

Power of Attorney (VA)

by M.R. Litman, Virginia Estate & Trust Law, PLC, with Practical Law Trusts & Estates

Status: Law stated as of 20 Nov 2020 | Jurisdiction: Virginia

This document is published by Practical Law and can be found at: us.practicallaw.tr.com/w-028-1828

Request a free trial and demonstration at: us.practicallaw.tr.com/about/freetrial

A power of attorney used by an individual residing in Virginia to authorize a third party to manage the individual's property and financial matters. This Standard Document has integrated notes and drafting tips.

Estate planning, estate and trust administration, and estate and trust taxation filing deadlines may be impacted by emergency measures enacted in response to the 2019 novel coronavirus disease (COVID-19). For current updates on certain state and local laws and procedures impacted by COVID-19, including electronic signature, notarization, and witnessing laws and emergency orders, court closures, deadline extensions, and updated procedures, tax extensions, and general emergency estate planning guidance, see [Private Client Global Coronavirus Toolkit](#).

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

In Virginia, an individual uses a power of attorney to authorize a third party to manage the individual's property and financial matters (Va. Code Ann. §§ 64.2-1600 to 64.2-1642).

This Standard Document refers to the person:

- Who executes a power of attorney as the principal.
- Appointed by the principal to make financial and property decisions as the agent. The agent is also commonly referred to as the attorney-in-fact.

This Standard Document is based on the Virginia Uniform Power of Attorney Act (the Act) and creates a durable power of attorney (Va. Code Ann. §§ 64.2-1600 to 64.2-1642). For more information on durability, see Drafting Note, Durability. The Act applies to a Virginia power of attorney no matter when created (Va. Code Ann. § 64.2-1642). The principals of law and equity supplement the statutory rules that govern the relationship between the principal and the agent (Va. Code Ann. § 64.2-1619).

This Standard Document does not give the agent authority to make health care decisions on the principal's behalf. These types of powers are handled in a separate advance directive (Va. Code Ann. §§ 54.1-2981 to 54.1-2993.1).

The meaning and effect of the power of attorney is determined by either:

- The law of the jurisdiction indicated in the power of attorney.
- In the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

(Va. Code Ann. § 64.2-1605.) This Standard Document does not explicitly indicate Virginia as the applicable jurisdiction. However, the execution of this power of attorney in Virginia makes it a Virginia power of attorney.



Authority Regarding Principal's Property

Unless otherwise provided in the power of attorney, authority granted in a Virginia power of attorney is exercisable regarding all property that the principal has when the power of attorney is executed or acquires later regardless of whether:

- The property is located in Virginia.
- The authority is exercised in Virginia.
- The power of attorney is executed in Virginia.

(Va. Code Ann. § 64.2-1622(F).)

Other Forms of Powers of Attorney

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

- Statutory form powers of attorney for other states.
- Non-durable powers of attorney. These are not typically used for general estate planning purposes. For more information on durability, see Drafting Note, Durability.
- Internal powers of attorney for financial institutions.
- Military powers of attorney.
- Separate powers of attorney for tax purposes (such as Internal Revenue Service [Form 2848](#)).
- Designations of health care agents, known as advance medical directives (or powers of attorney for health care) in Virginia (Va. Code Ann. §§ 54.1-2981 to 54.1-2993.1).
- Powers of attorney to delegate parental or legal custodial powers (Va. Code Ann. §§ 20-166 to 20-167).

- Powers of attorney that become effective in the future, often on the principal's incapacity. These are called springing powers of attorney.
- Limited powers of attorney. If the principal does not want to grant an agent broad fiduciary powers and instead wants to limit an agent's authority to one particular transaction or set of actions, the drafting attorney should consider preparing a separate special or limited power of attorney for that purpose.

Powers Not Assignable by a Power of Attorney

When preparing a power of attorney, counsel should consider that an agent may only be granted certain powers under Virginia law. There are other powers a principal cannot delegate and an agent cannot exercise, including:

- Registering to vote or voting for the principal (Va. Code Ann. § 24.2-123).
- Executing or amending a will for the principal (Va. Code Ann. §§ 64.2-401 and 64.2-403).

Provisions attempting to grant an agent authority to do any act that cannot be delegated to an agent under Virginia law should not be included in the power of attorney document.

Bracketed Language

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

[PRINCIPAL NAME]

DURABLE POWER OF ATTORNEY

[I, [PRINCIPAL NAME], of the [CITY/COUNTY] of [JURISDICTION], Virginia, appoint my [RELATIONSHIP], [AGENT NAME], as my true and lawful Agent, and revoke all previous powers of attorney given by me, except any advance medical directive or medical or health care power of attorney currently in force. All references to "my Agent" shall include the initial agent and any successor agent or agents appointed under this instrument.

OR

I, [PRINCIPAL NAME], of the [CITY/COUNTY] of [JURISDICTION], Virginia, appoint my [RELATIONSHIP], [AGENT NAME], and my [RELATIONSHIP], [AGENT NAME], [either/all] of whom may act alone and independently or [both/all] of whom may act [jointly/together], as my true and lawful Agents, and revoke all previous powers of attorney given by me, except any advance medical directive or medical or health care power of attorney currently in force. All references to “my Agent” shall include the initial agents and any successor agent or agents appointed under this instrument.

OR

I, [PRINCIPAL NAME], of the [CITY/COUNTY] of [JURISDICTION], Virginia, appoint my [RELATIONSHIP], [AGENT NAME], and my [RELATIONSHIP], [AGENT NAME], [both/all] of whom must act together, or the survivor of whom may act alone, as my true and lawful Agents, and revoke all previous powers of attorney given by me, except any advance medical directive or medical or health care power of attorney currently in force. All references to “my Agent” shall include the initial agents and any successor agent or agents appointed under this instrument.]

DRAFTING NOTE: APPOINTING AGENTS

In this introduction section, the drafting attorney should identify:

- The principal and the principal’s city or county of residence.
- The agent acting under the power of attorney, including the agent’s relationship to the principal.
- If there are two or more agents, whether the agents may act independently or must act together.

Single or Multiple Agents

The principal may designate one agent or multiple agents to serve at a time. Under Virginia law, unless the power of attorney explicitly provides otherwise, each co-agent may exercise its authority independently (Va. Code Ann. § 64.2-1609(A)). However, the drafting attorney should identify whether the agents may act independently or must act together to avoid any confusion when the power of attorney is in place.

Counsel should select:

- The first bracketed option if the principal wants to designate one agent.
- The second bracketed option if the principal wants to designate multiple agents who each can act independently.
- The third bracketed option if the principal wants to designate multiple agents who must act jointly. This option provides that if one agent ceases to act, the other may act alone.

For information regarding selecting successor agents, see Drafting Note, Successor Agents.

Effective Date

A Virginia power of attorney is effective when executed unless the power of attorney expressly provides otherwise (Va. Code Ann. § 64.2-1607). This power of attorney is effective when executed by the principal. This power of attorney does not make the effective date dependent on the principal becoming incapacitated or some other occurrence (unlike many springing powers of attorney). For more information on execution of the power of attorney, see Drafting Note, Execution of Power of Attorney.

