SCHENKMAN JENNINGS LLC
ATTORNEYS AT LAW

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Estate Planning Series

DURABLE POWER OF ATTORNEY IN ESTATE PLANNING

A Power of Attorney is an important document that allows someone else to handle your affairs if you have difficulty or are unable to do so. In a Power of Attorney, you give someone else (the "Agent" or "Attorney-in-fact") the authority and power to act on your behalf. If you become ill, incapacitated or unable to handle your financial affairs, or simply choose to let someone else do it for you, the person or persons designated in the Power of Attorney can pay bills, and do other things in your best interest. A Durable Power of Attorney often becomes necessary with age or illness.

A Power of Attorney can be ***general***, meaning that it gives the Attorney-in-fact the authority to do whatever you might do for yourself, or ***limited***, meaning that it is limited in scope and/or time. For example, a Power of Attorney may be limited to one specified act or type of act, such as a limited Power of Attorney to attend a real estate closing and sign the closing documents on behalf of a buyer or seller, or it may be limited in time, such as a Power of Attorney that is effective only during the time that someone is out of the country on a trip. When a Power of Attorney is ***durable***, it means that it takes effect upon its execution (or a specified date) and continues in effect even if the Principal becomes incapacitated. The power could also be ***springing***, meaning that it only takes effect after the Principal is incapacitated (or some other definite future act or circumstance). The problem with a springing Power of Attorney is that it requires a judicial determination of incapacity for the power to take effect. In the best situation, this can take a considerable amount of time.

A Power of Attorney is a useful and powerful tool and usually the person who is given the authority to act will do so with the best intentions. Unfortunately, as with many things, something with a good purpose still can be used for an improper purpose. A General Power of Attorney allows the Attorney-in-fact to do almost anything you could or might do yourself. As a result, it can be an invitation to abuse and self-dealing. As the victim of the abuse, you may not be aware of what is happening, and the nature and extent of the abuse may not come to light until after you have died and someone else is able to obtain access to your banking and other financial records.

Disputes can arise when the Attorney-in-fact has used the Power of Attorney to transfer the Principal's assets to himself or his family members. This may be done as an estate planning technique, such as making gifts to take advantage of the annual exclusion from gift taxes. On the other hand, it may be done to deprive other family members of a share of your assets that they otherwise might eventually inherit. For example, a person may wrongfully use a Power of Attorney to withdraw money from a bank account and deposit the money in his or own bank account. Under New Jersey law, the traditional rule is that a power of attorney should not be

construed to allow the Attorney-in-fact to transfer assets to himself or others without clear language in the power authorizing such gifts.

A Power of Attorney also may be attacked as having been procured by undue influence, or when the Principal already was incompetent and therefore legally unable to execute a Power of Attorney. This type of action is similar to a will contest in which a will is claimed to have been procured by undue influence, or in which it is claimed that the testator was of unsound mind and unable legally to make a Will.

A Power of Attorney is an essential part of your estate plan. However, it must be drafted properly to achieve its desired effect and avoid abuse.

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