STATEMENT OF DIVISION VIII
OF THE DISTRICT OF COLUMBIA BAR
ON THE DURABLE POWER OF ATTORNEY ACT OF 1985,
BEING ARTICLE III OF BILL 6-7 AND BILL 6-34

Judiciary Committee
Council of the District of Columbia
Wednesday, September 18, 1985, 2:00 p.m.

I. Introduction.

My name is Julian E. Markham, Jr. An attorney, I am a member of The Steering Committee, Division VIII (Estates, Trusts, and Probate Law) of the District of Columbia Bar and its delegate to testify before you today. So saying, protocol of the District of Columbia Bar cautions me to emphasize to you that the views today expressed represent only those of Division VIII and not those of the District of Columbia Bar as a whole or of its Board of Governors since authority for public statement has been sought from neither group.

By the same token, the membership of the Estates, Trusts and Probate Law section of the District of Columbia Bar, its Division VIII, has been canvassed only respecting adoption of the Uniform Durable Power of Attorney Act and the testimony given today is necessarily limited to that subject, to the exclusion of any comment on the remainder of the provisions of Bill 6-7, District of Columbia Guardianship and Durable Power of Attorney Act of 1985.

II. Public Necessity For Durable Power of Attorney Legislation.

When the membership of Division VIII was polled respecting authority of the Steering Committee to publicly endorse adoption of the Uniform Durable Power of Attorney Act in 1983, its participating members voted resoundingly, in fact by a margin of 276-2, to urge the Council's enactment of this important legislation into law. This enthusiastic response, this clearly perceived answer to a strongly felt public need by the probate, estate and trust law attorneys of Division VIII was in the past mirrored by endorsement by The Bar Association of the District of Columbia, the District of Columbia Chapter of the American College of Probate Counsel, and the Fiduciary Section of the District of Columbia Bankers Association. While obviously I can speak for none of these other organizations, the point here to be made is the enormous out-pouring of support for durable power of attorney legislation in the District of Columbia, this so that the needs of its citizens can be effectively met in the manner permitted those resident in each of the fifty (50) states whose respective legislatures have considered, debated and enacted the Durable Power of Attorney into its local law.[1/]

[1/] Hereto attached as Exhibit A for informational purposes is a compilation and comparison of the statutes of the states adopting durable power of attorney legislation as of July 10, 1982, this being ACPC Study #17 which was prepared under the auspices of the American College of Probate Counsel.

The merit of the durable power of attorney, the public need it satisfies in context of our presently existing law may be summarized as follows.

A Power of Attorney creates an agency relationship between the originating party, the principal, who confers the power to act on his behalf to another, the attorney in fact.

At common law, a power of attorney becomes invalid upon the death or mental disability of the principal. This is so because, classically, the law requires that the principal be competent to ratify what his attorney-in-fact does in his place and stead. As a result of this requirement, the power of attorney is really a useless legal instrument at the time when it is needed the most, particularly within the family unit, namely: when the principal becomes mentally incapacitated. In addition, since most persons who are asked to rely upon the power do not know whether the principal has become disabled since its grant, they, as a practical matter, may be reluctant or refuse to take the requested action without adequate assurance that the principal is still competent. As later seen, the remedy for these legal infirmities is the Durable Power of Attorney Act.

Under current local law, the predominant mechanism for the management of the financial affairs of an incompetent person is the Court supervised conservatorship. This, as a solution, has become increasingly cumbersome, expensive, and consumptive of much judicial energy. The modern solution of choice, therefore, is the enactment of a statute which will permit a power of

attorney to be "durable", that is one which will survive the disability or incompetency of the principal. The proposed legislation would require that the power of attorney contain appropriate language which indicates either an intention on the part of the principal that the power is to survive incompetency or that it becomes effective only when the principal becomes incompetent. Either way, use of the durable power of attorney is thus a matter of the citizen's personal choice and voluntary act.

Increased longevity, the result of advances in medical knowledge, will probably result in an increase in the chance of our citizens experiencing some form of physical or mental disability during later life, at which time they may be expected to have conceptual difficulty or to be absolutely unable to manage their financial affairs. The durable power of attorney, a voluntary legal remedy, can assist this body of persons in their time of need.

In this context, it should be noted that the conservatorship alternative to the durable power of attorney is not only expensive, time-consuming and burdensome to the local Court system, it also involves the emotional strain and predictable, almost certain humiliation of a quasi incompetency proceeding. Matters of private family finance and health, all of great delicacy, become the subject of public record and scrutiny by the curious and the uncaring.

Also in this context, consider the living trust which requires, typically, the payment of not insignificant attorney

fees for its preparation and ongoing trustees commissions for its maintenance. As an alternative, the living trust is thus considerably more expensive than the durable power of attorney. The living trust, in essence, provides an option more theoretical than real to the person of modest or moderate means who wishes to forsee, and provide for the possible advent of disability or incapacitation.

For that person of modest or moderate means, in no small measure representative of the larger body of our population, the durable power of attorney provides the only viable answer to his need to provide for private asset management should disablement occur. Again, this is so because the proposed legislation permits the attorney-in-fact to continue to function for, and on behalf of the principal during any period of the principal's incapacity just as he was able to do during periods of complete competency.