Act by Agent Binds Principal and Successors in Interest

An act performed by an agent under a power of attorney has the same effect as if the principal performed the act and inures to the benefit of and binds the principal as well as the principal’s successors in interest (Va. Code Ann. § 64.2-1622(G)).

Revocation of Previous Powers of Attorney

This section revokes the principal’s previous powers of attorney except for any advance medical directive or health care power of attorney in force. If the principal has any other powers of attorney the principal wants

to maintain, counsel should specifically identify them by name and date to exclude their revocation.

Under Virginia law, the execution of a new power of attorney does not automatically revoke a previous power of attorney executed by the same principal unless the new power of attorney provides that

the previous power of attorney is revoked or that all other powers of attorney are revoked (Va. Code Ann. § 64.2-1608(F)).

For more information on revocation of a power of attorney, see Drafting Note, Revocation.

Article I

Authority

1. General Grant of Authority. I hereby grant to my Agent the general authority to do all acts that I could do, including, without limitation, the authority to act in my name and transact business as I may do in my own name, personally, with respect to the following:

- (a) Real Property. My Agent shall have the powers set forth in Virginia Code § 64.21625, including but not limited to the power to buy, sell, insure, develop, encumber, exchange, and lease any part or all of my real property and execute and record any transfer on death deed or any instrument effectively revoking a previously recorded transfer on death deed;
- (b) Tangible Personal Property. My Agent shall have the powers set forth in Virginia Code § 64.21626, including but not limited to the power to buy, receive, sell, lease, exchange, convey, encumber, manage, conserve, insure, move, and store my tangible personal property;
- (c) Stock, Bonds, Commodities and Options. My Agent shall have the powers set forth in Virginia Code §§ 64.21627 and 64.21628, including but not limited to the power to buy, sell, or exchange stocks, bonds, or other investments on my behalf; establish, continue, modify, or terminate accounts with brokers of securities; pledge stocks or bonds as security to borrow, pay, renew, or extend the time of payment of a debt; and to authorize or terminate agency accounts with third parties;
- (d) Banks and Other Financial Institutions. My Agent shall have the powers set forth in Virginia Code § 64.21629, including but not limited to the power to establish, add, or deposit to, withdraw by check or electronic funds, or transfer from or terminate any of my accounts or deposits in banks or other financial institutions; borrow money or execute notes on such terms as my Agent may deem appropriate; and enter any safe deposit box that I may be the lessee of and remove or add to its contents;
- (e) Operation of Entity or Business. My Agent shall have the powers set forth in Virginia Code § 64.21630, including but not limited to the power to form, operate, buy, sell, or liquidate all or any part of any entity or business; buy, sell, enlarge, reduce, or terminate an ownership interest in any entity or business; exercise all rights I may have as an owner in person or by proxy; and change the form of organization or name of any entity or business;
- (f) Insurance and Annuities. My Agent shall have the powers set forth in Virginia Code § 64.21631, including but not limited to the power to pay the premium on, make a contribution to, modify, exchange, rescind, release, terminate, sell, or pledge any interest in an insurance or annuity contract procured by me or on my behalf, including contracts for life, casualty, disability, health and long term care insurance; and borrow against or obtain the cash surrender value of any life insurance or annuity contract;
- (g) Estates, Trusts and Other Beneficial Interests. My Agent shall have the powers set forth in Virginia Code § 64.21632, including but not limited to the power to accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from any estate, trust, or other beneficial interest; transfer and convey any of my property to the trustee(s) serving under any revocable trust created by me (alone or with any other person), including any transfer-on-death, pay-on-death or beneficiary designation; exercise for my benefit any presently exercisable general power of appointment; initiate and participate in any settlement or compromise with respect to litigation or other dispute

Power of Attorney (VA)

concerning any interest in an estate or trust; and renounce, reject, disclaim, release, or consent to the reduction in or modification of a share in or payment from an estate, trust, or other beneficial interest;

(h) Claims and Litigation. My Agent shall have the powers set forth in Virginia Code § 64.21633, including but not limited to the power to assert and maintain before a court or administrative agency any claim, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover anything of value or damages sustained by me; make or accept a tender, offer of judgment, or admission of facts; bind me in litigation or settlement; waive the issuance and service of process; appear on my behalf; pay a judgment, award, or other order against me; and receive payments in settlement of or as proceeds of a claim or litigation;

(i) Personal and Family Maintenance. My Agent shall have the powers set forth in Virginia Code § 64.21634, including but not limited to the power to perform the acts necessary to maintain my customary standard of living and that of my spouse, the individuals legally entitled to my support, and the individuals whom I have customarily supported or indicated the intent to support; and act as my personal representative pursuant to the Health Insurance Portability and Accountability Act and any similar state statute for the sole purpose of making payments for any health care authorized by my health care agent or me;

(j) Benefits from Governmental Programs or Civil or Military Service. My Agent shall have the powers set forth in Virginia Code § 64.21635, including but not limited to the power to enroll in, apply for, select, reject, change, amend, or discontinue any benefit or program, including but not limited to Social Security, Medicare, Medicaid and the Department of Veterans Affairs; prepare, file, or maintain a claim for any benefit or assistance, financial or otherwise, to which I may be entitled; and receive the proceeds of any such claim;

(k) Retirement Plans. My Agent shall have the powers set forth in Virginia Code § 64.21636, including but not limited to the power to select the form and timing of payments, make a rollover, establish a Plan in my name, make a contribution or withdrawal, exercise investment powers and borrow from or sell assets to a Plan; amend or terminate individual retirement accounts or other retirement or deferred income arrangements; change custodians of any Plan; and make selections of optional benefits offered by my employer and exercise continuation rights as to any benefits;

(l) Taxes. My Agent shall have the powers set forth in Virginia Code § 64.21637, including but not limited to the power to prepare, sign or file federal, state, local, or foreign income (including U.S. Form 1040 and Virginia Form 760), gift (including U.S. Form 709), payroll, property or other tax returns, claims for refunds, requests for extension of time or any other tax-related documents (including U.S. Form 2848); pay taxes due; collect refunds; receive confidential information; contest deficiencies; exercise any election available to me; and act for me in all tax matters for all periods from 1985 to 2095 before the IRS or other taxing authority; and

(m) Advisors and Other Professionals. My Agent shall have the power to employ or terminate accountants, brokers, custodians, health care providers and managers, investment advisors, insurance professionals, attorneys, and other advisors or agents as my Agent deems advisable, including my Agent or any firm with which my Agent or my Agent's spouse is associated or related; rely upon such advice and services furnished by such advisors or agents; and pay them reasonable compensation.

DRAFTING NOTE: GENERAL GRANT OF AUTHORITY

Article I of this Standard Document includes the general and specific powers the principal may give to the agent. These powers are broad, covering the most common types of financial and property transactions. The language is intended to allow the agent to perform all acts under Virginia law that the principal may perform, including the authority to act in the

principal's name and transact business on behalf of the principal.

