Powers of Attorneys and Advance Directives-- Some Pitfalls, Prats* and Problems

> "Power tends to corrupt and absolute power corrupts absolutely."
>
> Lord Acton, Letter to Bishop Mandell Creighton (April 5, 1887)

> "Let every eye negotiate for itself, And trust no agent."
>
> Shakespeare, *Much Ado About Nothing* (1598-1599)

I. What are they?

> "A power of attorney is an instrument in writing authorizing another to act as one's agent. The agent holding the power of attorney is termed an 'attorney in fact' as distinguished from an attorney at law."[1]

An "elderly" estate planner has the opportunity to know his clients for many, many years, having perhaps attended baptisms, weddings and funerals. As a result, when the question of "advance directives" or powers of attorney comes up, the client may be expecting some very personal service at a crucial time in their lives. Who's going to take care of things? Who's going to determine they're nuts? Who's going to "pull the plug"?

A. Advance Health Care Directives. Typical advance health care directives include living wills and health care powers of attorney. These present not only legal questions, but religious and moral ones as well:

> St. Paul belittled the finality of dying with the words, "Oh Death, where is they sting? Oh grave, where is they victory?" Today, religious leaders and health care

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*prats/prattes n. 1. Precarious situations; the buttocks; to "prat about"; a "pratfall". Cassell's Dictionary of Slang (1998).

> professionals alike speak of "terminal conditions" and "persistent vegetative states." Society's approach to death and dying has thus become so technological. Perhaps the situation is best described thus: "the intervention in the dying process through artificial means obscures the meaning of death, so that today it is more a matter of moral judgment than biological fact."[2]

B. Financial Powers of Attorney. On the other hand, a financial power of attorney normally gives one person (the attorney-in-fact) the power to act on behalf of another (the principal), to handle various business transactions. It can be wonderful, and dangerous:

> "The power of attorney is a simple yet powerful document which allows an individual full authority to perform almost any act the principal could do personally. As a result of this power, there are 'manifold opportunities and temptations for self-dealing'. That this is a problem is clear because financial abuse of the elderly is much more widespread than the public generally acknowledges. Although this exploitation occurs in many different ways, such as telemarketing frauds, home repair scams, and thefts of Social Security checks, the worst financial exploitation occurs with durable powers of attorney. In fact the abuse of powers of attorney has been called an 'invisible epidemic', because the victims, who are usually elderly or incapacitated, may be unaware what is happening or too frightened or embarrassed to raise

> any formal objections which would bring the case to light. . . .
>
> "A power of attorney can be an important, powerful, flexible document and, when combined with the power to make gifts, can be a useful estate planning tool. However, it can also be a troublesome document that creates the potential for fraud and abuse. Consequently, the principal and the principal's lawyer should consider carefully whether to include the gift-giving power among those powers given to the attorney-in-fact."[3]

Financial powers of attorney are typically broken into the following classes:

1. *"Regular" or "nondurable" powers of attorney* are written instruments, appointing an agent to act on behalf of the principal. At common law, these were only valid until the principal became incompetent or died. Since an agent acts at the principal's direction, and the principal can terminate the agency at any time, the incapacity or death of the principal would violate both of these elements.[4] Therefore, a common law power of attorney would be useless for disability planning, because it ends right when you need it.

2. *"Durable" powers of attorney* are powers of attorney that are either (a) valid now and valid if you become incompetent or (b) become valid if you're incompetent (sometimes called "springing" powers of attorney).

In 1954, Virginia was the first state to pass legislation authorizing durable powers of attorney.[5] However, they became much more popular when the Uniform Probate Code introduced a version as a part of the Code itself, in 1969.[6]

Nebraska first authorized durable powers when it adopted the Uniform Durable Power of Attorney Act in 1985. Sections 30-2664 to 30-2672. The "Nebraska Short Form Act" was passed in 1988, and defines the form as either a "nondurable power of attorney" (common law form), a "present durable power of attorney" (it's good now and when you become incompetent), or a "contingent durable power of attorney" (springing form).

II. A Short History

Compared to wills and trusts, powers of attorney are of very recent origin:

> "Trustees, administrators, and bailees are of ancient origin, whereas agents appeared only at the end of the eighteenth century."[7]

Powers of attorney are essentially agency relationships, and while they're similar to a master-servant situation, it's not the same:

> "The student of law who reads his Blackstone carefully, discovers much learning upon the subject of master and servant, but when he looks for the subject of principal and agent he finds nothing whatever, except as the latter terms are indifferently and carelessly mingled with the former. . . . .
>
> "[T]he relation of master and servant has been defined as a *status*, while agency in contrast has been designated a contractual relation. . . . The word 'agent' is of comparatively modern origin in English law. It probably came into use through the law merchant in the early part of the 18th century; and the treatment of agency as a separate branch of the law had hardly developed prior to 1800. The word, 'attorney,' and the civil law term, 'procurator,' most nearly resembled the present idea of an agent."[8]

As outlined above, non-durable powers of attorney were recognized at common law, 1920 being the earliest reference to them I could find in a Nebraska Supreme Court opinion,[9] but durable powers of attorney only date from 1954 nation-wide, and from 1985 in Nebraska. All fifty states now have statutes authorizing

durable powers of attorney.[10]

This lack of history is a blessing and curse. We're free to experiment with them and use them in ways that may be innovative and useful. But by the same token, without much of a history, we may place our clients in some precarious positions, especially when nefarious agents are appointed to handle someone else's money or health. Greed and acrimony sometime overcome the bonds of matrimony, family and harmony:

> There is no calamity
> greater than lavish
> desires.
> There is no greater guilt than discon-
> tentment.
> And there is no greater disaster than
> greed.
>
> --Lao Tzu, Sixth Century Chinese Taoist Philosopher, *The Way of Lao Tzu* 46.

For example, prior to the 1989 case of Fletcher v. Mathew, 233 Neb. 853, 448 N.W.2d 576 (1989) (a pretty good example of greed), there was no statutory or case precedent saying a power of attorney form had to include the specific power to make gifts in order for any gifts by the attorney-in-fact to be valid. This particular problem continues to create problems for the estate planner, as outlined below, and probably, like your mother-in-law, haunts you daily.

> "I should, many a good day,
> have blown my brains out,
> but for the recollection
> that it would have given
> pleasure to my mother-in-
> law; and even *then*, if I
> could have been certain to
> haunt her . . ."
>
> --Lord Byron, letter of January 28, 1817

III. The Nature of the Beast

> "Call things by their right names. . . . Glass of brandy and water! That is the current but not the appropriate name: ask for a glass of liquid fire and distilled damnation."
>
> --Robert Hall (1764-1831), from Olinthus Gregory, Brief Memoir of the Life of Hall

What then, exactly, is a power of attorney? We've mentioned the law of agency and the law of contract. But in addition, it seems to have elements of a fiduciary, a conservator and a trustee. Is it all of these things?[11]

1. Agency Law. The most common reference for an attorney-in-fact is that they're an agent:

> "Because the power of attorney creates an agency relationship, the authority and duties of an attorney in fact are governed by the principles of the law of agency . . . ." In re Estate of Lienemann, 222 Neb. 169, 382 N.W.2d 595, 602 (1986).

