DETERMINING AUTHORITY
TO
EXECUTE REAL ESTATE DOCUMENTS

I. RULES FOR EXECUTING REAL ESTATE DOCUMENTS

The basic rules to guide the proper execution of real estate documents are found in Section 35-4-20, et seq Code of Alabama. These rules are well known and require little comment. The principal rules are:

1. Such a document must be written, signed and attested by at least one witness.

2. Attestation can be satisfied by a Notary acknowledgment. Section 35-4-23.

3. The acknowledgment must be in material compliance with the forms provided by Section 35-4-29. See Exhibit "A"

4. If a deed acknowledgment is defective, it is void and will not pass title but the instrument constitutes an agreement to make a conveyance and might be enforceable in equity.[1]

There are other rules that must be understood and addressed – such as:

(A) An individual grantor must be 19 and not under some legal incapacity.

(B) The grantor and grantee must be identified in the instrument.

(C) The property to be conveyed must be described properly.

(D) There must be consideration.

(E) There must be delivery.[2]

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[1] *Lowery v. May*, 104 So. 5 (Ala. 1925); *Niehuss v. Ford*, 38 So. 2d 484 (Ala. 1949).

[2] *Culver v. Carrol*, 57 So. 767 (Ala. 1912); *Henslee v. Henslee*, 82 So. 2d 222 (Ala. 1955).

(F) If homestead property, the spouse of a married grantor must sign.[3] See Statute

(G) The deed must be properly attested or acknowledged. Section 35-4-20 and 35-4-23.[4]

Since our assigned topic is limited to a consideration of the "authority" required to make a conveyance, we will not consider today any rules other than those that deal with authority to convey. All references to statutory authority, unless stated otherwise, will be to the Code of Alabama, 1975, as amended.

II. AUTHORITY TO EXECUTE

Our main concern in this session is to consider the authority required in different settings for the execution of valid and enforceable instruments of conveyance. The authority required is determined by the character of the grantor. Alabama law recognizes many different entities and treats them as separate "persons" under the law. The following are the most commonly encountered entities:

1. **Individuals**: The individual is the first to be considered. Under the law, everyone is deemed competent to own and dispose of real property unless he or she is laboring under a specified legal incapacity. A Grantor must be 19 years of age (or 18 and married). Section 35-4-1.

2. **Corporations**: Under Section 10-2B-3.02, every corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs – including the buying and selling of real estate – unless its Articles of Incorporation provide otherwise.

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Sims v. Cox, 611 So. 2d 339 (Ala. 1992); *Gowens v. Goss*, 561 So. 2d 519 (Ala. 1990); *Phillips v. Fuller*, 814 So. 2d 885 (Ala. Civ. App. 2001).

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A Deed that is not attested or acknowledged posseses no title but does constitute an agreement to execute a deed. See *Niehuss v. Ford*, 251 Ala. 529, 30 So 2d 484 (1949).

Questions about the authority to convey are usually raised in the context of closing real estate transactions (usually commercial closings) and the issuance of title insurance for the buyer or the buyer's mortgage lender. However, even in the absence of lenders and of title insurance, there is concern over malpractice liability if you represent a buyer and allow him (or it) to make a purchase only to learn later that there are validity issues arising over an alleged lack of authority to sign a deed. Having made the basic observation that Section 10-2B-3.02 vests corporations with essentially the same powers as an individual, several other and related rules must always be kept in mind:

A. Always read the Articles/By-Laws. Require certified copies of the Articles and By-Laws (and all amendments to them) to be furnished and then read them to assure there are no unusual restrictions or limitations.

B. If the sale is in the ordinary course of business, there must be a standard corporate resolution adopted by the Board of Directors whereby the specific transaction of concern is approved and whereby a specified agent of the corporation is given the authority to sign the deed of conveyance and other closing documents. Section 10-2B-12.01.