When preparing the power of attorney, the drafting attorney may choose to include some of or all the included language and should consider all text and modify it as needed. If the client has concerns about

specific assets or circumstances, the drafting attorney may modify the power of attorney accordingly. However, the drafting attorney should consider that a power of attorney that is too specific may not cover an unanticipated situation.

Subject to certain exceptions that require an express grant of authority, if a power of attorney grants an agent the authority to do all acts that a principal could do, the agent has the general authority outlined in Va. Code Ann. §§ 64.2-124 and 64.2-1625 to 64.2-1637 (Va. Code Ann. § 64.2-1622). This general authority includes the power to make gifts in certain limited circumstances (see Drafting Note, Authority to Make Gifts).

Powers of attorney in Virginia typically include this language but also include express language stating the most common powers for clarity when dealing with third parties.

The powers outlined in Paragraphs 1(a) to (m) of Article I of this Standard Document reference specific powers outlined in the Virginia Uniform Power of Attorney Act regarding:

- **Real property.** Powers related to real property, which generally include the power to buy, sell, exchange, lease, mortgage, assign, manage, insure, and develop (Va. Code Ann. § 64.2-1625).
- **Personal property.** Powers related to tangible personal property, which generally include the power to buy, sell, manage, insure, possess, move, store, and perform other actions needed to manage or secure the personal property (Va. Code Ann. § 64.2-1626).
- **Stocks, bonds, commodities, and options.** Powers related to stocks, bonds, commodities, and options, which generally include the power to buy, sell, pledge, open and close accounts, and exercise voting rights regarding stock and bonds and to buy and sell commodities and options (Va. Code Ann. §§ 64.2-1627 and 64.2-1628).
- **Banks and financial institutions.** Powers related to banks and other financial institutions, which generally include the power to continue, terminate, or modify an existing account, create a new account, make withdrawals from an account, receive statements for an account, borrow money, and pledge an account (Va. Code Ann. § 64.2-1629).
- **Operation of business.** Powers for operation of a business, which generally include operating, buying, selling, voting stock, and performing other acts necessary during the business (Va. Code Ann. § 64.2-1630).
- **Insurance and annuities.** Powers for insurance and annuities, which generally include the power to continue to pay the premiums, exchange, modify, terminate, secure new or additional contracts of insurance or annuities, obtain a loan against the contract of insurance or annuity, exercise investment options, and determine how and when the contract of insurance or annuity will be paid out (Va. Code Ann. § 64.2-1631). However, these powers do not include the power to change a beneficiary, which the principal must expressly grant in the power of attorney if desired (see Drafting Note, Express Grant of Authority).
- **Estates, trusts, and other beneficial interests.** Powers over estates, trusts, and other beneficial interests, which generally include the ability to accept an interest for the principal, to make demands for payment, to participate in alternative dispute resolution, and take other actions necessary to protect the principal's interest in the trust or estate (Va. Code Ann. § 64.2-1632). However, these powers do not include the power to amend, revoke, or create a revocable trust for the principal (or a will, which is not permitted in any case). The principal must expressly grant that power in the power of attorney if desired (see Drafting Note, Express Grant of Authority).
- **Claims and litigation.** Powers over claims and litigation, which generally authorize the agent to start litigation and to participate in ongoing litigation on behalf of the principal, including making or accepting settlement offers, paying judgments, settlement amounts, or other awards, and receiving money or other valuables in settlement or because of a judgment or other award (Va. Code Ann. § 64.2-1633).
- **Personal and family maintenance.** Powers over personal and family maintenance, which generally include maintaining the current standard of living of the principal and those that the principal supported or who were legally entitled to support by the principal, paying child support of the principal, providing proper living quarters for the principal and those entitled to the support of the principal, cooperating with an agent named in the principal's health care power of attorney regarding health care

payments, paying expenses related to the health care and custodial care of the principal and those entitled to the support of the principal, making payments for transportation, maintaining credit or debit cards, and making payments for religious or social purposes (Va. Code Ann. § 64.2-1634). Personal and family maintenance powers include HIPAA powers (see Drafting Note, Compliance with HIPAA).

- **Government benefits and civil or military benefits.** Powers over benefits from governmental programs or civil or military service, which generally allow the agent to handle all matters related to government, military, or civil benefits unless a particular government agency requires the use of the agency's own power of attorney form (Va. Code Ann. § 64.2-1633).
- **Retirement plans.** Powers over retirement benefits and deferred compensation, which generally authorize the agent to determine the form and timing of payments, withdraw benefits, make rollovers, establish a retirement plan for the

principal, make contributions to a retirement plan, exercise investment options regarding a retirement plan, and borrow from a retirement plan (Va. Code Ann. § 64.2-1636). However, these powers do not include the power to change a beneficiary, which the principal must expressly grant in the power of attorney if desired (see Drafting Note, Express Grant of Authority).

- **Taxes.** Powers regarding taxes, which generally include the authority for the agent to prepare, sign, and file the principal's tax returns, make claims for refunds, make requests for extensions of time, and pay the principal's taxes and collect refunds unless the taxing authority requires use of its own forms (Va. Code Ann. § 64.2-1637).
- **Advisors and other professionals.** Powers to employ or terminate certain professionals, such as accountants, brokers, health care providers and managers, investment advisors, attorneys, and other advisors or agents, and pay them reasonable compensation.

2. Express Grant of Authority.

(a) [Create *Inter Vivos* Trusts. I grant to my Agent the power to create for me one or more revocable trusts of which I am an income beneficiary and with such person or persons as my Agent shall select as the trustee or co-trustees, without bond or other security, and with such other terms and provisions as my Agent shall deem appropriate, including, but not limited to, provisions to minimize or eliminate any death or transfer taxes which may be imposed on my estate, any such trust, any beneficiary of my estate or any beneficiary of any such trust, and to grant to the trustee or co-trustees of any such trust any one or more of the powers granted to a trustee under the governing law of the trust; provided, however, such trust agreement shall provide that I retain the power to revoke any such trust, in whole or in part at any time, or that I have a general power of appointment over the assets of such trust; and further provided that at my death the assets of any such trust shall pass in a manner which is consistent with any existing estate plan which I may have previously instituted, including dispositions of my property by will, trust, beneficiary designation, or otherwise, and including the apportionment of taxes and other expenses, or if there is no person named in such trust to whom such assets shall pass, then such assets shall be delivered to the personal representative of my estate. It is not my intention in granting the power enumerated in this paragraph to allow my Agent to change in any way the persons who will be receiving the property of my estate or the overall scheme of my estate plan; rather, I am attempting to facilitate my Agent's ability to save taxes or otherwise reduce the costs of administering my estate.]

(b) [Amend, Revoke, or Terminate *Inter Vivos* Trusts. If my Agent creates a revocable trust for me, this paragraph shall include the power to alter, amend, or modify such trust in a manner which is consistent with the provisions contained herein; and in addition, any such trust created by me or by my Agent may be revoked by my Agent as long as such revocation results in a disposition of my estate which is consistent with my existing estate plan. Further, my Agent shall have the power to transfer all or part of the interest I may own in any real property, stocks, bonds, accounts with financial institutions, insurance, and other property to the trustee of such trust.]