2. Contract Law. However, the Supreme Court also relies on general contract law for interpreting powers of attorney:

> "A power of attorney must be construed in accordance with the rules for the interpretation of written instruments generally. . . . Where the intention of the parties appears from the language employed in the power of attorney, that intention should prevail, and a strained interpretation should never be given to defeat it." Graham Ice Cream Co. v. Petros, 127 Neb. 172, 254 N.W. 869 (1934).

3. Fiduciary, Trustee and Conservatorship Law. An attorney-in-fact would differ from a trustee or a guardian in several material respects:

A. Instructions. The attorney-in-fact has a duty to obey the instructions of the principal, while a trustee has a duty to carry out the terms of the trust in the best interests of the beneficiaries, rather than obeying the beneficiaries' instructions.[12]

B. Investments. A trustee must exercise independent judgment regarding investment of trust assets, but an attorney-in-fact is under a duty to follow the principal's desires regarding investment of assets given to him to protect.[13]

C. Binding Actions. An attorney-in-fact's actions may bind the principal, while a trustee's actions only bind the trust assets and would not create personal liability for the beneficiaries.[14]

D. Supervision. A conservator is normally not subject to supervision by the protected person, while an attorney-in-fact is normally subject to the principal's supervision (at least before the principal is incapacitated).

However, a conservator is obviously supervised by the court, but, once the principal becomes incapacitated, there may be no supervision of the attorney-in-fact.

E. Discretion with Assets. A conservator's discretion with the protected person's assets may be limited, including, in Nebraska courts, the inability to sell real estate or pay attorneys' and conservators' fees without court approval. Therefore, the conservator's discretion would normally be in a narrower range than that of a trustee or an attorney-in-fact.

F. Duty to Act. Unlike either a trustee or a conservator, an attorney-in-fact normally would not have a *duty* to act, unless instructed by the principal. This may actually be a shortcoming, if the attorney-in-fact should be taking some actions while the principal is incompetent. However, the fiduciary duty of an attorney-in-fact, discussed below, may be sufficient to require that they take actions to protect or preserve

the principal's assets under their control, if they knew or should have known such actions were required.

Having said all this, the typical attorney-in-fact has many elements of a fiduciary nature:

1. It's usually a relative motivated by a family duty, and a genuine concern for an older family member's well-being.

2. The attorney-in-fact may be motivated by a desire to handle an older family member's affairs in a cost-effective and private manner.

3. The attorney-in-fact's family connections with the principal may create an interest in protecting the principal's best interests.

4. If not a family member, the attorney-in-fact would normally be motivated by a desire to help someone else, and takes the role on reluctantly. Normally there's no other real alternative.

Contrasting these points with a trustee show very clear differences, including the fact that professional trustees provide investment services for a fee and are in the business as a means of profit.

> "It is telling that corporate fiduciaries are generally unwilling to serve as attorneys-in-fact."[15]

Therefore, while most commentators would say a fiduciary isn't expected to be selfless, an attorney-in-fact for an incapacitated principal probably comes closest to that expectation. If you've either been an attorney-in-fact, you know it's a thankless job, and may have driven some of them either to drink, or to the stealing that eventually did them in. Just kidding.

However, since an attorney-in-fact must always remember to put his own self-interests in second place, altruism apparently has to be the guiding motivation. For example, in the case of Cheloha v. Cheloha, 255 Neb. 32, 582, N.W.2d 291, 297 (1998), calling the case's attorney-in-fact an agent, the Nebraska Supreme

Court summarized these rules and applied fiduciary principals:

> "Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal. . . . An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal. . . . . An agent is prohibited from profiting from the agency relationship to the detriment of the principal." (Emphasis added).

Recognizing that a perfect attorney-in-fact will carry out the best ideals of a fiduciary relationship, how often will you find that person? If it doesn't happen, and we appoint a crook, what can we do about it? One of the real advantages to the power of attorney is that we don't have to monitor the attorney-in-fact, but that's also one of its real disadvantages.

A trustee is required to account to the beneficiaries, who can then bring an action in court concerning the trustee's performance. A conservator is strictly subject to court supervision, and perhaps the ultimate recipients of the protected person's assets. A personal representative is also subject to the court overview, and must account to the heirs or devisees.

The attorney drafting the power of attorney can help in this regard, by including certain accounting provisions. For example, should the attorney-in-fact be required to account to his brothers and sisters, if he's watching dad's assets? Should you appoint more than one attorney-in-fact and require joint consent for any actions taken? Obviously any restrictions limit the low cost and ease of operation that attracted us to powers of attorney in the first place. However, keep all of these concerns in mind when drafting your form. Planning for one family may require you to include all of the restrictions, but none of them for another family.

"Children begin by loving
their parents; after a time
they judge them; rarely, if
ever, do they forgive
them."

--Oscar Wilde, *A Woman of No Importance* (1893)

IV. Statutory Requirements

There are basically three different Nebraska statutes dealing with powers of attorney--both financial and health care:

1. *Uniform Durable Power of Attorney Act*. In 1985, the Unicameral adopted the Uniform Durable Power of Attorney Act, found at sections 30-2664 to 30-2672. It is relatively short and painless, giving the drafter the language to easily make the power either effective (a) now and when you're nuts, or (b) only when you're cuckoo (springing):

"This power of attorney
shall not be affected by
subsequent disability or
incapacity of the
principal"

or

"This power of attorney
shall become effective upon
the disability or
incapacity of the
principal"

or

"Similar words showing the
intent of the principal
that the authority
conferred shall be
exercisable notwithstanding
the principal's subsequent
disability or incapacity."

The statute gives no form, requires no witnesses or notaries, but grants the county court and district court of the principal's

domicile the necessary jurisdiction to determine the "validity and enforceability of a durable power of attorney."

For a somewhat short review of the uniform act, and the limited case law interpreting it, see 8A Uniform Laws Annotated 309 (1993), and updates.

2. *Nebraska Short Form Act*. Apparently to make the power of attorney form "user-friendly", the Unicameral adopted the Nebraska Short Form Act in 1988 (Sections 49-1501 to 49-1561). A form is given (Section 49-1522), which must be notarized (Section 49-1506).

The supposed blessing of the Act is to set out 31 various "specific authorities" and "general powers" that define the authorities given, without having to put the actual powers in the power of attorney. For example, to incorporate the "General Power for Disputes and Litigation", Section 49-1548 gives you a definition that takes up a whole page in the statute. You simply check the boxes you want.

