

RE:

Submitted by: New York State Law Revision Commission

MEMORANDUM IN SUPPORT

TITLE OF BILL: An act to amend the general obligations law in relation to powers of attorney, to provide definitions and general requirements for valid powers of attorney, provide for the duties of the agent, require the agent to sign the power of attorney form, provide procedures for the revocation of the power of attorney, and provide for civil proceedings with respect to powers of attorney.

PURPOSE: This bill fills in several gaps in the general obligations law and clarifies several ambiguities in the statute. It amends the general obligations law to address the impact of HIPAA's Privacy Rule on powers of attorney, the Agent's fiduciary obligations, the Principal's execution of a Power of Attorney that delegates authority to the Agent to make major gifts and other asset transfers, the circumstances under which the Agent is authorized to make gifts to himself or herself, the Principal's ability to revoke the power of attorney and appoint a designee to monitor the Agent's actions, the circumstances under which a third party's refusal to accept the instrument is permissible, and the procedure for challenging a power of attorney or the acts of the Agent.

SUMMARY OF MAJOR SPECIFIC PROVISIONS: The major significant changes recommended by the Commission are as follows:

A. Major Gifts and Other Property Transfers: The bill requires that a grant of authority to make major gifts and other asset transfers must be set out in a Major Gifts Rider which is witnessed in the same manner as a Will. The creation of a Major Gifts Rider allows the Principal to make an informed decision as to whether the Agent may make gifts or other transfers of the Principal's property to third parties as well as to the Agent. The execution requirements alert the Principal to the gravity of granting the Agent this type of authority.

B. HIPAA Privacy Rule: The bill adds the term "health care billing and payment matters" to the term "records, reports and statements" as those terms are explained in section 5-1502K, so that an Agent can examine, question, and pay medical bills in the event the Principal intends to grant the Agent power with respect to records, reports and statements.

C. Agent: The bill includes a statutory explanation of the Agent's fiduciary duties. A Notice to the Agent is added to the statutory short form explaining the role of the Agent, the Agent's fiduciary obligations and the legal limitations on the Agent's authority. If the Agent intends to accept the appointment, the Agent is required to sign the power of attorney as an acknowledgment of the Agent's fiduciary obligations.

The bill also requires that in transactions on behalf of the Principal, the Agent's legal relationship to the Principal must be disclosed where a handwritten signature is required. In all transactions (including electronic transactions) where the Agent purports to act on the Principal's behalf, the Agent's actions constitute an attestation that the Agent is acting under a valid power of attorney and within the scope of the authority conveyed by the instrument. The bill provides

that the Principal may provide in the power of attorney that the Agent receive reasonable compensation if the Principal so desires. Without this designation, the Agent is not entitled to compensation.

D. Principal: The bill adds a section to the statute that explains how the power of attorney can be revoked. It expands the Caution to the Principal so that the Principal will be better informed about the serious nature of the document. The bill also permits the Principal to appoint someone to monitor the Agent's actions on behalf of the Principal, and gives the Monitor the authority to request that the Agent provide the Monitor with a copy of the power of attorney and a copy of the documents that record the transactions the Agent has carried out for the Principal.

E. Third Parties: The bill provides that third parties have the ability to refuse to accept powers of attorney based on reasonable cause. Reasonable cause includes the Agent's refusal to provide an original or certified copy of the power of attorney, the third party's good faith referral of the Principal and the Agent to the local adult protective services unit, the third party's actual knowledge of a report to the local adult protective services unit by another person, actual knowledge of the Principal's death, or the incapacity of the Principal if the power of attorney is nondurable. The bill expands the definition of "financial institution" to include securities brokers, securities dealers, securities firms, and insurance companies and provides that a financial institution must accept a validly executed power of attorney without requiring that the power of attorney be on the institution's own form. The third party does not incur any liability in acting on a power of attorney unless the third party has actual notice that the power is revoked or otherwise terminated. A financial institution is deemed to have actual notice of revocation when the office where the account is located receives written notice.

F. Other Major Provisions: The bill increases the amount of the gifting provision to that of the annual exclusion amount under the Internal Revenue Code. It adds a provision allowing gifting to a "529" account up to the annual gift tax exclusion amount. "529" accounts, authorized in the Internal Revenue Code at section 529, are popular tax-advantaged savings accounts for education expenses. The bill amends the provisions regarding gift splitting to allow the Principal to authorize the Agent to make gifts to a defined list of relatives from the Principal's assets up to twice the amount of the annual gift tax exclusions, with the consent of the Principal's spouse.

STATEMENT IN SUPPORT:

This bill has been introduced at the request of the New York State Law Revision Commission.

The power of attorney is a written instrument whereby an individual appoints another person to act on his or her behalf in financial matters. The person making the appointment is known as the "Principal;" the person receiving the appointment is known as the "Agent." Their relationship is governed by the law of agency. The power of attorney is widely used for financial and estate planning and for avoiding the expense of guardianship in the event of incapacity. Its popularity among attorneys and the public at large has also led to its use for transactions far more complex than those originally contemplated by the law, particularly in the area of gift giving and property transfers. Given an aging population and the concomitant increase in the potential for incapacity, the use of the power of attorney, particularly the durable power of attorney, whose effectiveness continues beyond the Principal's incapacity, is likely to become even more widespread.

As well as being useful, the power of attorney is deceptively simple to create. It can be

obtained from any number of websites on the Internet or in a stationery store and its execution merely requires the Principal's signature be acknowledged by a notary public. But this simplicity belies the extraordinary power that this instrument can convey. The potential authority of the Agent can include power to transfer assets that pass by Will as well as assets such as life insurance or retirement benefits that ordinarily pass outside a Will. The Principal may delegate these sweeping powers to the Agent without fully understanding the scope of the Agent's authority.

Despite the broad authority associated with this important legal tool, monitoring the Agent's exercise of her authority is difficult. The Agent can act immediately and without notice to the Principal, even a Principal with capacity. With a durable power of attorney, which continues in effect after the Principal's incapacity, the Agent can continue to act without oversight even though the incapacitated Principal is no longer able to control or review the Agent's actions, an arrangement that was not permitted by common law.

Not only is the lack of any oversight troubling, the general obligations law, which governs the use of powers of attorney, is silent on several salient elements of the use of powers of attorney: (1) the Agent's fiduciary obligations and accountability, (2) the disclosure of the agency relationship when the Agent's handwritten signature is required, (3) the events which terminate the power of attorney, (4) the circumstances when refusing to accept a power of attorney is reasonable, and (5) the use of powers of attorney to obtain medical records which are protected by the HIPAA Privacy Rule of 2003 regarding confidentiality of an individual's health information.

Ambiguities in the general obligations law and the statutory short form power of attorney surrounding an Agent's authority to make gifts and other property transfers can create problems about whether the exercise of such authority is permissible, particularly when an incapacitated Principal can no longer clarify his or her intent.

Based on its study, the Commission has concluded that while a power of attorney should remain an instrument flexible enough to allow an Agent to carry out the Principal's reasonable intentions, the combined effect of its potency and ease of creation, statutory silence about an Agent's responsibilities, and statutory ambiguities about the authority to transfer assets can frustrate the proper use of the power of attorney, particularly when a Principal is incapacitated and can no longer take steps to ensure its proper use. To the extent that guidance can be found in the common law, its principles should be codified in the general obligations law to provide clarity and direction for Principals and Agents. The statute should also offer guidance to third parties asked to accept powers of attorney and those asked to investigate financial exploitation.

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: This act shall take effect on the first day of January next succeeding the date on which it shall have become law.