Other useful facets of the proposed legislation should be noted. The durable power of attorney is revocable by the principal and by any Court-appointed fiduciary for the principal. The latter provision permits unitary management of the principal's property should Court appointment for some reason be made. The proposed legislation also permits the principal to designate, by power of attorney, the person whom he would prefer to be appointed by the Court as his Conservator or other judicially appointed fiduciary in the event of later Court proceedings. The death of the principal does not affect the

power of attorney until notice of the principal's death is received by the attorney-in-fact or other person acting in good faith under the power (a similar provision in the proposed law relates to the disability or incapacity of a principal who has given a non-durable power). This provision protects those persons who are requested to act upon presentation of a power of attorney and, hence, facilitates the practical application of the power to serve its intended purpose.

Finally, the proposed statute does not affect the prohibition against execution of deeds of real property pursuant to a power of attorney. Section 45-601 D.C. Code (1981 Ed.). This peculiarity has been a longstanding element of local law.

III. Consideration of the Provisions of Proposed Durable Power of Attorney Legislation.

A. Historical Backdrop.

Durable Power of Attorney legislation was, it is believed, first introduced before the Council of the District of Columbia by Bill 4-400, the Durable Power of Attorney Act of 1982, by then Chairman Arrington L. Dixon, and thereupon referred to the Judiciary Committee. It apparently died aborning for want, inter alia, of publicly expressed bar and citizen support. Reintroduced as Bill 5-420 by Chairman David A. Clarke, the Durable Power of Attorney Act of 1984 apparently fell casualty to lack of public hearing thereon in that year. In this interim, among the states, enactment of Durable Power of Attorney statutes

advanced, in identical or substantially similar form to the pending District of Columbia legislation, from forty two (42) to all of the fifty (50) states as heretofore noted.

Introduced before the Council this year and referred to the Judiciary Committee are two bills: The District of Columbia Durable Power of Attorney Act of 1985, Bill 6-34, and The District of Columbia Guardianship Protective Proceedings and Durable Power of Attorney Act of 1985, Bill 6-7. Each of these bills, insofar as the durable power is concerned, would provide desired remedial relief to the public and to the Bar which serves it alike. Both of these bills are patterned after the Uniform Durable Power of Attorney Act [Part 5, 8 U.L.A. 511 (1978)] which was drafted by the National Conference of Commissioners on Uniform State Laws and by it approved and recommended for enactment in all the states, but each is not precisely identical to the other in applicable part.

B. Comparison and Comment on Pending Durable Power Legislation.

Bill 6-34, in all substantive respects, follows its model, the aforesaid Uniform Durable Power of Attorney Act. Except for misnumbering of the sections in the draft bill (these omit a section one and begin with section two), no error in spelling and no difference in language has been detected between Bill 6-34 and the uniform law it is designed to emulate.

While to much the same beneficial effect, Article III of Bill 6-7, "Durable Power of Attorney", departs from the language

of the model law, chiefly by deletion of the term "disability" at certain critical junctures of the bill's text but also in other potentially substantive terms. This may serve to distort its uniform application and construction with companion laws of the adopting states and to narrow its application under local law. These differentiations between Bill 6-7 and the Uniform Law model are highlighted by the attachment hereto appended as Exhibit B. It is recommended that Bill 6-7 be redrafted to conforming status with the Uniform Act. Also deleted from the Durable Power provisions at Article III of Bill 6-7 are sections, now in Bill 6-34 as Sections 7 and 8 and similarly present in the model uniform act, which relate to severability of the act's provisions so that, were any of the same to be held invalid, the remainder would not, ipso facto, be so tainted and to the stated legislative goal of uniform application and construction of the durable power provisions.

IV. Conclusion.

Enactment of a Durable Power of Attorney Act is demonstrably in the public interest, fulfilling as it does a real and pressing need for those District of Columbia citizens of advancing years, in modest and moderate financial circumstance, who wish to responsibly arrange and structure their legal lives to provide for the mode and method of their property management, by a person or suitable financial institution of their own choosing, in the event they are afflicted by disablement or incapacitation. So doing, those responsible citizens would not only serve their own

interests of privacy and financial peace of mind, but also the larger public good by ameliorating pro tanto the crush of cases besetting the Probate Division of the Superior Court, both its judicial and administrative personnel.

Accordingly, Division VIII of the District of Columbia Bar respectfully requests this Committee's expedited attention to passage of durable power of attorney legislation. Because Bill 6-34 is specific in its advancement of this urgently needed public relief and is complete in its terms and provisions and brings with it no overlay of larger, more difficult public issues such as those which may be attendant to the other legislative objectives expressed in Bill 6-7, the members of Division VIII of the District of Columbia Bar most earnestly solicit its early enactment into law. Alternatively, the members of Division VIII would respectfully request that the Judiciary Committee consider severing and extracting Article III from the remaining and by no means necessarily attendant provisions of Bill 6-7 and expedite its separate passage into law. Either way, it is the considered judgment of the membership of Division VIII that enactment of a Durable Power of Attorney Act will bring sure and certain benefit to the citizens of the District of Columbia.

Respectfully submitted,

DIVISION VIII, THE DISTRICT
OF COLUMBIA BAR

By: _____
Julian E. Markham, Jr.