A memo circulated amongst the members of the Judiciary Committee at the time the law was passed, says the law is "long on merit and on potential for great daily practical service to the citizenry of Nebraska". However, it also stated one of its disadvantages:

> "The Nebraska Short Form Act extends, ironically enough, through sixty-one sections over more than sixty pages and could very well be called the 'Long Nebraska Short Form Act.'"[16]

3. *Health Care Power of Attorney*. The Legislature enacted Nebraska's health care power of attorney statute in 1992. The law outlines how to draw up the actual document, including a form (Section 30-3408). Note the following:

A. The health care P.O.A. is not valid unless the principal is "incapable of making health care decisions" (Section 30-3412);

B. The power must be in writing (30-3404)

C. The power must identify the principal, the attorney-in-fact and any successor attorney-in-fact (30-3404);

D. The power must specifically authorize the attorney-in-fact to make health care decisions on behalf of the principal if the principal is "incapable" (30-3404);

E. The power must show the date of its execution; and

F. The power must be either (1) witnessed and signed by at least two adults who either saw the signing and dating or the principal's acknowledgment of the signature and date, or (2) notarized by somebody who isn't the attorney-in-fact, or a successor.

V. Some Other Requirements

As you might expect, the principal must be mentally competent to make or revoke a power of attorney. Presumably these would involve the same concepts of undue influence and competency found in other probate situations.[17] It appears the Nebraska courts would use the same principles of competence and undue influence that apply to other similar documents, including wills, deeds and contracts:

i. Competence. Perhaps the most similar situation are the Nebraska cases on the competency of a grantor who deeds real estate away:

> "'In order to set aside an instrument or instruments . . . for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend

> the purport and effect of what he was doing.'" In the Matter of Estate of Saathoff, 206 Neb. 793, 295 N.W.2d 290, 295 (1980) (quoting Dunbier v. Rafert, 170 Neb. 570, 103 N.W.2d 814 (1960)).

For a case discussing the presumption of competency in a P.O.A. situation, see In re Head, 615 P.2d 271, 274-75 (N.M. Ct. App. 1980).

> "Most jurisdictions that have considered the issue have held that competence to execute a durable power of attorney is similar to the competence required to execute a contract. *E.g.*, *In re Guardianship of Ray*, No. 657, 1991 W.L. 179418, at *4 (Ohio Ct. App. September 16, 1991) (defining capacity to execute durable power of attorney as 'the ability of the principal to understand the nature, scope and the extent of the business she is about to transact'). *Cf. In re Rick*, No. 6920, 1994 WL 148268 *5 (Del Ch. Ct. March 23, 19994) (applying standard for testamentary capacity to durable power of attorney)."[18]

> "The use of this technique is limited or unavailable, however, in planning for a presently mentally incapacitated individual since the power of attorney will not be valid if the person executing it does not possess the requisite capacity to understand the nature and significance of the act of execution. . . . Where the incapacity relates to senility or a psychiatric disorder, there may be intervals of time when the person is lucid enough to execute a power of attorney. If so, there

should be medical documentation that the principal was lucid at the time of execution of the power." Schlesinger & Scheiner, "Estate Planning Using Powers of Attorney", Trusts & Estates page 38 (July 1992).

ii. Undue Influence. Likewise, the principal should be free of undue influence when signing the power of attorney.[19] Presumably the Nebraska courts would likewise apply the undue influence rules from the will context:

> "The elements which must be proved in order to vitiate a will on the ground of undue influence are that (1) the testator was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the result was clearly the effect of such influence." In re Estate of Price, 223 Neb. 12, 388 N.W.2d 72, 79 (1986).

In the case of Fremont Nat. Bank & Trust Co. v. Beerbohm, 223 Neb. 657, 392 N.W.2d 767 (1986), the p.r. of the deceased's estate brought suit to set aside some transfers made by the deceased to a niece during the deceased's lifetime, on the grounds the niece used undue influence to obtain the transfers. The niece did not have a power of attorney, but was closely helping the aunt with her affairs. Citing the Price case, the Supreme Court outlined the following rules in that situation:

> "Undue influence sufficient to defeat a transfer of property is such manipulation as destroys the free agency of the transferor and substitutes another's purpose for that of the transferor. . . . The elements which must be proved in order to vitiate a transfer of property on the ground of undue

> influence are that (1) the transferor was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the transfer was clearly made as the result of such influence. Moreover, in an equitable action the existence of undue influence must be proved by clear and convincing evidence." 392 N.W.2d at 770.

The Supreme Court held the p.r. had failed to prove undue influence in the facts of the case.

Likewise, the same rules have been applied in attempts to set aside deeds because of alleged undue influence. See, e.g., In the Matter of Estate of Saathoff, 206 Neb. 793, 295 N.W.2d 290 (1980)

Query: Can a person under conservatorship execute a power of attorney?

> "Generally, a power of attorney will not be an available alternative for one who is already incompetent, and the only options then available will be court-supervised administration of the disabled person's affairs through a committeeship, conservatorship or guardianship." Schlesinger & Scheiner, "Estate Planning Using Powers of Attorney", Trusts & Estates page 38 (July 1992).
>
> See also Section 30-3403(2) on health care p.o.a.'s:
>
> "There shall be a rebuttable presumption that every adult is competent for purposes of executing a power of attorney for health care unless such adult has been adjudged incompetent or unless a guardian has been appointed

for such adult."

Cf. the powers of a prior attorney-in-fact after a conservator's appointed. See Section 30-2667, UPC 5-501 and the discussion at page 20 below.

However, a power of attorney can be used to nominate a guardian or conservator. If properly drafted, the Nebraska power of attorney can clearly guide the guardianship and conservatorship process:

> "A principal may nominate, by a durable power of attorney, the conservator, guardian of the estate, or guardian of the person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court *shall* make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification. A principal in a power of attorney or a durable power of attorney may *waive the requirement that the conservator, guardian of the estate, or guardian of the person be required to post a bond*. Section 30-2667(2) of the Nebraska Probate Code (emphasis added).

In the Missouri case of Byrne v. Schneider,[20] the Court upheld the appointment of a non-related guardian named in a power of attorney, over the objections of family members. However, in the Nebraska case In re Conservatorship of Anderson, 262 Neb. 51, 628 N.W.2d 233 (2001), the attorneys-in-fact were passed over because of gifts they had made to themselves that weren't permitted by the P.O.A.

VI. Advance Directives.

> I felt that the assortment of tablets that I had been given may have been mis-prescribed, since they

> seemed to interfere with the pleasant effects of alcohol. In the interests of my health, therefore, I stopped taking them.
>
> --Barry Humphries, More Please (1992)

The most common forms of advance directives are the "living will", authorized under Nebraska's "Rights of the Terminally Ill Act", Sections 20-401 to 20-416, and the Health Care Power of Attorney statutes, cited above.

The living will statutes set out the form and the questions to be addressed, including the requirements for signature (two witnesses or a notary; only one witness can be associated with the health care provider; no witnesses can be an employee of a life or health insurance provider for the client).