(c) [Gifts. My Agent shall have the powers set forth in Virginia Code § 64.21638 to make gifts of cash or other property, including interests in real property, as follows:

Power of Attorney (VA)

- (i) To such individuals or charitable organizations as I shall direct;
- (ii) To any one or more charitable organizations in total or partial satisfaction of any outstanding charitable pledges of mine;
- (iii) [To or for the benefit of any one or more charitable organizations consistent with my pattern of giving as determined by my Agent, in my Agent's sole discretion;]
- (iv) [To or for the benefit of any one or more of my descendants, their spouses, and any other persons to whom I have made gifts during my lifetime; provided the amount, when added to all gifts previously made by me or on my behalf (and if I am married by my spouse or on my spouse's behalf) in the same calendar year to such individual, does not exceed the federal gift tax annual exclusion then in effect (including gift-splitting if I am married) by delivery to the respective donee, to a custodian under the Uniform Transfers (or Gifts) to Minors Act (with the designation "age 21" or "age 25," if applicable) of any jurisdiction in which the donee or custodian resides, to the owner of a § 529 plan or an ABLE account or to a trustee of an existing trust for the benefit of the donee;]
- (v) [To any one or more beneficiaries named in my will or revocable trust agreement in total or partial satisfaction of any bequests, devises, or equivalent trust distributions to such beneficiary or beneficiaries determined at the time of such gifts; provided, however, my Agent, in accordance with Virginia Code § 64.2-417, shall either (i) indicate in a contemporaneous writing delivered to the donee that the gift is to be deducted from or is in satisfaction of the bequest, devise or equivalent trust distribution or (ii) receive from the donee a written acknowledgment that the gift is to be deducted from the bequest, devise or equivalent trust distribution;]
- (vi) [To make payments as provided under Internal Revenue Code § 2503(e) for (i) the tuition of any one or more of my descendants and their spouses (including the unmarried surviving spouses of deceased descendants) directly to the educational organization providing the education or training to him or her and (ii) the allowable medical and dental care expenses of any one or more of the same individuals directly to any person or institution providing such care.]

Except for gifts made at my direction, my Agent shall first determine in good faith before making any gift on my behalf that my estate is sufficient to make such gifts after considering my current and reasonably anticipated future needs, comfort, obligations, and resources.]

- (d) [Rights of Survivorship. My Agent may create, change, or terminate any ownership arrangement, including bank and brokerage accounts, in which I am a joint tenant owning an interest with one or more person with rights of survivorship, provided that at my death the assets pass in a manner which is consistent with any existing estate plan which I may have previously instituted.]
- (e) [Beneficiary Designations. My Agent may create a new beneficiary designation or change an existing beneficiary designation on any retirement plan as well as on any other account in which I own an interest at a bank, credit union, brokerage firm, insurance company, or other financial institution, provided that at my death, the assets pass in a manner which is consistent with any existing estate plan which I may have previously instituted. The term "retirement plan" shall include any employee or self-employed benefit plan, individual retirement account, pension plan, thrift plan, stock bonus plan, tax sheltered annuity (whether payable to me or to another person), profit-sharing plan, or any other plan, arrangement or account which is qualified for favorable income tax treatment under federal law.]
- (f) [Delegation. My Agent may delegate any authority granted under this power of attorney to any person or entity and revoke any authority so delegated.]
- (g) [Digital Assets. My Agent shall have the power to access, modify, transfer, handle, distribute, delete, and control my digital assets as defined under Virginia Code § 64.2116, including the content of any electronic communications, regardless of the ownership of the physical device upon which the digital asset or content is stored.]
- (h) [Pets. My Agent shall have the power to pay the expenses associated with the feeding, care (including veterinary costs), and shelter of any pets I may own. If the continued care of such pets becomes unreasonably burdensome for my Agent or is not in my best interest, my Agent may transfer such pets to a person, humane society, or animal rescue organization, chosen by my Agent, who is willing to care for such pets and compensate such person, humane society, or animal rescue organization. If any such pet is unable to continue living with a comfortable quality of life, my Agent may direct that such pet shall be humanely euthanized.]

DRAFTING NOTE: EXPRESS GRANT OF AUTHORITY

An agent may perform certain actions for the principal only if both:

- The power of attorney expressly grants the agent the authority.
- The exercise of the authority is not otherwise prohibited or limited by Virginia law, an agreement, or an instrument to which the authority or property is subject.

Powers that the power of attorney document must expressly grant include the power to:

- Create, amend, revoke, or terminate the principal's *inter vivos* trust.
- Make most gifts consistent with the principal's estate plan and previous pattern of giving (and that are within the federal gift tax annual exclusion then in effect). However, limited gifting authority is included in a general grant of power (see Authority to Make Gifts).
- Create or change rights of survivorship.
- Create or change a beneficiary designation.
- Delegate authority granted under the power of attorney.
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.
- Exercise fiduciary powers that the principal has the authority to delegate.
- Have authority over the content of an electronic communication of the principal as provided by Va. Code Ann. § 64.2-123.

(Va. Code Ann. § 64.2-1622(A).) This power of attorney includes optional language for the most common expressly authorized powers. It also includes optional language granting express authority over the care of the principal's pets.

Power to Create an *Inter Vivos* Trust

This optional clause allows the agent to create a trust for the principal's benefit. The language requires the

trust to be revocable and to conform to the principal's existing estate plan. The agent should create the trust for the specific purposes of saving taxes or reducing the costs of estate administration.

The principal and agent should discuss the principal's estate plan in detail if the principal chooses to grant the agent powers over trust disposition and creation. Any action the agent takes regarding a trust must be consistent with the principal's estate planning goals. The agent should know and understand the principal's intentions regarding:

- Intended beneficiaries of the trust.
- The purpose of the trust.
- The property the agent may transfer to the trust.

The principal and agent should document a detailed plan. This can be used to provide information and instructions to the agent should the principal become incapacitated.

If the principal lacks capacity to create an *inter vivos* trust when the agent creates the trust for the principal, the agent may consider seeking court approval of the trust (Va. Code Ann. § 64.2-1614).

Power to Amend, Modify, Revoke, or Terminate a Trust

This optional clause allows the agent to act regarding a trust created by the principal or the agent. The agent's actions regarding the trust must be consistent with the principal's existing estate plan and overall estate planning goals. Powers of attorney do not typically give the agent the power to amend, revoke, or terminate the principal's existing trust instrument. An existing trust instrument usually provides that these powers are personal to the grantor.

Authority to Make Gifts

If the power of attorney grants an agent the authority to do all acts that a principal could do, the agent has the authority to make charitable gifts in any amount of the principal's property to any individuals or to charitable organizations according to the principal's

personal history of making or joining in the making of lifetime gifts (Va. Code Ann. § 64.2-1622(H)). If the principal does not want the agent to have authority to make these gifts, the principal must expressly prohibit the agent from making all gifts (Va. Code Ann. § 64.2-1622(A)(2)).