C. If the sale is not in the ordinary course of business, there must be a standard corporate resolution adopted by the Board of Directors and by the Shareholders.[5] The Director resolution must recommend to the Shareholders that the contemplated transaction be authorized and consummated. The Shareholders must then be given 20 days' written notice of the time, place, location and reason for the shareholder meeting to consider the proposal. The Shareholders must then adopt a resolution by a 2/3 vote of the shares present (and there must be a quorum). The Shareholder resolution must authorize the transaction and specify the agent(s) of the corporation who will be

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AL Red Cedar v. TN Valley Bank, 76 So. 980 (Ala. 1917); *Smith v. AL Life Ins.*, 4 Ala. 558 (Ala. 1843).

authorized to sign the deed and other closing documents. Section 10-2B-12.02.

D. A deed that is regular on its face, purporting to have been executed in the name of the corporation by its president, vice president or secretary shall (when attested or acknowledged as provided by statute) be prima facie evidence that such conveyance was so executed and was duly authorized. When recorded, it must be received in evidence in any court of the state without further proof. Section 35-4-67.

E. Make certain the corporation is named as the Grantor and that the office of the officer signing it is stated.[6] It is important, too, that the Notary acknowledgment conform to the form given in Section 35-4-29. A copy of this format is shown on **Exhibit "A"** hereto.

F. A corporate officer will ordinarily be unfamiliar with the title history so corporate deeds will normally be Limited Warranty Deeds. When negotiating contracts on behalf of corporate sellers, keep this in mind. The buyer should obtain title insurance to assure its title claim is protected.

3. **Limited Liability Companies**: Land may be acquired, held and conveyed in the name of a limited liability company. Section 10-12-23. As with a corporation, a member of a limited liability company owns no interest in the real property owned by the company. If the Articles of Organization provides for management of the company to be by manager, then the manager has the authority to bind the company with a transfer. Otherwise, any member has that authority. Section 10-12-23.

Although there is little statutory procedural guidance for limited liability companies, the caveats for a corporation are deemed applicable:

1. Read the Articles of Organization and Operating

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[6] *Copeland Bros. Realty v. Jones*, 108 So. 591 (Ala. 1926)

Agreement, and each amendment thereto. Require certified copies be furnished for review.

2. Whether in the ordinary course of business or not, have the members sign a resolution authorizing the transaction and naming an agent of the company to sign the deed and other closing documents. If there is any concern at all about the number or identity of the members, require an Estoppel Certificate.

3. Make certain the deed is in the name of the LLC and that the office of the agent signing it is stated. The Notary acknowledgment is in the same format as that given for a corporation by Section 35-4-23. A copy is shown by **Exhibit "A"** hereto.

4. **Partnerships**: Concerns over the authority of a partnership's conveying real estate depends upon the kind of partnership that is involved. There are two kinds of partnerships:

1. **General Partnerships**: The Uniform Partnership Act, as adopted by Alabama, says a general partnership results when two or more persons associate together to carry on a business as co-owners for profit. This is so even if they do not intend to form a partnership. Section 10-8A-202. In a General Partnership all partners are deemed general partners. The act of any partner apparently in the ordinary course of business will bind the company. The act of any partner outside the ordinary course of business will not bind the company unless the act was indeed authorized. Section 10-8A-301. Under Section 10-8A-303, a partnership may file in the Probate Office of the County wherein its main office is located a Statement of Partnership Authority whereby it specifies the authority that its various partners have. As to transfers of land within that county, a person who gives value without knowledge to the contrary, is entitled to rely on the signature of a general partner as being valid – unless such a statement is recorded and sets out limitations to the contrary.

(A) The safest course of action is to require a certified copy of the written partnership agreement (if it is written), and every amendment thereto, to be furnished for review, and to then require a resolution to be adopted by all general partners authorizing the contemplated transaction and specifically authorizing a given partner to sign the deed and other closing documents. If the partnership agreement is not in writing, the partners should be urged to put it in writing. If they do not, at a minimum, have all known partners certify also that there are no partners that have not been disclosed to you

(B) The Notary Acknowledgment should be in the same format as that for a corporation and a limited liability company, and is shown on **Exhibit "A"** hereto.

B. **Limited Partnerships**: The Alabama Limited Partnership Act of 1997 provides for the formation of a partnership with both general and limited partners. Limited partners are essentially investors in the partnership venture and thus are not to participate in the control or management of the business. Section 10-9B-303. As a consequence, limited partners are not liable for partnership debts except to the extent of their investments in the company. A General Partner of a Limited Partnership, on the other hand, is responsible for the management of the business and is liable as is a general partner in a general partnership. Section 10-9B-403. The General Partner(s) have authority to sign deeds.

