new form and make sure everyone you gave the old form to has a copy of the new one, including, but not limited to, your agents and your physicians.

WHAT IF I DO NOT WANT TO USE THIS FORM?

In the event you do not want to use the Illinois statutory form provided here, any document you complete must be executed by you, designate an agent who is over 18 years of age and not prohibited from serving as your agent, and state the agent's powers, but it need not be witnessed or conform in any other respect to the statutory health care power.

If you have questions about the use of any form, you may want to consult your physician, other health care provider, and/or an attorney.

APPENDIX C

Former Statutory Short Form Power of Attorney for Health Care

.....

NOTICE TO THE INDIVIDUAL SIGNING THIS POWER OF ATTORNEY FOR HEALTH CARE

PLEASE READ THIS NOTICE CAREFULLY. The form that you will be signing is a legal document. It is governed by the Illinois Power of Attorney Act. If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.

The purpose of this Power of Attorney is to give your designated "agent" broad powers to make health care decisions for you, including the power to require, consent to, or withdraw treatment for any physical or mental condition, and to admit you or discharge you from any hospital, home, or other institution. You may name successor agents under this form, but you may not name co-agents.

This form does not impose a duty upon your agent to make such health care decisions, so it is important that you select an agent who will agree to do this for you and who will make those decisions as you would wish. It is also important to select an agent whom you trust, since you are giving that agent control over your medical decision-making, including end-of-life decisions. Any agent who does act for you has a duty to act in good faith for your benefit and to use due care, competence, and diligence. He or she must also act in accordance with the law and with the statements in this form. Your agent must keep a record of all significant actions taken as your agent.

Unless you specifically limit the period of time that this Power of Attorney will be in effect, your agent may exercise the powers given to him or her throughout your lifetime, even after you become disabled. A court, however, can take away the powers of your agent if it finds that the agent is not acting properly. You may also revoke this Power of Attorney if you wish.

The Powers you give your agent, your right to revoke those powers, and the penalties for violating the law are explained more fully in Sections 4-5, 4-6, and

4-10(b) of the Illinois Power of Attorney Act. This form is a part of that law. The "NOTE" paragraphs throughout this form are instructions.

You are not required to sign this Power of Attorney, but it will not take effect without your signature. You should not sign it if you do not understand everything in it, and what your agent will be able to do if you do sign it.

Please put your initials on the following line indicating that you have read this Notice:

**ILLINOIS NON-STATUTORY
POWER OF ATTORNEY FOR HEALTH CARE**

1. I, _____, of _____, Illinois, hereby revoke all prior powers of attorney for health care executed by me and appoint _____, of _____, Illinois (phone: _____) as my attorney-in-fact (my "agent") to act for me and in my name (in any way I could act in person) to make any and all decisions for me concerning my personal care, medical treatment, hospitalization and health care and to require, withhold or withdraw any type of medical treatment or procedure, even though my death may ensue.

A. My agent shall have the same access to my medical records that I have, including the right to disclose the contents to others.

B. Effective upon my death, my agent has the full power to make an anatomical gift of the following: *(NOTE: Initial one. In the event none of the options are initialed, then it shall be concluded that you do not wish to grant your agent any such authority.)*

- _____ Any organs, tissues, or eyes suitable for transplantation or used for research or education.
- _____ Specific organs: _____
- _____ I do not grant my agent authority to make any anatomical gifts

C. My agent shall also have full power to authorize an autopsy and direct the disposition of my remains. I intend for this power of attorney to be in substantial compliance with Section 10 of the Disposition of Remains Act. All decisions made by my agent with respect to the disposition of my remains, including cremation, shall be binding. I hereby direct any cemetery organization, business operating a crematory or columbarium or both, funeral director or embalmer, or funeral establishment who receives a copy of this document to act under it.

D. I intend for the person named as my agent to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records, including records or communications governed by the Mental Health and Developmental Disabilities Confidentiality Act. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and regulations thereunder. I intend for the person named as my agent to serve as my "personal representative" as that term is defined under HIPAA and regulations thereunder.

- (i) The person named as my agent shall have the power to authorize the release of information governed by HIPAA to third parties.
- (ii) I authorize any physician, health care professional, dentist, health plan, hospital, clinic, laboratory, pharmacy or other covered health care provider, any insurance company and the Medical

Informational Bureau, Inc., or any other health care clearinghouse that has provided treatment or services to me, or that has paid for or is seeking payment for me for such services to give, disclose, and release to the person named as my agent, without restriction, all of my individually identifiable health information and medical records, regarding any past, present, or future medical or mental health condition, including all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, drug or alcohol abuse, and mental illness (including records or communications governed by the Mental Health and Developmental Disabilities Confidentiality Act).

- (iii) The authority given to the person named as my agent shall supersede any prior agreement that I may have with my health care providers to restrict access to, or disclosure of, my individually identifiable health information. The authority given to the person named as my agent has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health care provider.