A general grant of authority to do all acts the principal can do does not grant the agent any other authority to gift. If the principal wants the agent to have additional gifting authority, the principal must expressly grant this authority. If the principal expressly grants the agent the general authority to make gifts, this grant of power authorizes the agent to:

- Make gifts up to the federal gift tax annual exclusion amount.
- Consent to splitting gifts with the principal's spouse (if any).

However, these gifts must either be:

- Consistent with the principal's objectives if known to the agent.
- Determined by the agent to be in the principal's best interest based on all relevant factors (including some specific factors identified in the statute) if the principal's objectives are unknown.

(Va. Code Ann. § 64.2-1638.)

If the principal wants the agent to have broader authority to make gifts, an express grant of a power to make gifts is not sufficient. In this case, the principal must include additional language expressly authorizing the agent to make gifts beyond those permitted by a general grant authorized by Va. Code Ann. § 64.2-1638 (Va. Code Ann. § 64.2-1622(A)(2)). A principal almost never includes this authorizing unless the principal outlines in detail a specific pattern of giving. An agent exercising this power would otherwise be subject to a significant risk of liability.

Because authorizing gifting can enable an agent to dispose of significant assets of the principal, the power of attorney typically contains express language if gifting is desired.

Power to Create or Change Rights of Survivorship

A principal may have a survivorship interest in jointly owned property, such as bank or brokerage accounts.

On the death of one owner, title automatically passes to the surviving owner. Under this clause, the agent may create, modify, or terminate a survivorship interest in the principal's property that is consistent with the principal's existing estate plan. If the principal includes this clause, the principal should inform the agent of all property in which the principal has a survivorship interest and the principal's intentions regarding that property.

Power to Create or Change a Beneficiary Designation

The principal may grant the agent the power to change beneficiaries on any property that names a beneficiary, including any retirement plan, annuity, or life insurance contract, if the agent acts in a manner consistent with the principal's existing estate plan. A principal may include this power to add flexibility in the event of a birth, marriage, divorce, or death in the family or if the overall estate plan changes. If the principal includes this clause, the principal should inform the agent of all property in which the principal has a survivorship interest and the principal's intentions regarding such property.

Delegation

The principal may grant the agent the power to delegate authority granted in the power of attorney to any person or entity and revoke any delegated authority. Despite any delegation of authority, the agent still has duties to the principal under the Uniform Prudent Investor Act (see Drafting Note, Agent Liability).

Digital Assets

The principal may grant the agent the power to administer the principal's digital assets under the Virginia Uniform Fiduciary Access to Digital Assets Act (UFADAA) (Va. Code Ann. §§ 64.2-116 to 64.2-132). Under the UFADAA:

- A digital asset is an electronic record a principal owns or has a right or interest in. A digital asset does not include an underlying asset unless the asset itself is an electronic record. For example, an online bank account is a digital asset, but the funds in the account are not. In contrast, bitcoins are digital assets.

- A custodian is an individual or company who processes, receives, or stores the digital asset for the principal.

(Va. Code Ann. § 64.2-116.)

The UFADAA provides legal authority for the agent to manage digital assets under the principal's estate plan while protecting the principal's private communications from unintended disclosure. The principal can specify whether the custodian of the asset should preserve, distribute, or destroy the principal's digital assets.

The principal may indicate the principal's directions for digital assets by using an online tool (separate from the custodian's general terms of service) for the agent's access to the assets. If the custodian provides this online tool, the UFADAA makes the principal's instructions in the online tool legally enforceable. If the custodian does not provide an online tool or the principal declines to use the tool, the principal may give legally enforceable directions for the preservation, distribution, or destruction of digital assets in the principal's power of attorney or other written record. (Va. Code Ann. § 64.2-118.)

If the principal did not provide any direction either through an online tool or the principal's estate plan, the custodian's terms of service for the account control whether the agent may access the digital assets (Va. Code Ann. § 64.2-119).

When disclosing the principal's digital assets, the custodian has the discretion to grant the agent full access to the user's account or partial access as long as the access allows the agent to perform the

agent's authorized and required tasks (Va. Code Ann. § 64.2-120(A)).

Under the UFADAA, a custodian must respond to an agent's request for access to the digital assets within 60 days of receiving proper proof of the agent's authority under the power of attorney (Va. Code Ann. § 64.2-130(A)).

An authorization for an agent to access the principal's digital assets is generally separate from an authorization for the agent to possess or engage in certain transactions with the underlying asset (and the principal should authorize both if both are desired). For example, an agent may have authority over a principal's bank account under the principal's power of attorney. However, if the principal does not grant the agent authority under the UFADAA to access the electronic records for the principal's bank account, the custodian cannot grant the agent the authority to access the electronic records or engage in electronic transactions for the account even though this agent may engage in account transactions non-electronically. It is generally advisable to include in the power of attorney language authorizing the agent to act under the UFADAA.

Pets

The principal may grant an agent the power to care for, pay expenses associated with, or euthanize (under certain circumstances) the principal's pets or transfer those pets to an individual or organization willing to care for the pets and compensate that individual or organization.

3. Restrictions on Authority.

(a) Foreign Accounts. My Agent shall have no power over any foreign account unless my Agent has expressly accepted that power in writing.

(b) Self-Dealing. My Agent may participate in decisions about any interest I may have in any corporation, limited liability company, or limited or general partnership even if my Agent has an individual interest in that entity. My Agent may deal with and make investments through any person or entity even if my Agent is related to that person or entity as a family member, beneficiary, owner, partner, member, manager, employee, stockholder, director, or fiduciary. In addition, except as otherwise expressly provided in this power of attorney, my Agent may enter into any transaction on my behalf without court approval notwithstanding my Agent's personal interest, provided my Agent determines in good faith that the purchase price and terms are fair and reasonable.

DRAFTING NOTE: RESTRICTIONS ON AUTHORITY

Unless the power of attorney specifically provides otherwise, an agent that is not an ancestor, spouse, or descendant of the principal cannot exercise authority under the document to create in the agent or in an individual to whom the agent owes a legal obligation of support an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise

(Va. Code Ann. § 64.2-1622(B)). Authorizing an agent to exercise authority in this way gives a non-relative agent the power to give the agent or a person the agent supports an interest in the principal's property. This is not typically something the principal wants, and it is uncommon to include a provision authorizing an agent to exercise authority in this way in a Virginia power of attorney.

Article II

Compliance with HIPAA

I authorize my Agent to obtain my protected health information and medical records and consent to the release of such information and records to third parties, and I authorize all health care providers to release my protected health information and medical records to my Agent.

DRAFTING NOTE: COMPLIANCE WITH HIPAA

A grant of general authority under a power of attorney regarding the principal's personal and family maintenance authorizes the agent to pay expenses necessary for health care and custodial care on behalf of the principal, the principal's spouse, and the principal's dependents (see Drafting Note, General Grant of Authority). The agent may also act as the principal's personal representative under the Health Insurance Portability and Accountability Act (HIPAA) and applicable regulations in making decisions related to the past, present, or future payment for the provision of health care consented to by the principal or anyone authorized under Virginia law to consent to health care on behalf of

the principal (42 U.S.C. §§ 1320d to 1320d-9 and Va. Code Ann. § 64.2-1634).