The living will is essentially directed to the world, while the health care p.o.a. goes to a specific person. One question you'll face is whether your health care power of attorney should be simple or detailed:

> "The key to developing and executing an effective durable power of attorney for healthcare is simplicity. In short, the durable power of attorney for healthcare should be as concise as possible."[21]

Unlike many agency relationships, normally the person receiving a health care power of attorney is given an "authority", rather than an "obligation". In other words, the agent is not normally burdened with an affirmative duty to act and to monitor the principal's state of being.[22]

This is implied in the Legislative intent portion of Nebraska's statute:

> "It is the intent of the Legislature to establish a decisionmaking process which allows a competent adult to designate another person to make health care and medical treatment decisions if the adult

> becomes incapable making such decisions." Section 30-3401(1), R.R.S. 1943.

However, once someone has been appointed and starts to take action under the health care p.o.a., there are definite duties imposed on them:

A. For example, Section 30-3418 says the attorney-in-fact has a

> "*duty* to consult with medical personnel, including the attending physician, and thereupon to make health care decisions (a) in accordance with the principal's wishes as expressed in the power of attorney for health care or as otherwise made known to the attorney in fact or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests, with due regard for the principal's religious and moral beliefs if known." (Emphasis added).

B. Section 30-3417(1) says that, once the health care p.o.a. is effective, the attorney-in-fact "shall make health care decisions on the principal's behalf".

Which is better--a health care power of attorney, or a living will? A small comparison:

1. Living wills are very simple and easy to get, with many hospitals providing them to the patients. Therefore, they're easily obtained. On the other hand, health care powers of attorney are a little more complicated, and should be prepared by an attorney because of the various questions in them that need to be answered.

2. Health care powers of attorney are directed to a live person, to make health care decisions when you can't, including the question of whether you should be taken off

life-
support. This is unlike a living will, that seems to be directed to the world in general.

3. Health care powers of attorney go beyond just "pulling the plug", but can relate to all kinds of decisions about your client's health. "Are you getting the best medical care?" "Are you in the right hospital?" "Is your doctor nuts?" By giving a *specific person* the power to help you with these questions, the result may have a better chance of matching your client's wishes.

With all of these forms floating around (living wills, health care powers of attorney, a hospital "DNR" form (do not resuscitate), etc., the possibility of conflicts certainly exist, especially if the health care attorney-in-fact disagrees with other family members about what to do, or the client has allegedly given an opinion to family members after the date of the health care p.o.a. that conflicts with the attorney-in-fact's opinion. In such a situation, lawyers love the courts, and Section 30-3421 provides for a lawsuit, presumably in county court, to decide a number of things about the health care p.o.a., including "whether the . . . proposed acts of the attorney in fact are consistent with the wishes of the principal".

"Springing vs. Non-Springing".

One of the more important questions for a regular financial p.o.a. is whether it should be immediately effective, or "spring" into action when the principal can't, or is otherwise goofy. However, under Nebraska's health care p.o.a. statute, the only time the health care attorney-in-fact can act is when "the adult becomes incapable of making such decisions." Section 30-
3401(1). The authority commences <u>only</u> when the principal is "incapable of making health care decisions. Section 30-3411.

Therefore, an obvious important element of the health care p.o.a. is to provide a means of saying when the principal is "incapable". The statute defines it:

> "Incapable shall mean the inability to understand and appreciate the nature and consequences of health care decisions, including the benefits of, risks of, and

> alternatives to any proposed health care or the inability to communicate in any manner an informed health care decision". Section 30-3402(7).

Section 30-3412 requires that the "attending physician" make a written determination that the principal is "incapable of making health care decisions". The principal can require that two doctors determine if he's nuts (Section 30-3408(1)). In addition, under Section 30-3415, if a dispute arises on this point, a petition in county court can be filed to resolve the issue.

Suffice it to say, the health care p.o.a. should address the point in some way, saying (1) how to determine if they're "incapable"; (2) one or two doctors; and (3) any other requirements the client can dream up to run things from the pre-grave (and drive up the costs).

HIPPA. The Health Insurance portability and Accountability Act of 1996 (HIPAA), imposed restrictions on the disclosure of a person's health information.[23] Either your health care p.o.a., or the general p.o.a. should address this problem, and enable the attorney-in-fact to obtain the necessary financial information, notwithstanding HIPPA.

I wish I had the voice of Homer
To sing of rectal carcinoma,
Which kills a lot more chaps, in fact,
Than were bumped off when Troy was sacked.

J.B.S. Haldane (1892-1964), "Cancer's a Funny Thing", from Ronald Clark's book, J.B.S. (1968)

> When you don't have any money, the problem is food. When you have money, it's sex. When you have both it's health.

J. P. Donleavy, The Ginger Man (1955)

VII. P.O.A.'s and Conservatorships

When is a conservatorship needed, even though there's a power of attorney? Are there fights over the principal? Do we need to take some kind of testamentary action? Do we need to do things not permitted by the power of attorney? Do we need to amend a trust? Do we need to make gifts not permitted by the power of attorney? Any "substitution of judgment" decision may not be available to an attorney-in-fact, whereas a conservator may be able to, if approved by the Court.

Several courts, including Nebraska's Court of Appeals, have declined to appoint a conservator if the attorney-in-fact was on board, and doing a good job.

> "The evidence shows without dispute that Amelia's interests are being served by John in his capacity as her attorney in fact and that the durable power of attorney gave him the powers that a guardian and conservator would have. Therefore, we conclude as a matter of law that the appointment of a guardian and conservator for Amelia was unnecessary, and we reverse, and remand with direction to dismiss the proceedings." In re Guardianship and Conservatorship of Hartwig, 11 Neb. App. 526, 656 N.W.2d 268, 280 (2003).

However, compare In re Conservatorship of Anderson, 262 Neb. 51, 628 N.W.2d 233 (2001), in which the Supreme Court refused to set aside the conservatorship, even though there was a durable power of attorney, in light of evidence of mis-doings:

> "But their status as Robert's attorneys in fact would not preclude the appointment of a conservator *if the court found that they had wasted or dissipated his estate*." (Emphasis added).[24]

Section 30-2637(3) allows a Nebraska conservator to "create revocable or irrevocable trusts of property of the estate which may extend beyond his or her disability or life". In the case of In re Guardianship and Conservatorship of Garcia, 262 Neb. 205, 631 N.W.2d 464 (2001), the Supreme Court refused to allow a conservator to amend an existing trust because of the facts, but that section 30-2637(3) did give the court the power to amend or revoke a trust, after the settlor becomes incompetent.

This cough I've got is hacking.
The pain in my head is wracking.
I hardly need to mention my flu.
The Board of Health has seen me
They want to quarantine me,
I might as well be miserable with you.

Howard Dietz, Miserable with You" (1931)

8. Forms

> "Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted."[25]

A. Some Particular Pitfalls. In developing your form for a power of attorney,

is it enough to simply appoint someone as your attorney-in-fact, without setting out the powers they have? Is it enough to reference the Nebraska Short Form Act? What powers can you delegate in a power of attorney?