(NOTE: The above grant of power is intended to be as broad as possible so that your agent will have the authority to make any decision you could make to obtain or terminate any type of health care, including withdrawal of food and water and other life-sustaining measures, if your agent believes such action would be consistent with your intent and desires. If you wish to limit the scope of your agent's powers or prescribe special rules or limit the power to make an anatomical gift, authorize autopsy or dispose of remains, you may do so in the following paragraphs.)

2. The powers granted above shall not include the following powers or shall be subject to the following rules or limitations: *(NOTE: Here you may include any specific limitations you deem appropriate, such as: your own definition of when life-sustaining measures should be withheld; a direction to continue food and fluids or life-sustaining treatment in all events; or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs or unacceptable to you for any other reason, such as blood transfusion, electro-convulsive therapy, amputation, psychosurgery, voluntary admission to a mental institution, etc.).*

[NONE, or spell out]

(NOTE: The subject of life-sustaining treatment is of particular importance. For your convenience in dealing with that subject, some general statements concerning the withholding or removal of life-sustaining treatment are set forth below. If you agree with one of these statements, you may initial that statement; but do not initial more than one. These statements serve as guidance for your agent, who shall give careful consideration to the statement you initial when engaging in health care decision-making on your behalf.)

_____ I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

_____ I want my life to be prolonged and I want life-sustaining treatment to be provided or continued, unless I am, in the opinion of my attending physician, in accordance with reasonable medical standards at the time of reference, in a state of "permanent unconsciousness" or suffer from an "incurable or irreversible condition" or "terminal condition", as those terms are defined in Section 4-4 of the Illinois Power of Attorney Act. If and when I am in any one of these states or conditions, I want life-sustaining treatment to be withheld or discontinued.

_____ I want my life to be prolonged to the greatest extent possible in accordance with reasonable medical standards without regard to my condition, the chances I have for recovery or the cost of the procedures.

(NOTE: This power of attorney may be amended or revoked by you in the manner provided in Section 4-6 of the Illinois Power of Attorney Act.

3. This power of attorney shall become effective immediately.

(NOTE: Insert a future date or event during your lifetime, such as a court determination of your disability or a written determination by your physician that you are incapacitated, when you want this power to first take effect.)

4. This power of attorney shall terminate on _____.

(NOTE: Insert a future date or event, such as a court determination that you are not under a legal disability or a written determination by your physician that you are not incapacitated, if you want this power to terminate prior to your death.)

(NOTE: If you do not amend or revoke this power, or if you do not specify a specific ending date in paragraph 4, it will remain in effect until your death; except that your agent will still have the authority to donate your organs, authorize an autopsy, and dispose of your remains after your death, if you grant that authority to your agent.)

(NOTE: You cannot use this form to name co-agents. If you wish to name successor agents, insert the names and addresses of the successors in paragraph 5.)

5. If any agent named by me shall die, become incompetent, resign, refuse to accept the office of agent or be unavailable, I name the following (each to act alone and successively, in the order named) as successors to such agent:

For purposes of this paragraph 5, a person shall be considered to be incompetent if and while the person is a minor, or an adjudicated incompetent or disabled person, or the person is unable to give prompt and intelligent consideration to health care matters, as certified by a licensed physician.

(NOTE: If you wish to, you may name your agent as guardian of your person if a court decides that one should be appointed. To do this, retain paragraph 6, and the court will appoint your agent if the court finds that this appointment will serve your best interests and welfare. Strike out paragraph 6 if you do not want your agent to act as guardian.)

6. If a guardian of my person is to be appointed, I nominate the agent acting under this power of attorney as such guardian, to serve without bond or security.

7. I am fully informed as to all the contents of this form and understand the full import of this grant of powers to my agent.

Dated this _____ day of _____, 2017.

Principal

The principal has had an opportunity to review the above form and has signed the form or acknowledged his or her signature or mark on the form in my presence. The undersigned witness certifies that the witness is not: (a) the attending physician or mental health service provider or a relative of the physician or provider; (b) an owner, operator, or relative of an owner or operator of a health care facility in which the principal is a patient or resident; (c) a parent, sibling, descendant, or any spouse of such parent, sibling, or descendant of either the principal or any agent or successor agent under the foregoing power of attorney, whether such relationship is by blood, marriage, or adoption; or (d) an agent or successor agent under the foregoing power of attorney.

(Witness Signature)

(Print Witness Name)

(Street Address)

(City, State, Zip)

(NOTE: You may, but are not required to, request your agent and successor agents to provide specimen signatures below. If you include specimen signatures in this power of attorney, you must complete the certification opposite the signatures of the agents.)

Specimen signatures of _____ agent (and
successors)

I certify that the signatures of my agent (and
successors) are genuine.

(agent)

(principal)

(successor agent)

(principal)

(successor agent)

(principal)

(NOTE: The name, address, and phone number of the person preparing this form or who assisted the principal in completing this form is optional.)