In practice, many drafting attorneys provide general language similar to the language included above permitting the agent to obtain the principal's protected health information and medical records for ascertaining the principal's capacity should the principal's capacity be in question, especially as it relates to petitions for guardianship or conservatorship of the principal. However, the drafting attorney must ensure the language does not contradict any powers given to a separate agent under the principal's advance medical directive.

Article III

Durability

This power of attorney shall not terminate upon my disability or incapacity.

DRAFTING NOTE: DURABILITY

A power of attorney created under the Virginia Uniform Power of Attorney Act is durable unless it expressly provides that it terminates on the principal's incapacity (Va. Code Ann. § 64.2-1602). A durable power of attorney does not terminate

if the principal becomes incapacitated. It instead continues during periods of the principal's incapacity. In Virginia, powers of attorney for estate planning purposes are typically durable.

Article IV

Revocation

I may revoke this power of attorney by a written instrument explicitly revoking it (such as a revocation or a new power of attorney expressly revoking all former powers of attorney) or by physical destruction of all executed originals.

DRAFTING NOTE: REVOCATION

In Virginia, a power of attorney terminates when:

- The principal dies.
- The principal becomes incapacitated if the power of attorney is not durable.
- The principal revokes the power of attorney.
- The power of attorney provides that it terminates.
- The purpose of the power of attorney is accomplished.
- The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns and the power of attorney does not provide for another agent to act under the document.

(Va. Code Ann. § 64.2-1608(A).)

The agent's authority terminates when:

- The principal revokes the authority.
- The agent dies, becomes incapacitated, or resigns.
- Unless the power of attorney provides otherwise, an action is filed:

- for the divorce or annulment of the agent's marriage to the principal or their legal separation;
 - by the agent or principal for separate maintenance from the other; or
 - by the agent or principal for custody or visitation of a child in common with the other.
- The power of attorney terminates.

(Va. Code Ann. § 64.2-1608(B).)

This language provides the method by which the principal may revoke the power of attorney. The revocation terminates the power of attorney and the agent's authority to act under the power of attorney. If the principal revokes the power of attorney, the principal should provide notice to the named agent and third parties that may be relying on the revoked power of attorney.

This power of attorney also revokes previous powers of attorney (but not any advance medical directive or medical or health care power of attorney currently in force) executed by the principal (see Drafting Note, Revocation of Previous Powers of Attorney).

Article V

Inducement to and Protection of Third Parties

Any third party may rely on either an original of this power of attorney or a photocopy, portable document format, other electronically transmitted copy, or facsimile of this power of attorney until the third party receives notice or has

actual knowledge of my death or that I have limited, amended, or revoked this power of attorney. For myself and for my heirs, executors, legal representatives, and assigns, I agree to indemnify and hold harmless any third party from and against any and all claims or liability that may arise or be asserted against such third party who relies on the provisions of this instrument. No third party shall have any responsibility or duty to inquire into, determine, or ensure the proper disposition or application of funds or property in any transaction with my Agent.

DRAFTING NOTE: INDUCEMENT TO AND PROTECTION OF THIRD PARTIES

Photocopy or Fax of Original

A photocopy, portable document format, other electronically transmitted copy, or fax of an original power of attorney generally has the same effect as the original except as otherwise provided by Virginia law (Va. Code Ann. § 64.2-1604(D)).

Reliance on Acknowledged Power of Attorney

A third party that accepts an acknowledged power of attorney that has been executed under Va. Code Ann. § 64.2-1603 may rely on the power of attorney as if the power of attorney is valid and the agent properly exercised the agent's authority if the third party accepts the power of attorney in good faith and without actual knowledge that:

- The power of attorney is void, invalid, or terminated.
- The purported agent's authority is void, invalid, or terminated.
- The principal is deceased.
- The agent is exceeding or improperly exercising the agent's authority.

(Va. Code Ann. § 64.2-1617(B).)

A person that is asked to accept an acknowledged power of attorney may request and rely on without further investigation:

- An agent's certification under oath of any factual matter concerning the principal, agent, or power of attorney.
- An English translation of the power of attorney if the power of attorney contains in whole or part language other than English.
- An opinion of the counsel for the principal or the agent or the opinion of counsel for the person about any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

(Va. Code Ann. § 64.2-1617(C).)

For this, acknowledged means verified before a notary public or other individual authorized to take acknowledgments (Va. Code Ann. § 64.2-1617(A)). For more information on execution and acknowledgment of a power of attorney, see Drafting Note, Execution of Power of Attorney.

Article VI

Agent's Duties

1. Due Care. My Agent shall use due care to act in my best interest in accordance with the terms of this instrument.
2. Liability for Breach of Fiduciary Duty. My Agent, as a fiduciary under Virginia law, shall be liable for any breach of legal duty owed to me.
3. No Liability for Retention of Property. My Agent may hold, invest, and reinvest any property owned by me without being under any duty to diversify the property or to invest in income-producing property and without regard for any statutory restrictions on the investment powers of fiduciaries, including the "prudent investor rule" and the "prudent man rule."

4. No Commingling of Property. My Agent shall not commingle my property with the property of my Agent.
5. Records. My Agent shall keep a record of all receipts, disbursements, and significant actions taken under this instrument.
6. Accounting. Upon my personal demand, or if I am incapacitated or deceased, upon the written demand of any of the persons listed below, my Agent shall account for all receipts, disbursements, investment transactions, and other significant actions taken under this instrument:
 - (a) The personal representative of my estate;
 - (b) Any person named in or pursuant to this instrument as a successor Agent;
 - (c) [The trustee of any revocable trust created by me;]
 - (d) [My spouse, [NAME]; and]
 - (e) [[[Both/Any] of my children, [NAMES]/My child, [NAME]].]

DRAFTING NOTE: AGENT'S DUTIES

Under Virginia law, an agent has a duty to act:

- According to the principal's reasonable expectations to the extent known by the agent and otherwise in the principal's best interest.
- In good faith.
- Only within the scope of the agent's authority.

(Va. Code Ann. § 64.2-1612(A).)

Except as otherwise provided in the power of attorney, the agent must:

- Act loyally for the principal's benefit.
- Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.
- Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances.
- Keep a record of all receipts, disbursements, and transactions made on behalf of the principal.
- Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent known by the agent and otherwise act in the principal's best interest.
- Attempt to preserve the principal's estate plan to the extent known by the agent if preserving the plan

is consistent with the principal's best interest based on all relevant factors, including:

- the value and nature of the principal's property;
- the principal's foreseeable obligations and need for maintenance;
- minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
- eligibility for a benefit, a program, or assistance under a statute or regulation.

(Va. Code Ann. § 64.2-1612(B).)

Counsel should keep the boilerplate language included in this section because it provides general information to the agent about the agent's duties.

Agent Liability

An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan (Va. Code Ann. § 64.2-1612(C)). An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest regarding the property or affairs of the principal (Va. Code Ann. § 64.2-1612(D)).