Traditionally, the following powers could *not* be delegated to an agent:

1. To make, amend or revoke a will;

2. To fund a trust;

3. To change insurance beneficiaries;

4. To take a marriage vow or an oath;

5. To vote;

6. To perform a personal service contract; and

7. To otherwise delegate a fiduciary responsibility already borne by a principal.[26]

Having said this, how specific do you need to be in the power of attorney to outline the powers you want included? The Nebraska Short Form Act has a very extensive list of powers, outlining them in detail. This is easily referenced by simply referring to the Act. However, many persons asked to accept the power of attorney you drafted won't be familiar with the Nebraska Short Form Act, and you won't be around when your form is presented:

> "Third parties are notoriously leery of relying on powers of attorney, and if the document doesn't spell out exactly what an agent is authorized to do, a third party will probably back away from it. Under exactly this kind of pressure, drafters have increasingly added ever more specific language in an effort to reassure third parties."[27]

B. Some Particular Prats. Some questions will need special attention in your form:

1. Powers?.

i. Some to Include. Some typical powers to include are:

Access safety deposit boxes;
Transfer real estate;
Deal with retirement plans, including IRA's, rollovers and voluntary contributions, changing the ownership or beneficiary designations on the accounts, plans or annuities, and waiving non-employee spousal rights;
Borrow funds;
Enter into buy-sell agreements;
Deal with life insurance, including the power to cash in or change the ownership or beneficiary designations on the policies;
Forgive and collect debts;
Complete charitable pledges;
Make statutory elections and disclaimers, including the power to disclaim or refuse to accept an inheritance, joint tenancy property or life insurance proceeds[28];
Pay employees' salaries;
Hire counsel and otherwise act to represent or protect the principal's interest in any legal action, including the power to settle, pursue or appeal litigation;
Deal with and collect health or long-term care insurance;
Make an orderly disposition of a professional practice;
Waive attorney-client or other similar privileges, in order to allow the attorney-in-fact to consult the principal's attorney or other advisors; and
Sign tax returns, IRS powers of attorney and settle tax disputes.[29]

ii. Some to Exclude?

a. Compensation? Paying the attorney-in-fact compensation may be scary for the client. However, in the case of Cheloha v. Cheloha, 255 Neb. 32, 582 N.W.2d 291 (1998), the Supreme Court defeated the attorney-in-fact's claim that certain transfers were for compensation, since the power of attorney failed to include a compensation paragraph.

b. Change P.O.D. accounts? In the case of Crosby v. Luehrs, 266 Neb. 827, 669 N.W.2d 635 (2003), the Supreme Court refused to allow the attorney-in-fact to transfer P.O.D.

accounts of the principal into the principal's name alone, since the attorney-in-fact would then receive a part of the accounts under the principal's will.

c. Trusts. Do you allow the attorney-in-fact to establish, fund, amend or revoke trusts?

d. Governmental Agencies. Do you allow the attorney-in-fact to deal with governmental agencies? If so, will you need any extra forms required by those agencies.

e. Gifts.

> To the noble mind
> Rich gifts wax poor when givers prove unkind.
>
> --Shakespeare
> *Hamlet*, III, i, 100 (1600-1601)

Should the attorney-in-fact have the power to make gifts to the attorney-in-fact and people other than the attorney-in-fact? An outline of the Nebraska cases on these points is shown at the end of this seminar paper.

In addition to the Nebraska cases on gifting by an attorney-in-fact, you may have IRS problems as well. If gifts are made by an attorney-in-fact who has no power to make such gifts, at the principal's death the IRS includes the gifts in the taxable estate under IRC Sec. 2038, as a revocable transfer.[30] Therefore, the ability to make the gifts is obviously an important estate tax planning problem. The extent of the litigation cited in the footnote emphasizes the need to use the right language in your powers of attorney, when it comes to gifts. Be as specific as you can as to what gifts are permitted by the attorney-in-fact. Some examples:

1. Gifts equal to the annual exclusion ($11,000 per donee, per year);

2. Gifts to custodians and trustees;

3. Power to pay tuition and medical costs, in addition to other specific gifts;

4. Power to consent to the splitting of gifts with a competent spouse;

5. Power to make gifts to use up the principal's unified credit, during lifetime;

6. Power to establish or fund revocable or irrevocable inter vivos trusts;

7. Power to make gifts to charities or fulfill charitable pledges;

8. Power to make gifts to a competent spouse; and

9. Power to renounce inheritances, etc., thereby effectively making a tax-free gift.[31]

Keep in mind it may be argued by the IRS that an extensive power to make gifts gives the attorney-in-fact a general power of appointment under IRS Sec. 2041, thereby including the principal's assets in the attorney-in-fact's estate for estate tax purposes, if the attorney-in-fact died first. However, some commentators suggest there is no real threat on this point because Section 2041(b)(10(c)(i) excludes instruments that are exercisable "except in conjunction with the[ir] creator". Therefore, the argument goes, Section 2041 doesn't apply because agents under a power of attorney must always act "in conjunction" with the wishes of their principals, and are bound by their fiduciary duty to do so.[32]

Perhaps more importantly, with the federal estate tax not kicking in until the higher stratospheres ($1.5 million this year, etc.), the problem may not affect most estate plans you might be handling.

2. Limitations? Do you place limitations on the attorney-in-fact to try and keep him honest? For example, should there be accounting requirements to the principal, as well as others? Do you appoint two or more attorneys-in-fact, and make them agree to any actions taken? Do you require the attorney-in-
fact to notify outsiders once action is taken?

3. Durable v. Nondurable? Is the power of attorney Durable or Nondurable? If durable, is it effective now, or only upon "disability" (a "springing power of attorney")?

"The primary disadvantage

> of the use of the springing durable power is that because its operation is triggered by disability, that event may have to be conclusively established to a third person in order to induce such person to accept the authority of the agent. The instrument, therefore, should contain a clear definition of the term disability. Some procedure or mechanism for objectively certifying the onset of disability should be written into the terms of any springing durable power." Schlesinger & Scheiner, "Estate Planning Using Powers of Attorney", Trusts & Estates (July 1992, at page 41).

Who decides the "disability"--a doctor; some other third person; the attorney-in-fact; a court?

> "The easiest and most conclusive manner by which to establish the incompetency of the principal is by the written certification of one or more doctors who have examined the principal and certify that the principal can no longer handle his or her business and/or personal affairs. Care must be taken that if a specific doctor is named, alternates should be provided if the doctor subsequently dies or becomes disabled." Schlesinger & Scheiner, "Estate Planning Using Powers of Attorney", Trusts & Estates (July 1992, at page 41).

The New Jersey springing power of attorney statute sets out a definition of disability:

> "A principal shall be under a disability if he is unable to manage his

> property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance."[33]

4. Revocable? Is the power of attorney revocable or irrevocable? If revocable, how do you revoke it?

> "Some suggestions for revocation of a power of attorney include (a) sending a certified letter to the agent with copies to third parties; (b) providing language in the power of attorney that notice of revocation will only be accepted if the notice is filed at a central location, e.g., registrar of deeds; or (c) using language similar to 'I hereby revoke all other powers of attorney previously made by me.'" Schlesinger & Scheiner, "Estate Planning Using Powers of Attorney", Trusts & Estates page 39 (July 1992).