1. As in a General Partnership, require a copy of the partnership agreement to be furnished to you along with each and every amendment thereto. Read them to make certain that you know who the general partner is — and there may be more than one. If there are more than one, have them all sign a verification that the proposed transaction is

authorized and that a specified general partner is authorized to execute the deed and other closing documents.

2 The Notary Acknowledgment form is similar to that of the corporation. A copy of a suggested format is attached as **Exhibit "A".**

5. **Executors and Administrators**: Although Executors and Administrators both are responsible for the probating of estates, their duties, powers, exemptions and liabilities are very different.

1. **Executors**: This term has historically referred to that individual (or entity) named by a testator in his Will to carry out the directions in the Will and to dispose of the estate assets in the manner provided. The enlightened modern tendency is to style this officer in a more neutral fashion as a "Personal Representative" rather than Executor. The Probate Court, upon a proper application to probate, appoints the Executor (aka Personal Representative) by means of Letters Testamentary. This Order is the formal instrument of authority which empowers the Executor to discharge the duties of his office. Section 43-2-20.

Without question, when dealing with a testate estate, the first thing to do is to confirm the Will has been filed for probate and that Letters Testamentary have been issued to the individual named in the Will to receive such letters. Other important considerations are:

(A) Review the Will to ascertain whether the Testator gave the Executor the power to sell the estate realty. If so, the Executor may do so without further intervention of the Probate Court, subject to the other considerations mentioned herein. Section 43-2-839, Section 43-2-844, Section 35-4-303, Section 35-4-320

(B) Review the Court's Probate file to make certain notice of the death has been published as required by

Section 43-2-60 and that Letters Testamentary have been issued. This notice is designed to inform possible creditors of the decedent of the probate administration and to allow them time to file claims against the estate. Claims can be filed against the estate for a period of six months following the issuance of Letters Testamentary. However, Section 43-2-60, requires the Executor to make a diligent search for creditors and to give them actual notice of the probate administration.[7] The Executor is required to file an affidavit certifying that this has been done. Creditors who have been so notified have six months from the date of notice to file their claims. Section 43-2-50.

(C) Review the Court's Probate file to ascertain whether any claims have been filed against the estate. If there are claims, they must be treated as any other lien against the estate property. Note that claims filed untimely are generally barred. Section 43-2-350.

(D) If you have confirmed there are no claims, and the Executor has power under the Will to sell, then you can deem him or her authorized to execute a deed.

(E) Sometimes there is uncertainty over how to properly display the grantor's name on a deed of conveyance. The preferred and proper way to show the name of the executor-grantor in a deed is as follows:

> John Doe, as Executor of the Estate
> of Richard Roe, deceased

(F) The Notary acknowledgment should be set out as shown by Exhibit "A" hereto relative to conveyances by representatives.

(G) If the Will does not grant the Executor (Personal Representative) power to sell estate property, the Executor must make application to the Probate Court for the

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[7] *See also* § 43-2-62

authority to sell as would an estate Administrator. That discussion is found below.

B. **Administrators**: This term refers to that individual appointed by a Probate Court (rather than by the decedent) to administer the probating of an intestate estate. He must provide a bond with sureties before entering into his duties. Again, the modern tendency is to refer to this officer by the neutral title of "Personal Representative". Upon a proper application, the Probate Court appoints the Administrator by issuance of Letters of Administration. This Order, similar to Letters Testamentary issued to an Executor, is the formal instrument of authority which empowers the Administrator to discharge the duties of his office. Section 43-2-48.

Confusion reigns where there is a probate administration but no Will. Extreme care should be taken when you encounter a need for a conveyance by an Administrator. Here are the main concerns:

(A) Keep in mind that under Alabama law a Will can be filed for five years following death. Section 43-8-161. If the proposed sale is to take place within that five years, there is risk that a Will may subsequently surface and be probated which will dispose of the property in a manner almost certain to differ from the disposition which you supervised by allowing the heirs to sell prematurely. Should that happen, go ahead and notify your E & O carrier.