If an agent is selected by the principal because of special skills or expertise or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise are considered in determining whether the agent has acted with care, competence, and diligence under the circumstances (Va. Code Ann. § 64.2-1612(E)). Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines (Va. Code Ann. § 64.2-1612(F)).

An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for the act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person. However, notwithstanding any delegation by the agent of the agent's authority under the power of attorney, the agent still has duties to the principal under the Virginia Uniform Prudent Investor Act. (Va. Code Ann. §§ 64.2-780 to 64.2-791 and 64.2-1612(G).) For more information on agent delegation, see Drafting Note, Delegation.

Co-Agent and Successor Agent Liability

Except as otherwise provided in the power of attorney, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent. If an agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent, that agent must notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken action (Va. Code Ann. § 64.2-1609(C), (D)).

For information regarding selecting a successor agent, see Drafting Note, Successor Agents.

Exoneration of Agent

Any provision in a power of attorney relieving the agent of liability for breach of duty is binding on the

principal and the principal's successors in interest except to the extent the provision either:

- Relieves the agent of liability for breach of duty committed:
 - dishonestly;
 - with an improper motive; or
 - with reckless indifference for the purposes of the power of attorney or the best interest of the principal.
- Was inserted because of an abuse of a confidential or fiduciary relationship with the principal.

(Va. Code Ann. § 64.2-1613.)

Counsel should generally keep the boilerplate liability and exoneration language that is included in this section as an inducement for the agent to serve unless there is a specific reason to revise or remove it.

Accounting by Agent

The boilerplate language in this section generally incorporates the statutory accounting requirements. One of the agent's duties under Virginia law is to keep a record of all receipts, disbursements, and transactions made for the principal (Va. Code Ann. § 64.2-1612(B)). Except as otherwise provided in the power of attorney, the agent must disclose receipts, disbursements, or transactions conducted on behalf of the principal if requested by:

- The principal.
- A guardian, a conservator, or another fiduciary acting for the principal.
- On the death of the principal, the personal representative or successor in interest of the principal's estate.

If so requested, the agent must comply with the request within 30 days or provide a writing or other record substantiating why additional time is needed and comply with the request within an additional 30 days. (Va. Code Ann. § 64.2-1612(H).)

Except as otherwise provided in the power of attorney, the agent must disclose certain information to certain persons on reasonable request by that person if that person in good faith believes the principal is

incapacitated or, if deceased, was incapacitated when the agent acted. These persons include:

- A person authorized to make health care decisions for the principal.
- The principal's spouse, parent, or descendant.
- An adult sibling, niece, or nephew of the principal.
- A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate.
- The adult protective services unit of the local department of social services for the county or city where the principal resides or is located.
- The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare.
- A person asked to accept the power of attorney.

If one of these persons in good faith believes the principal is incapacitated or, if deceased, was incapacitated when the agent acted, that agent must:

- Disclose to that person the extent to which the agent has chosen to act and the actions taken on behalf of the principal within the five years before the date of:
 - the request; or
 - the principal's death if the principal is dead when the request is made.
- Permit reasonable inspection of records pertaining to actions by that person.

Where the principal is deceased when the request is made, the request shall be made within one year after the principal's death. If so requested, the agent must comply with the request within 30 days or provide a writing or other record substantiating why additional time is needed and comply with the request within an additional 30 days. (Va. Code Ann. §§ 64.2-1612(l) and 64.2-1614(A).)

Counsel should customize this accounting section as necessary to reflect the client's preferences and circumstances while still allowing for all accounting required by the agent under Virginia statute.

Article VII

Miscellaneous Provisions

1. Guardianship and Conservatorship Proceedings. In any court proceeding for the appointment of a legal guardian of my person or legal guardian or conservator of my property, I hereby nominate my then serving Agent to serve in those capacities and request that no surety be required on my Agent's bond as my guardian or conservator.

DRAFTING NOTE: GUARDIANSHIP AND CONSERVATORSHIP PROCEEDINGS

In the power of attorney, the principal may nominate a guardian of the principal's person or conservator of the principal's estate for consideration by the court if protective proceedings for the principal's person or estate are begun after the principal executes the power of attorney. If, after the principal executes the power of attorney, the court appoints a guardian or conservator or other fiduciary charged with the management of some of or all the principal's property, the agent is accountable to the fiduciary as well as the principal.

The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court (Va. Code Ann. § 64.2-1606).

In this Standard Document, the principal nominates the currently serving agent to serve as guardian and conservator. Counsel should revise this provision if more than one agent will be serving at a time or if the principal wants to nominate someone other than the agent to serve as guardian or conservator.

2. Compensation and Expenses. My Agent shall receive no compensation for my Agent's services but shall be entitled to receive reimbursement of reasonable expenses.

DRAFTING NOTE: COMPENSATION AND EXPENSES

Unless the power of attorney provides otherwise, the agent is entitled to:

- Reimbursement of expenses reasonably incurred on behalf of the principal.
- Compensation that is reasonable under the circumstances.

(Va. Code Ann. § 64.2-1610.)

However, unless the agent is a professional, such as an attorney or accountant or a corporate fiduciary, a power of attorney document typically does not provide for the agent to receive compensation for the agent's services. Counsel should revise this section if the client wants the agent to receive compensation.

3. No General Power of Appointment. I intend that any authority granted to my Agent shall be construed and limited to prevent my Agent from being taxed on my income and to prevent my property from being considered subject to a "general power of appointment" exercisable by my Agent, as that term is defined by the Internal Revenue Code.

4. Enforceability and Severability. If any provision of this instrument is held unenforceable or invalid, such unenforceability or invalidity shall not affect other provisions or applications of this instrument that can be given effect without the invalid provision or application and to this end the provisions of this instrument are severable.

5. Terms.

(a) "My Agent" shall include any substitute, alternate, or successor Agent or Agents.

(b) Where appropriate to the context, any gender shall include the other genders; and the singular shall include the plural, and vice versa.

(c) "Plan" shall refer to any qualified retirement plan, individual retirement account, or similar tax-deferred retirement arrangement or annuity subject to the distribution rules of Section 401(a)(9) of the Internal Revenue Code.

(d) Except as otherwise provided in this instrument, the "Internal Revenue Code" shall refer to the Internal Revenue Code of 1986, as amended from time to time, and any subsequent corresponding provisions and interpretive laws, regulations, or rulings.

6. Counterparts. This instrument may be executed in more than one counterpart, any one of which shall, for all purposes, be deemed an original. A certified copy of this instrument shall also be deemed an original.

Article VIII

Successor Agents

1. Appointment. If [AGENT NAME] dies, resigns, or becomes unable to serve by reason of incapacity or otherwise, then I appoint my [RELATIONSHIP], [SUCCESSOR AGENT NAME], as my Agent. [My Agent may appoint by written instrument any person or entity as a successor Agent if I have not otherwise named a successor Agent who is willing and able to serve.]

OR

Appointment. If [both/all] of [AGENT NAME] and [AGENT NAME] die, resign, or become unable to serve by reason of incapacity or otherwise, then I appoint my [RELATIONSHIP], [SUCCESSOR AGENT NAME], as my Agent. [My Agent may appoint by written instrument any person or entity as a successor Agent if I have not otherwise named a successor Agent who is willing and able to serve.]