The problem of whether the power of attorney has been revoked makes some banks and other institutions unwilling to recognize them, or require additional documentation and problems for the lawyer. Some states have passed laws requiring the banks to accept the powers, but providing protection for the banks relying on the particular power of attorney.[34]

Should the attorney-in-fact sign the document? Not required by the statutes, but would show the attorney-in-fact's on board. Also time-consuming, and some clients may not want the kid to know he has the right to write checks on their checking account.

C. Some Other Problems (or at least questions)

1. Medicaid. Related to the power

to make gifts, you may also want the power of attorney to help qualify the principal for Medicaid payments, including the following powers:

i. Power to get rid of enough assets to qualify for medical or other assistance;

ii. Power to convert the principal's assets into assets that are exempt under Medicaid rules and regulations (funeral trust, etc.);

iii. Power to renounce an inheritance;

iv. Power to create a trust that qualifies for Medicaid, either to exempt the assets or create a "self-needs" trust; and

v. Power to change the principal's domicile to another state, where Medicaid eligibility rules may be more favorable.

2. Real Estate. Should you index the power of attorney against any real estate? If so, you're going to need something that references the legal descriptions either in the power or in a separate affidavit, etc.

IX. Conclusion

With almost every estate planning tool, there are assets and liabilities with a power of attorney:

Advantages:

A. Cheap to create;

B. Cheap to run;

C. Cheap alternative to a conservatorship or guardianship;

D. Effective (banks accept them; everybody thinks they know what they are);

E. Especially important in light of longer living. On this point, watch the need to supervise the principal's choice of residence, etc. Should you include more detail in the form about nursing homes and otherwise

choosing the principal's residence?

Disadvantages:

A. Normally gives great deal of power to the attorney-in-fact;

B. May be misused;

C. If the attorney-in-fact is greedy, or otherwise not suitable, it puts a gun in the hand of a crook.

Power may justly be compared to a great River, while kept within it's due Bounds, is both Beautiful and Useful; but when it overflows, it's Banks, it is then too impetuous to be stemmed, it bears down all before it, and brings Destruction and Demolition wherever it comes.

--Andrew Hamilton, Argument in Zenger Trial, 1735, quoted in Livingston Rutherfurd, *John Peter Zenger: His Press, His Trial* 238 (1904)

A Short History of Nebraska P.O.A. Cases

I. Cases Showing "Theory" of a Power of Attorney:

1. Watkins v. Hagerty, 104 Neb. 414, 177 N.W. 654 (1920). Pre-durable power of attorney case. Two principals give power of attorney to their son, and one dies. Court holds the power is still valid as to the other principal. In addition, whether the surviving principal was later goofy doesn't matter, since the persons receiving the power didn't know of his goofiness. Court approaches the problem using *contract and agency principles*.

2. Graham Ice Cream Co. v. Petros, 127 Neb.

172, 254 N.W. 869 (1934). "Power of Attorney Saves the Day!" Plaintiff claims the defendant was the true owner of some assets to be used to satisfy plaintiff's judgment. Power of attorney given to the defendant helps prove he isn't the owner of the assets in question. Court generally applies *contract law* to decide the problem.

3. Burns v. Commonwealth Trailer Sales, 163 Neb. 308, 79 N.W.2d 563 (1956). Supreme Court strictly construes the language in a power of attorney, implying that if you want to give the attorney-in-fact a power, you better specifically say it. Court applies *contract law*, as well as *agency* theories.

4. Plummer v. National Leasing Corp., 173 Neb. 557, 114 N.W.2d 25 (1962). Man giving "blank" power of attorney to another can't complain what the other did with it. Again applying *agency law* and estoppel, Supreme Court says, "[W]e must apply the rule that where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the act should bear the loss."

5. In re Estate of Lienemann, 222 Neb. 169, 382 N.W.2d 595 (1986). Supreme Court says a power of attorney creates an *agency relationship*, but also discusses *constructive trusts*.

6. Zybach v. Dept. of Social Services, 226 Neb. 370, 411 N.W.2d 627 (1987). Incompetent principal qualifies for Medicaid, even though her attorney-in-fact transferred all of her assets to himself, in violation of Medicaid rules and Nebraska law. In other words, you can't use a power of attorney to accomplish an illegal act--depriving oneself of resources "for the purpose of qualifying for assistance". Applying *agency theories*, the Supreme Court said "[A]ny attorney in fact or agent has no implied or apparent authority to do that which the principal himself would not be authorized to do."

7. Fletcher v. Mathew, 233 Neb. 853, 448 N.W.2d 576 (1989). Relying on the grounds of fraud, rather than undue influence, Supreme Court held against the attorney-in-fact. "'Because the power of attorney creates an *agency* relationship, the authority and duties of an attorney in fact are governed by the principles of *the law of agency*.' . . . An agency is a *fiduciary relationship*." "Powers

of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted." (Emphasis added).

In addition, the Supreme Court said it probably is a "confidential relationship." Compare North Bend Senior Citizens Home, Inc. v. Cook, 261 Neb. 500, 623 N.W.2d 681 (2001), where the Court downplayed any "confidential" relationship created by the power of attorney:

> "Cook is simply Duda's grandniece, whom Duda appointed as her power of attorney. Cook was not rendering any professional services to Duda due to her position as Duda's attorney in fact." 261 Neb. at 509-10.

Note this "confidential relationship" question may be important if the attorney-in-fact inherits under the principal's will. Prior to Nebraska's Uniform Probate Code, a "confidential adviser" who received benefits under the will of an aged and sick person was presumed to have exercised undue influence on the deceased, and, once this is shown, the burden of going forward with the evidence shifts to that person. See, e.g., In re Garfield's Estate, 192 Neb. 461, 222 N.W.2d 369 (1974). But, cf. Section 30-2431 of the Nebraska Probate Code:

> "Contestants of a will have the burden of establishing undue influence . . . . Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof."

8. Vejraska v. Pumphrey, 241 Neb. 321, 488 N.W.2d 514 (1992). Supreme Court uses *constructive trust theory* to set aside joint tenancy C.D. between principal and attorney-in-fact.

9. Crosby v. Luehrs, 266 Neb. 827, 669 N.W.2d 635 (2003). Case goes into some detail on the *fiduciary duty* of an attorney in fact.

9. First Colony Life Ins. Co. v. Gerdes, 267 Neb. 632, 676 N.W.2d 58 (2004). Supreme Court applies *agency and fiduciary theories* to hold that attorney-in-fact's change of beneficiary

in the principal's life insurance was not a gift, where the attorney-in-fact didn't benefit from the change.

II. <u>Cases Involving "Gifts" To The Attorney-in-Fact</u>:

1. <u>In re Estate of Lienemann</u>, 222 Neb. 169, 382 N.W.2d 595 (1986). Conservator of principal (one son) brought suit to set aside three joint C.D.'s created by an attorney-in-fact (another son). Applying theories of *agency*, Supreme Court finds two of the C.D.'s were created by the principal--not the attorney-in-fact, and were therefore valid. Third was created by the attorney-in-fact, without instruction or direction from the principal, and was therefore invalid.