(B) An Administrator has no authority to convey real property of the estate without the specific approval of the Probate Court. If you represent an estate Administrator and he wants to sell estate property, make certain first that publication has been made and that the claims period has expired (as in a testate estate). Then file a petition with the Probate Court pursuant to Section 43-2-444, seeking approval to sell the land. Any sale by an Administrator is

limited in purpose to the payment of estate debts or for distribution among the heirs. See also Section 43-2-843 and 844.

(C) You are not through yet even if you have your order from the court authorizing the sale. Once you have the authorizing Order, you must then close the transaction but **DO NOT RECORD THE DEED OR DISBURSE ANY SALE PROCEEDS**. You must then file a Report of Sale with the court (Section 43-2-459). The court must allow the report to lie for 10 days before a confirmation order can be signed. Section 43-2-460. If there are no objections filed with the court within the 10 days, then the court will issue a Confirmation Order. That Order should be appended to the deed and recorded with it. Once you have obtained the Confirmation Order, the deed can be recorded and the funds can be disbursed in accordance with law.

6. **Unincorporated Associations**: Prior to 1996, an unincorporated association "was without the capacity to acquire, hold, or convey title to real property."[8] Deeds drawn before 1996 were therefore normally conveyed from or into trustees for the unincorporated association. Until the real property was conveyed, title remained in the trustees.[9] Conveyance, of course, had to be made by the trustees for and on behalf of the association.

In 1995 the Alabama Legislature enacted the **Alabama Unincorporated NonProfit Association Act** (codified at §10-3B-1 et seq) which allows a non-profit unincorporated association to acquire and convey real property in its own name.[10] If you represent such association as a seller of real property (or if you represent a purchaser from such a seller) you will want to consider carefully whether the person executing the deed of conveyance has the requisite authority to do so. Section 10-3B-6 *requires* the filing

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[8] *Walters v. Stewart*, 838 So. 2d 1047 (Ala. Civ. App. 2002).

[9] *Id.*

[10] §10-3B-5

by the association of a Statement of Authority with the Probate Judge where the property is located. That Statement identifies the association by name and address, identifies the agent who will be authorized to sign the document, and sets forth the action by which the authority to sign was granted. You should verify that such statement was filed, and verify that the agent who is offering to sign the document is indeed the agent who was authorized to sign. Should the authority merely state that the President (or some other office holder) has such authority, you may wish to require an incumbancy statement to be provided by which the various officers are identified by sworn statement.

Such transactions ordinarily will arise under either of two scenarios:

1. **Property Conveyed to Trustees Prior to 1996**: The Statement of Authority mentioned above must be filed.[11] Once done, the association may convey property in its own name.

   Such association may, of course, choose to incorporate. When that is done, legal title vested in the association's trustees passes automatically to the newly incorporated entity.[12]

2. **Property Conveyed to the Unincorporated Association After 1996**: Where the association acquires real property in its own name, the basic rules are the same. Require a Statement of Authority to be filed as before, and verify that the individual signing is indeed the individual who is named in the statement as the authorized agent.[13]

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[11] §10-3B-6

[12] *Adams v. Bethany Church*, 380 So. 2d 788 (Ala. 1980).

[13] §10-3B-6

7. **Powers of Attorney**: A Power of Attorney is an instrument whereby one person authorizes another person to do particular acts for him, or to transact business for him, not of a legal nature. A Power of Attorney can be very broad and general in scope or it can be for a very limited purpose. Whether broad or limited, the power may or may not be "durable". That is an important distinction. Prior to the enactment of Section 26-1-2, there was no such thing in Alabama as a "Durable Power of Attorney". The power, whether general or limited, terminated upon the death or mental incapacity of the principal. This imposed a severe problem for lawyers trying to close a transaction under a power of attorney because there was no certainty the principal was alive and well at the moment the deal was closed. This necessitated telephone calls virtually at the closing table to verify the principal was alive and competent. Such concerns were particularly troublesome when the principal was in military service and in a combat zone. Not only was his safety a concern, there was also the practical inability at times to reach him.