DRAFTING NOTE: SUCCESSOR AGENTS

A principal may designate one or more successor agents to act if an agent:

- Resigns.
- Dies.
- Becomes incapacitated.
- Is not qualified to serve.
- Declines to serve.

A principal may grant authority to designate one or more successor agents to:

- An agent.
- Another person designated by name, office, or function.

Unless the power of attorney otherwise provides, a successor agent:

- Has the same authority as that granted to the original agent.

- Cannot act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

(Va. Code Ann. § 64.2-1609(B).)

Counsel should:

- Select the first bracketed option if the principal appoints one initial agent in Article I.
- Select the second bracketed option if the principal appoints multiple initial agents in Article I.
- Include the bracketed sentence in the selected option if the principal wants an agent to be able to appoint a successor if there are no named successor agents willing or able to serve.

For information regarding successor agent liability, see Drafting Note, Co-Agent and Successor Agent Liability.

2. Capacity of My Agent. Any named agent shall be deemed incapacitated (1) during any period the individual is incompetent as determined by a court of competent jurisdiction; (2) during any period that a conservator or guardian for such individual has been appointed based upon his or her incapacity; (3) during any period when 2 physicians licensed to practice medicine certify in writing to the named successor Agent that such individual, as a result of illness, age, or other cause, no longer has the capacity to act prudently or effectively in his or her business or financial matters; or (4) 30 days after any named successor Agent requests that the individual acting as Agent provide a certificate from a physician licensed to practice medicine that such person has the capacity to act prudently or effectively in business and financial matters and such individual fails to provide such certification. In the event incapacity is deemed to exist by reason of subsection (4) listed here in this paragraph, capacity will be deemed to exist once certification has been provided.

3. Reliance by Third Parties. Any third party dealing with a named successor Agent may rely upon as conclusively correct an affidavit or certificate, signed under penalties of perjury, of such Agent that those persons named as prior Agents are unavailable, unable, or unwilling to act. Any person who relies in good faith upon any representation my Agent may make regarding (1) the fact that my Agent's powers are then in effect, (2) the scope of my Agent's authority under this instrument, (3) my competency at the time this instrument was executed, (4) the fact that this instrument has not been revoked, and (5) the fact that my Agent continues to serve as my Agent, shall not incur any liability to me, my estate, or my heirs, successors, or assigns for permitting my Agent to exercise any power granted to my Agent hereunder.

4. Agent Resignation. My agent may resign by giving notice to me personally. If I am incapacitated, my agent may resign by giving the notice required by Va. Code Ann. § 64.2-1616.

DRAFTING NOTE: AGENT RESIGNATION

Unless the power of attorney provides otherwise, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

- To the conservator or guardian if one has been appointed for the principal and a co-agent or successor agent.
- If none, to an adult who is a spouse, child, or other descendant, parent, or sibling of the principal.

- If none, to another person reasonably believed by the agent to have sufficient interest in the principal's welfare.
- If none, to the adult protective services unit of the local department of social services for the county or city where the principal resides or is located.

(Va. Code Ann. § 64.2-1616.)

WITNESS my hand and seal this [DATE] day of [MONTH], [YEAR].

_____ (SEAL)

[PRINCIPAL'S NAME]

COMMONWEALTH OF VIRGINIA

[CITY/COUNTY] OF [CITY/COUNTY NAME]

I, the undersigned, a Notary Public in and for the Commonwealth of Virginia, do certify that [PRINCIPAL NAME], whose name is signed to the writing above dated the [DATE] day of [MONTH], [YEAR], has acknowledged the same before me in the jurisdiction aforesaid.

Given under my hand and notarial seal this [DATE] day of [MONTH], [YEAR].

[SEAL]

Notary Public

DRAFTING NOTE: EXECUTION OF POWER OF ATTORNEY

A power of attorney must be signed either:

- By the principal.
- In the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney.

A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments. To be recordable, a power of attorney must satisfy the requirements of Va. Code Ann. § 55.1-600. (Va. Code Ann. § 64.2-1603.)

A power of attorney may be acknowledged by electronic notarization that meets the requirements of Va. Code Ann. § 47.1-16 (Va. Code Ann. §§ 64.2-1600, 64.2-1603, and 64.2-1617).

Validity

A power of attorney executed in Virginia on or after July 1, 2010, is valid if its execution complies with Va. Code Ann. § 64.2-1603. A power of attorney executed in Virginia before July 1, 2010, is valid if its execution complied with Virginia law as it existed at the time of execution (Va. Code Ann. § 64.2-1604).

Power of Attorney (VA)

[AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY]

COMMONWEALTH OF VIRGINIA

[CITY/COUNTY] OF [CITY/COUNTY NAME]

I, [AGENT NAME], certify under penalty of perjury that [PRINCIPAL NAME] granted me authority as an agent or successor agent in a power of attorney dated [DATE].

I further certify that to my knowledge:

1. The Principal is alive and has not revoked the power of attorney or my authority to act under the power of attorney and the power of attorney and my authority to act under the power of attorney have not terminated;
2. [If I was named as a successor agent, the prior agent is no longer able or willing to serve; and]
3. [OTHER RELEVANT STATEMENTS].

SIGNATURE AND ACKNOWLEDGMENT

[AGENT NAME]

[DATE]

[AGENT NAME]

[AGENT ADDRESS]

[AGENT TELEPHONE NUMBER]

This document was acknowledged before me on [DATE], by [AGENT NAME].

Notary Public

My commission expires: _____ [SEAL]

This document prepared by: [DRAFTING ATTORNEY NAME], [ADDRESS], [CITY], [STATE] [ZIP CODE] & [TELEPHONE NUMBER]]

DRAFTING NOTE: AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY

This optional certification form may be used by the agent to certify facts concerning the power of attorney (Va. Code Ann. § 64.2-1639). For example:

- If the power of attorney is springing, the certification should include additional language to say that the power of attorney was drafted to become effective on the occurrence of a specific event or contingency and that the event or contingency occurred.

- The certification may include applicable language to confirm the principal granted the agent the powers outlined in Virginia Code Ann. § 64.2-1622 or other specific powers.

The certification may include language specific to the use of the form. For example, if the agent provides the form to a bank, the agent may want to include language like:

Power of Attorney (VA)

"I have the powers set forth in Virginia Code § 64.2-1629, including but not limited to the power to establish, add, or deposit to, withdraw by check or electronic funds, or transfer from or terminate any of the principal's accounts or deposits in banks or other financial institutions; borrow money or execute notes on such terms as I may deem appropriate; and enter any safe deposit box that the principal may be the lessee of and remove or add to its contents."

The use of this form is similar to that of a certification of trust, though certifications of trust are more common.

Document Prepared By

If counsel create a certification, counsel should include counsel's information in this section so that if a third party has questions about the certification, the third party can contact counsel.

About Practical Law

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call 1-800-733-2889 or e-mail referenceattorneys@tr.com.