Prepared by: Susan Dawson-Tibbits, Attorney at Law
JOHNSON, BUNCE & NOBLE, P.C.
7800 N. Sommer Street, Suite 425
Peoria, IL 61615
Phone: (309) 691-9650
Fax: (309) 691-9651

**SECTIONS 4-5, 4-9, AND 4-10(b) OF THE
POWERS OF ATTORNEY FOR HEALTH CARE LAW**

Section 4-5. **Limitation on health care agencies.** Neither the attending physician nor any other health care provider may act as agent under a health care agency; however, a person who is not administering health care to the patient may act as health care agent for the patient even though the person is a physician or otherwise licensed, certified, authorized, or permitted by law to administer health care in the ordinary course of business or the practice of a profession.

Section 4-6. **Revocation and amendment of health care agencies.**

(a) Every health care agency may be revoked by the principal at any time, without regard to the principal's mental or physical condition, by any of the following methods:

1. By being obliterated, burnt, torn or otherwise destroyed or defaced in a manner indicating intention to revoke;
2. By a written revocation of the agency signed and dated by the principal or person acting at the direction of the principal; or
3. By an oral or any other expression of the intent to revoke the agency in the presence of a witness 18 years of age or older who signs and dates a writing confirming that such expression of intent was made.

(b) Every health care agency may be amended at any time by a written amendment signed and dated by the principal or person acting at the direction of the principal.

(c) Any person, other than the agent, to whom a revocation or amendment is communicated or delivered shall make all reasonable efforts to inform the agent of that fact as promptly as possible.

Section 4-9. **Penalties.** All persons shall be subject to the following sanctions in relation to health care agencies, in addition to all other sanctions applicable under any other law or rule of professional conduct:

(a) Any person shall be civilly liable who, without the principal's consent, wilfully conceals, cancels or alters a health care agency or any amendment or revocation of the agency or who falsifies or forges a health care agency, amendment or revocation.

(b) A person who falsifies or forges a health care agency or willfully conceals or withholds personal knowledge of an amendment or revocation of a health care agency with the intent to cause a withholding or withdrawal of life-sustaining or death-delaying procedures contrary to the intent of the principal and thereby, because of such act, directly causes life-sustaining or death-delaying procedures to be withheld or withdrawn and death to the patient to be hastened shall be subject to prosecution for involuntary manslaughter.

(c) Any person who requires or prevents execution of a health care agency as a condition of insuring or providing any type of health care services to the patient shall be civilly liable and guilty of a Class A misdemeanor.

Section 4-10. Statutory short form power of attorney for health care.

* * *

(b) The statutory short form power of attorney for health care (the "statutory health care power") authorizes the agent to make any and all health care decisions on behalf of the principal which the principal could make if present and under no disability, subject to any limitations on the granted powers that appear on the face of the form, to be exercised in such manner as the agent deems consistent with the intent and desires of the principal. The agent will be under no duty to exercise granted powers or to assume control of or responsibility for the principal's health care; but when granted powers are exercised, the agent will be required to use due care to act for the benefit of the principal in accordance with the terms of the statutory health care power and will be liable for negligent exercise. The agent may act in person or through others reasonably employed by the agent for that purpose but may not delegate authority to make health care decisions. The agent may sign and deliver all instruments, negotiate and enter into all agreements and do all other acts reasonably necessary to implement the exercise of the powers granted to the agent. Without limiting the generality of the foregoing, the statutory health care power shall include the following powers, subject to any limitations appearing on the face of the form:

(1) The agent is authorized to give consent to and authorize or refuse, or to withhold or withdraw consent to, any and all types of medical care, treatment or procedures relating to the physical or mental health of the principal, including any medication program, surgical procedures, life-sustaining treatment or provision of food and fluids for the principal.

(2) The agent is authorized to admit the principal to or discharge the principal from any and all types of hospitals, institutions, homes, residential or nursing facilities, treatment centers and other health care institutions providing personal care or treatment for any type of physical or mental condition. The agent shall have the same right to visit the principal in the hospital or other institution as is granted to a spouse or adult child of the principal, any rule of the institution to the contrary notwithstanding.

(3) The agent is authorized to contract for any and all types of health care services and facilities in the name of and on behalf of the principal and to bind the principal to pay for all such services and facilities, and to have and exercise those powers over the principal's property as are authorized under the statutory property power, to the extent the agent deems necessary to pay health care costs; and the agent shall not be personally liable for any services or care contracted for on behalf of the principal.

(4) At the principal's expense and subject to reasonable rules of the health care provider to prevent disruption of the principal's health care, the agent shall have the same right the principal has to examine and copy and consent to disclosure of all the principal's medical records that the agent deems relevant to the exercise of the agent's powers, whether the records

relate to mental health or any other medical condition and whether they are in the possession of or maintained by any physician, psychiatrist, psychologist, therapist, hospital, nursing home or other health care provider.

(5) The agent is authorized: to direct that an autopsy to be made pursuant to Section 2 of "An Act in relation to autopsy of dead bodies", approved August 13, 1965, including all amendments; to make a disposition of any part or all of the principal's body pursuant to the Uniform Anatomical Gift Act, as now or hereafter amended; and to direct the disposition of the principal's remains.