   The Alabama legislature finally understood (as did the legislatures of most, if not all other states) that the time of greatest need for a power of attorney is when the principal is indeed incapacitated and cannot think for himself – much less act for himself. Thus was developed the "Durable Power of Attorney" which endures the incapacitation of the principal.

   Many people are now requesting a General Durable Power of Attorney at the time they have their Will or estate plan prepared. Ordinarily, the power is not made effective immediately, but rather is made to spring into effect upon the certification of the principal's physician that the principal has become incapacitated. Should an individual not have such a power of attorney and become incapacitated due to illness or injury, a family member would ordinarily have to establish a guardianship and/or a conservatorship. Doing so is relatively expensive and requires the supervision of the Court. One would hope that the power of attorney purchased would never be needed. The peace of mind is well worth the modest cost.

When one acts under the authority given by a power of attorney, the proper way the signature line should be displayed is as follows:

_____
John Doe

By:_____
His Attorney in fact

The Notary acknowledgment will be similar to that used for officers signing in a representative capacity. The appropriate form is covered under Section 35-4-29. **See Exhibit "A".**

8. **Conservators**: A Conservator is one appointed by a Probate Judge to care for the financial assets of an incompetent person or a minor. This is not to be confused with a Guardian, one who is given the responsibility to care for another's physical needs. A Conservator bears a fiduciary duty in the management of his ward's assets. A Conservator may or may not need court approval before taking certain action. Section 26-2A-152 covers the rules associated with a Conservator's authority to act. If the Conservator must deal with the ward's real estate, he will have to specially petition the Probate Court for approval.[14] He has no authority to execute a deed to the ward's property without advance approval by the Court. With Court approval, he can dispose of the ward's realty for cash or on credit, and at public or private sale.

When a conservator signs a deed on behalf of a principle, the proper way to show the name of the grantor is as follows:

_____
"John Doe, as Conservator of the Estate of Richard Roe, incompetent/or minor" (Grantor herein)"

The Notary acknowledgment will be similar to that used in conjunction with the powers of attorney, as the conservator is acting in a representative capacity. Refer back to **Exhibit "A."**

[14] §26-2A-152(d)

Be particularly careful, however, if a transaction might reasonably involve a conflict of interest. Transactions involving the sale to, or purchase from, the following is voidable unless approved by the Court:

1. The Conservator

2. The spouse, agent or attorney of a Conservator

3. Any person related to the Conservator by blood or marriage within the fourth degree

4. Any corporation, trust or other organization in which the Conservator has a substantial beneficial interest.

5. Any other transaction involving the estate being administered which is affected by a substantial conflict between the fiduciary and personal interests.

9. **Trusts**: A trustee must act in accordance with the authority given in the trust.[15] When closing a transaction involving a sale by a trustee, or when insuring title coming out of a trustee, it is important that you review the trust and any amendments thereto, or at the very least, a memorandum of trust. [16] Ensure that the trustee(s) actually has/have authority to act, that all requirements of the trust have been met, and that the trust has not been terminated. Section 35-4-257 provides for the recordation of a trust in the County where the land is located. Many trustees (and/or beneficiaries of a trust) do not wish to record their trust and to thus give notice to the world of their private business. However, the

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15 §19-3B-815

16 In 2006, the Alabama legislature adopted §19-3B-1013 which allows for the recordation of a certificate or memorandum of trust. Such a document must identify all relevant information about the trust, but seeks to protect the privacy of interested individuals and creates a simpler way of recording information contained in the trust.

trust will not defeat the claims of creditors unless it is recorded. See Section 35-4-256. A recordation of a memorandum of trust pursuant to Section 19-3B-1013 is also sufficient.
When property is deeded from the trust, the signature line should appear as follows:

_____

John Doe, as Trustee of the Smith Family Trust, dated May 1, 2001" (Grantor herein)

10. **Lands owned by the State or by a State Agency**: Unless you are doing work for the Department of Transportation, you will probably never have occasion to address such a task. Nevertheless, there are two basic scenarios that are likely when dealing with a conveyance from the State or from a State agency:

    1.. **State Agency**: Section 36-13-10, states that "all property belonging to the state...is, unless otherwise provided by law, under the control of the Governor". Therefore, even when a sale is to be made by a State agency (as distinguished from the State itself), the conveyance must be approved in writing by the governor on the face of the conveyance. See Section 35-4-382.

