

# **PART 5. POWERS OF ATTORNEY**

## **SECTION 62-5-501. When power of attorney not affected by disability.**

(A) Whenever a principal designates another his attorney in fact by a power of attorney in writing and the writing contains (1) the words "This power of attorney is not affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate", (2) the words "This power of attorney becomes effective upon the physical disability or mental incompetence of the principal", or (3) similar words showing the intent of the principal that the authority conferred is exercisable notwithstanding his physical disability or mental incompetence or either physical disability or mental incompetence, the authority of the attorney in fact is exercisable by him as provided in the power on behalf of the principal notwithstanding later physical disability or mental incompetence of the principal or later uncertainty as to whether the principal is dead or alive. The power may define "physical disability" or "mental incompetence" and may set forth the procedures for determining whether the principal is physically disabled or mentally incompetent. If no definition of mental incompetence or procedures for determining mental incompetence are set forth, and the authority of the attorney in fact relates solely to health care, mental incompetence is to be determined according to the standards and procedures for inability to consent under Section 44-66-20(6) of the Adult Health Care Consent Act. The authority of the attorney in fact to act on behalf of the principal must be set forth in the power and may relate to any act, power, duty, right, or obligation which the principal has or may acquire relating to the principal or any matter, transaction, or property, including the power to consent or withhold consent on behalf of the principal to health care. The attorney in fact has a fiduciary relationship with the principal and is accountable and responsible as a fiduciary. All acts done by the attorney in fact pursuant to the power during a period of physical disability or mental incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees, legatees, and personal representative as if the principal were alive, mentally competent, and not disabled physically.

(B) An instrument to which this section is applicable also may provide for successor attorneys in fact and provide conditions for their succession, which may include an authorization for the court to appoint a successor, and the succession may occur whether or not the principal then is physically disabled or mentally incompetent. The appointment of an attorney in fact under this section does not prevent a person or his representative from petitioning the court to have a guardian or conservator appointed. Unless the power of attorney provides otherwise, appointment of a guardian terminates all or part of the power of attorney that relates to matters within the scope of the guardianship, and appointment of a conservator terminates all or part of the power of attorney that relates to matters within the scope of the conservatorship.

(C) A power of attorney executed under the provisions of this section must be executed and attested with the same formality and with the same requirements as to witnesses as a will. In addition, the instrument must be recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded. After the instrument has been recorded, whether recorded before or after the onset of the principal's physical disability or mental incompetence, it is effective notwithstanding the mental incompetence or physical disability. If the authority of the attorney in fact relates solely to the person of the principal, the instrument is effective without being recorded.

(D) A power of attorney as provided for under this section is valid if:

(1) executed in compliance with this section; or

(2) its execution complies with the law at the time of execution of the jurisdiction where the instrument was executed and it is recorded as required by subsection (C). Notwithstanding the provisions of Section 30-5-30, a valid power of attorney as provided for under this section which is executed in another jurisdiction may be recorded as though it complies with the provisions of subsection (C) of this section.

(E) A properly executed durable power of attorney that authorizes an attorney in fact to make health care decisions or other decisions regarding the principal is valid whether or not it was executed after May 14, 1990.

(F)(1) A third person in this State who receives or is presented with a valid power of attorney executed pursuant to this section, and has not received actual written notice of its revocation or termination, must not refuse to honor the power of attorney if it contains the following provision or a substantially similar provision:

"No person who may act in reliance upon the representations of my attorney-in-fact for the scope of authority granted to the attorney-in-fact shall incur any liability as to me or to my estate as a result of permitting the attorney-in-fact to exercise this authority, nor is any such person who deals with my attorney-in-fact responsible to determine or ensure the proper application of funds or property."

As used in this subsection, "to honor" a power of attorney means to deal with the attorney-in-fact as if the attorney-in-fact were the principal, personally present and acting on his own behalf within the scope of the powers granted to the attorney-in-fact.

(2) Unless the third person actually has received written notice of the revocation or termination of a valid power of attorney executed in accordance with this section, a third person in this State who receives or is presented with a power of attorney:

(a) does not incur liability to the principal or the principal's estate by reason of acting upon the authority of it or permitting the attorney-in-fact to exercise authority;

(b) is not required to inquire whether the attorney-in-fact has power to act or is properly exercising the power; or

(c) is not responsible to determine or ensure the proper application of assets, funds, or property belonging to the principal.

(3) A "third person" means an individual, a corporation, an organization, or other legal entity for purposes of this subsection.

(G)(1) An attorney-in-fact is entitled to reimbursement for expenses and compensation for services as provided in the power of attorney. In the absence of a provision in the power of attorney regarding reimbursement or compensation, or both:

(a) an attorney-in-fact is entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by the attorney-in-fact on the principal's behalf;

(b) an attorney-in-fact, upon the approval of the probate court, is entitled to reasonable compensation based upon the responsibilities he assumed and the effort he expended; and

(c) if two or more attorneys-in-fact are serving together, the compensation paid must be divided by them in a manner as they agree or as determined by a court of competent jurisdiction if they fail to agree.

(2) An interested person may petition a court of competent jurisdiction to review the propriety and reasonableness of payment for reimbursement or compensation to the attorney-in-fact, and an attorney-in-fact who has received excessive payment may be ordered to make appropriate refunds to the principal.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 483, Section 5; 1990 Act No. 521, Section 104; 1992 Act No. 256, Section 1; 1992 Act No. 306, Sections 5, 6; 1997 Act No. 152, Section 27; 2002 Act No. 362, Section 9; 2010 Act No. 244, Section 40, eff June 7, 2010.

**SECTION 62-5-502. Other powers of attorney not revoked until notice of death or disability.**

(a) The death, disability, or incompetence of any principal who has executed a power of attorney in writing does not revoke or terminate the agency as to the attorney-in-fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of

attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(b) An affidavit, executed by the attorney-in-fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability, or incompetence, is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(c) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

HISTORY: 1986 Act No. 539, Section 1.

**SECTION 62-5-503. Jurisdiction.**

The probate court has concurrent jurisdiction with the circuit courts of this State over all subject matter related to the creation, exercise, and termination of powers of attorney governed by the provisions of this Part, including the approval of the sale of real and personal property by an attorney-in-fact.

HISTORY: 1990 Act No. 521, Section 87.