2. <u>Peterson v. Peterson</u>, 230 Neb. 479, 432 N.W.2d 231 (1988). Suit to set aside transfers by attorney-in-fact, on the grounds the P.O.A. was obtained by undue influence. Court rules for attorney-in-fact, finding for the first time that in such a suit the undue influence must be proved by "clear and convincing evidence" (equity), as opposed to a "preponderance of the evidence" required in a will contest (law).

3. <u>Fletcher v. Mathew</u>, 233 Neb. 853, 448 N.W.2d 576 (1989). Personal representative of principal's estate sues attorney-in-fact to recover assets, alleging fraud and undue influence. Attorney-at-law was given a power of attorney by a 92 year old client. Using that power, he transferred close to $600,000 into assets owned jointly between himself and the client. Court adopts South Carolina rule that a gift by an attorney in fact to himself or a third party is "barred", "absent clear intent to the contrary". Judgment for fraud against attorney-in-fact for $592,690.62.

4. <u>Vejraska v. Pumphrey</u>, 241 Neb. 321, 488 N.W.2d 514 (1992). Suit by P.R. against attorney-in-fact to recover joint tenancy C.D. Power of attorney had no gifting power. Court applies <u>Fletcher</u> case to impose a constructive trust on the joint tenancy C.D. The attorney-in-fact had to show (1) there was a power to gift in the power of attorney <u>and</u> (2) the principal "had the clear intent to make a gift" to the attorney-in-fact.

5. <u>Townsend v. U.S.</u>, 889 F. Supp. 369 (D. Neb.

1995). Applying Nebraska law, federal district court ruled that checks written on the principal's account by the attorney-in-fact, to the attorney-
in-fact and other family members, were revocable transfers for purposes of the federal estate tax, since the power of attorney didn't expressly permit the making of gifts.

6. Mischke v. Mischke, 247 Neb. 752, 530 N.W.2d 235 (1995). Attorney-in-fact transferred principal's real estate to the attorney-in-fact and his brothers, even though power of attorney had no power to make gifts. Principal died, and P.R. of his estate sued the brothers to recover the assets. District court imposed a constructive trust on the real estate. Supreme Court held the gifts were invalid. "No gift may be made by an attorney in fact to himself or her self unless the power to make such a gift is expressly granted in the instrument itself and there is shown a clear intent on the part of the principal to make such a gift." 530 N.W.2d at 241 (Emphasis added).

A subsequent appeal, Mischke v. Mischke, 253 Neb. 439, 571 N.W.2d 248 (1997), discusses what damages the attorney-in-fact owed for his actions. The case is excellent to show the difficulties in making the attorney-in-fact "account in equity as trustee for all profits and advantages acquired by him in such dealings." 571 N.W.2d at 255-56.

7. Cheloha v. Cheloha, 255 Neb. 32, 582 N.W.2d 291 (1998). Another suit by the p.r. of a principal's estate against the attorney-in-fact for transfers made during principal's lifetime, alleged to be gifts and *compensation*. There were no paragraphs in the power of attorney authorizing gifts or payments of compensation. The P.R. wins again, but is significant because of the compensation claim, plus *the P.R. got pre-judgment interest*.

8. In re Conservatorship of Anderson, 262 Neb. 51, 628 N.W.2d 233 (2001). Attorneys-in-fact named in principal's P.O.A. were not entitled to appointment as conservators where they had made gifts to themselves not permitted by the P.O.A., and they owed the money back to the conservatorship.

9. Crosby v. Luehrs, 266 Neb. 827, 669 N.W.2d 635 (2003). Nephew having durable power of attorney changed ownership of principal's P.O.D. accounts, so they passed into

principal's estate, rather than to designated beneficiaries. P.O.A. gave nephew the power to "deposit moneys, withdraw, invest, and otherwise deal with tangible property". Apparently there was no gift power. Supreme Court held the transfers were a violation of the attorney-in-fact's fiduciary duty to the principal, and gave a new wrinkle to the ever-changing puzzle:

> "If an agent has reason to know the will of the principal, the agent's duty is not to act contrary to it. . . . Stated more specifically, if an agent knows that the principal has made a will or otherwise provided for the distribution of assets after the principal's death, the agent should avoid, where possible, taking action that will defeat the principal's estate plan." 669 N.W.2d at 647.

Cf. Ruppert v. Breault, 222 Neb. 432, 384 N.W.2d 284 (1986) (Attorney-in-fact removes joint names from principal's CD's, and Supreme Court says that's okay. No constructive trust.)

6. First Colony Life Ins. Co. v. Gerdes, 267 Neb. 632, 676 N.W.2d 58 (2004). Pursuant to oral instructions from the principal, attorney-in-fact changed the beneficiaries on the principal's life insurance policy roughly 8 days before principal died. Power of attorney was durable, but contained no power to make gifts. Attorney-in-fact did not benefit from the transfer. No fraud was alleged. Supreme Court held the change in beneficiary by the attorney-in-fact was proper, and was not a "gratuitous transfer".

Another Piece of Paper–

I found out in sixth grade. I was supposed to go to a friend's house after school, but during lunch period, she remembered it was her parents' wedding anniversary. It got me thinking: why was it that I never made my parents an anniversary card?

My family was close. Most days, we ate dinner together at 4:30 in the afternoon because my dad's shift ended at 4. On

weekends, the four of us--my parents, my younger brother and I--
would ride our bikes through our neighborhood like some street gang pedaling in unison to jam sessions in Washington Square Park. But we never celebrated my parents' anniversary. After school, I asked my mom why. A little pink in the cheeks, she shot back that they had never been married. . . .

They did not marry because *she* didn't want to. It was completely unnecessary and too conventional. If you loved someone as deeply as she loved my father, there was no reason to limit that love with legal binds. . . . Without the piece of paper, she felt, their connection was pure, limitless and unscripted. . . .

In the end, it took death to part my parents. When my dad went suddenly three years ago, they had been together 30 years. It was a lifetime more than many of us get with people we vow to love forever. Without a marriage certificate though, my mother wasn't my father's next of kin under the law. As my father's oldest child, it was *my* say that counted. Every time I signed another document, it felt as if I were further erasing my mom's role in my dad's life. Or at least helping society to.

My dad, an Army vet, had a formal military burial. After taps was played, soldiers folded the flag draped on my father's coffin and presented it to the family. Actually, they handed the flag to me. I didn't want to take it. It should have been presented to my mother, whose lap was empty. But she was not his wife, so the military refused. The idealistic bubble my mom had created for their love collapsed when it rubbed against the real world. No one cared about our weekend bike rides. . . .

--Cora Daniels, "Not the Marrying Kind", The New York Times Magazine at 82 (April 4, 2004)

[1]In re Estate of Lienemann, 222 Neb. 169, 382 N.W.2d 595, 602 (1986).