    2. **Where title is vested in the State** (as distinguished from an agency of the State), a proposed sale of same will almost always arise from a particular agency's negotiation for the sale. Upon having done so, the agency must certify to the governor that all requirements of law with respect to the sale have been complied with and that the governor has concurred with the sale. The governor may then cause a patent to be issued under the seal of the State and be signed by the governor and attested by the Secretary of State. See Section 35-4-382.

11. **Churches:** There are two basic classifications of churches. One is hierarchical and the other is congregational or self-governing. Hierarchical churches are those involving two or more levels of organization or supervision. Examples are: the Catholic Church, the Episcopal Church, the Methodist Church and the Presbyterian

Church. It is beyond the scope of this brief summary to describe the various procedures required to establish authority by these churches to convey their real property. Suffice it to say that a close examination should be made of the Book of Discipline for the church under consideration (or other authoritative church guideline) to ascertain the required procedures.

The authority required for non-hierarchical churches is set out in Section 10-4-20, et seq., Code of Alabama. A resolution adopted by a church congregation in a regular assembly can authorize a sale of any or all the church's property by its Trustees or other Agents. If the congregation chooses to consider such a resolution at a "Special Meeting", notice of the time, place and object of the meeting must be given at least ten (10) days prior to the meeting by posting Notice at the place of the regular meetings. Section 10-4-25.

The Trustees of a congregational church have the authority to borrow money on behalf of the church and to secure the loan with a mortgage if the church has adopted a resolution authorizing the Trustees to do so. A certified copy of the church congregation's authorizing resolution is prima facie evidence of the authority to convey by the Trustees.

12. **Professional Association**s: A Professional Association, historically, has been an unincorporated association organized under Alabama law for the purpose of rendering professional services. Although Professional Associations still exist, the authority to form new Professional Associations terminated January 1, 1984. See Section 10-4-406.

Beginning January 1, 1984, the filing of Professional Association Articles follow the same procedures as business corporations. Section 10-4-381. Under current law, a Professional Corporation shall be governed by the regulating board of the Association. Section 10-4-387.

With respect to Professional Associations organized prior to January 1, 1984, a conveyance in the name of the Association which is executed by the President and attested by the Secretary is conclusively presumed to be properly executed.

Professional Corporations formed after January 1, 1984 have the same powers as those enumerated under the Alabama Business Corporation Act. Section 10-4-385.

EXHIBIT "A"

ACKNOWLEDGMENT FOR INDIVIDUAL

STATE OF ALABAMA
_____ COUNTY

I, the undersigned _____ Notary Public hereby certify that _____, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this the ___ day of _____ 2008.

_____
Notary Public

ACKNOWLEDGMENT FOR A CORPORATION

STATE OF ALABAMA
_____ COUNTY

I, the undersigned _____ Notary Public in and for said County in said State hereby certify that_____ whose name as (President – or other office) of XYZ Company, Inc, a corporation, is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand this the ___ day of _____ 2008.

_____
Notary Public

ACKNOWLEDGMENT FOR OFFICIAL IN REPRESENTATIVE CAPACITY

STATE OF ALABAMA
_____ COUNTY

I, _____, a Notary Public in and for said County in said, hereby certify that _____, whose name as _____ is signed to the foregoing conveyance and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he, in his capacity as such _____ executed the same voluntarily on the day the same bears date.

Given under my hand this the ___ day of _____ 2008.

_____
Notary Public

ACKNOWLEDGMENT FOR CORPORATION IN REPRESENTATIVE CAPACITY

STATE OF ALABAMA
_____ COUNTY

I, _____, a Notary Public in and for said County, in said State, hereby certify that _____ whose name as _____ of _____ a corporation as _____ of the estate of _____, deceased, is signed to the foregoing _____ and who is known to me, acknowledged before me on this day, that being informed of the contents of said _____ he, as such officer, and with full authority, executed the same voluntarily for and as the act of said corporation, acting in its capacity as _____ as aforesaid.

Given under my hand this the ___ day of _____ 2008.

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Notary Public

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