[2]William J. Wood, "Advance Directives: Religious, Moral, and Theological Aspects", 7 The Elder Law Journal 457, 458 (quoting 1 Corinthians 15:55 and General Assembly of the Christian Church (1977).

[3]Hans A. Lapping, "License to Steal: Implied Gift Giving Authority and Powers of Attorney", 4 Elder L.J. 143, 167 (1996) (footnotes omitted).

[4]See, e.g., Restatement (Second) of Agency Section 118 (1958); Davis v. Lane, 10 N.H. 156, 158-59 (1839) (holding the insanity or incapacity of the principal serves as revocation of the authority of the agent); and Watkins v. Hagerty, 104 Neb. 414, 177 N.W. 654 (1920), where a pre-durable power of attorney was given by two principals to their son, and one of the principals died. In spite of this, the Nebraska Supreme Court held the power is still valid as to the other principal. The later possible insanity of the surviving principal also didn't matter since the persons relying on the power didn't know of the possible insanity.

[5]Va. Code Ann. Section 11-9-2 (Michie 2001).

[6]Unif. Probate Code Sections 5-501 to 5-505 & prefatory note.

[7]Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795, 795 (1983) (citations omitted). Professor Frankel points out bailments go back as far as 13th-century French and German law, while the Statute of Uses was enacted in 1536.

[8]Allen, *Agent and Servant Essentially Identical*, 28 Am. L. Rev. 9, 17-19 (1894) (Emphasis added).

[9]Watkins v. Hagerty, 104 Neb. 414, 177 N.W. 654 (1920).

[10]Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Georgia L. Rev. 1, 12 (2001).

[11]Much of the following discussion is plagiarized from the article by Professor Karen E. Boxx, called *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Georgia L. Rev. 1, 12 (2001). This is an excellent general discussion of the role of an attorney-in-fact as a fiduciary.

[12]1 Mechem, *A Treatise on the Law of Agency*, Section 1244, at 911.

[13]Reuschlein & Gregory, The Law of Agency and Partnership, Section 16, at 44 (2d ed. 1990).

[14]Restatement (Second) of Trusts, Section 144 (1958).

[15]Boxx, *supra*, note 11, at 37.

[16]A really excellent seminar paper on the "Short Form" Act was presented by Bill Day at the 1988 UNL Law School Seminar, "Estate and Business Planning Fundamentals".

[17]For discussions of the competence of the principal when signing or revoking the power of attorney, see Lombard, *Asset Management Under a Durable Power of Attorney--The Ideal Solution to Guardianships or Conservatorships*, 9 Prob. Notes 189, 190 (1983); Paul L. Sturgul, *Financial Durable Powers of Attorney*, 41 No. 5 Prac. Law. 21, 28 (July 1995) (suggesting the practice of having the principal's physician execute an affidavit, telling of the principal's competency on the date of the execution of the power); Moses & Pope, *Estate Planning, Disability, and the Durable Power of Attorney*, 30 S.C.L. Rev. 511, 523 (1979); Schmitt & Hatfield, *The Durable Power of Attorney: Applications and Limitations*, 132 Mil. L. Rev. 203, 207 (1991); and Uniform Probate Code Section 5-501 comment (provisions governing durable power of attorney assume competence of principal at execution) (Not in Nebraska's general power of attorney statute--the Uniform Durable Power of Attorney Act, Sections 30-2664, et seq.)

[18]Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574, 581, fn.32 (1996).

[19] For example, in the Missouri case of Risbeck v. Bond, 885 S.W.2d 749 (Mo. Ct. App. 1994), an Alzheimer's patient sought to void a power of attorney because he signed it under undue influence.

[20]808 S.W.2d 936 (Mo. Ct. App. 1991).

[21]Mead, "Durable Powers of Attorney for Healthcare", 39 The Practical Lawyer 39, 40 (July, 1993). With this "simplicity" in mind, you may want to include the health care p.o.a. in a regular power of attorney--a procedure permitted by the statute, Section 30-3408(2).

[22]Mead, supra at 40.

[23]For a general discussion of the Act, and how it applies to lawyers, see Stein, "What Litigators Need to Know About HIPAA", 36 Journal of Health Law 433 (Summer 2003).

[24]See Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574, 586 fn. 59 (1996), for a discussion of several cases ruling on this question.

[25]Fletcher v. Mathew, 233 Neb. 853, 448 N.W.2d 576, 582 (1989).

[26]Sturgul, "Financial Durable Powers of

Attorney (with Form)", 41 The Practical Lawyer 21, 29 (July 1995).

[27]Sturgul, supra at 30.

[28]See, e.g., IRS Letter Ruling 9015017, in which the IRS recognized disclaimers by attorneys-in-fact for a Delaware incompetent, thereby qualifying under IRC Sec. 2518.

[29]This summary paraphrases powers outlined in the article, Schlesinger & Scheiner, "Estate Planning Using Powers of Attorney", Trusts & Estates (July 1992, at page 40).

[30]See, e.g., IRS Letter Ruling 8635007 (Gifts under a Michigan power of attorney included in deceased's estate); IRS Letter Ruling 8623004 (Gifts included in deceased's estate, even though the principal didn't have sufficient mental capacity to revoke the gifts hereself. It is the *potential*, rather than the actuality of revoking the gift that gives rise to the includability of the transferred property); and Estate of Casey, 948 F.2d 895 (Ct. App. 4th Cir. 1991) (Gifts under a Virginia power of attorney included in deceased's estate).

Compare Estate of Yetta Bronston, 7327-87 T.C. Memo. 1988-
510 (1988) (New Jersey power of attorney language, "to grant, bargain, sell, convey, or lease or contract for the sale, conveyance, or lease of any property", plus the circumstances, all construed to permit gifts); Estate of Gagliardi, 89 T.C. 1207 (1987) (Even though the Pennsylvania power of attorney had no reference to making gifts, Tax Court held that in light of decedent's past history of making gifts, the power of attorney was sufficiently broad to authorize the making gifts on behalf of the decedent); Moglia v. Moglia, 144 A.D.2d 347, 533 N.Y.S.2d 959 (2d Dept. 1988) (General New York statutory short form durable power of attorney does not authorize gifts); and LeCraw v. LeCraw, 401 S.E.2d 697 (Ga. Sup. Ct. 1991) (Gifts under a Georgia power of attorney upheld, even though the power didn't specifically authorize gifts of the principal's property).

[31]See IRS Letter Ruling 9015017 (Attorney-in-fact was permitted to disclaim property, even where state law was silent as to whether this was permissible.)

[32]Sturgul, "Financial Durable Powers of Attorney (with Form)", 41 The Practical Lawyer 21, 33 (July 1995).

[33]N.J. Stat. Ann. Sec. 46:2(b)8(a).

[34]New York, Minnesota and New Jersey, for example, have statutes dealing with this

problem. See N.Y.G..L. Sec. 5-15-4; Minn. Stat. Sec. 523.20; N.J. Stat. Ann. 46:2B-8 et seq. (1991).