

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 attorney-in-fact, require the attorney-in-fact 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 codifies the common law with respect to powers of attorney and provides instruction and clarification on how to execute, use, and revoke both short-form and custom powers of attorney. The provisions also instruct the attorney-in-fact on the fiduciary obligations associated with acting pursuant to the power of attorney, how to sign when acting on behalf of the principal, and the significance of the signature. While not unduly burdening the use of powers of attorney, these provisions are intended to make it more difficult to use powers of attorney for financial exploitation of elderly and vulnerable principals.

SUMMARY OF SPECIFIC PROVISIONS

Section 1 repeals section 5-1501 of the general obligations law, which provided model statutory short forms for nondurable and durable powers of attorney and prescribed the basic requirements of short forms including incorporation of notice and directions to the principal. Section 5-1501 and 5-1506 are organized into new sections 5-1501A, nondurable power of attorney, 5-1501B, durable power of attorney, and 5-1501C, power of attorney effective at a future time.

Section 2 adds a new section 5-1501, which defines significant terms used throughout the statute.

Sections 3, 4 and 5 add new sections 5-1501A, 5-1501B and 5-1501C described above. To create a more reader-friendly format, each section contains two parts: the first prescribing the requirements for that power of attorney; and the second providing a model statutory short form. Sections 5-1501A and 5-1501C also provide model forms authorizing the release of protected health information related to capacity. Under the “Privacy Rule” of the Health Insurance Portability and Accountability Act of 1996, (HIPAA), such forms may be needed to accompany a nondurable power of attorney, which will cease to be effective when the principal becomes incapacitated, or a power of attorney effective at a future time if the principal wants it to take effect when the principal becomes incapacitated.

Sections 6 through 20 make grammatical changes to the construction sections, 5-1502A through 5-1502O, to make the usage of the terms “attorney-in-fact” and “agent” consistent throughout the statute. In addition, to make these sections gender-neutral like the rest of the statute, these sections change “his” to “his or her.”

Section 12 also amends section 5-1502G regarding the construction of the term: “estate transactions” in the power of attorney form to clarify that the attorney-in-fact who is authorized to engage in estate transactions has the authority to act with respect to any estate, trust or other fund, regardless of whether the estate, trust or other fund is specifically identified or in existence at the time the principal executes the power of attorney.

Section 16 amends section 5-1502K regarding the construction of the term: health care billing and payment matters; records, reports and statements” to remove any ambiguity about whether an attorney-in-fact acting under an existing or future power of attorney can access health care records in connection with the payment of health care bills.

Section 18 amends section 5-1502M regarding the construction of the term: “certain gift transactions” in the power of attorney form to conform to gifting provisions in the Internal Revenue Code.

Section 20 amends section 5-1502O regarding the construction of the term “all other matters,” to reflect the amendment to section 5-1502K regarding the limitation on the attorney-in-fact’s authority to make health care decisions for the principal

Section 21 amends section 5-1503 to permit modification of the statutory short form in two additional ways without invalidating the instrument as a statutory short form: to require that the attorney-in-fact has a duty to act pursuant to the power of attorney; and to designate who has authority to request and receive from the attorney-in-fact a complete record of all transactions on the principal’s behalf.

Section 22 amends section 5-1504 to permit third parties to refuse to honor a power of attorney for “reasonable cause.” The statute defines specific circumstances that do and do not constitute reasonable cause. The circumstances listed as constituting reasonable cause are not intended to be exclusive. The statute also describes circumstances which do not constitute reasonable cause. A third party will not be liable for honoring a power of attorney if it has not received actual notice of revocation by the principal or by operation of law.

Section 23 repeals section 5-1505, which prescribed the requirements for a durable power of attorney, the statutory short form for which was set forth in former section 5-1501. The reorganization of former sections 5-1501 and 5-1505 into new section 5-1501B necessitates the repeal of 5-1505.

Section 24 adds a new section 5-1505, which describes the authority of the attorney-in-fact, the standard of care that the attorney-in-fact must use, the nature of the attorney-in-fact’s fiduciary relationship with the principal, the potential liability of the attorney-in-fact, and the state’s jurisdiction over an attorney-in-fact who acts in the state, or whose actions affect property in this state.

Section 25 repeals section 5-1506, which prescribed the requirements of a power of attorney effective at a future time or upon the occurrence of a contingency specified in the power of attorney. The requirements and statutory short form are included at new section 5-1501C.

Section 26 adds a new section 5-1506, which provides that an attorney-in-fact is not entitled to compensation unless the principal specifically authorizes it. The new section also provides that an attorney-in-fact is entitled to reimbursement for reasonable expenses actually incurred in connection with his or her duties as attorney-in-fact.

Section 27 adds a new section 5-1507, which prescribes the manner in which the attorney-in-fact must sign whenever he or she is acting on behalf of the principal under the authority of the power of attorney.

Section 28 adds a new section 5-1508, which authorizes a special proceeding pursuant to CPLR article four for the following purposes: (1) compelling the attorney-in-fact to make records of transactions available; (2) determining the validity of the power of attorney; (3) determining whether the principal had capacity when the power of attorney was executed; (4) determining if the power of attorney was wrongfully procured; (5) removing the attorney-in-fact; (6) determining compensation issues; (7) approving the resignation of the attorney-in-fact; and (8) compelling a third person or financial institution to honor a power of attorney.

Section 29 adds a new section 5-1509, which provides three methods by which a principal may revoke a power of attorney: (1) expressly providing for the method of revocation in the document; (2) physically destroying all executed originals of the power of attorney and any copy that has been honored and retained by a third party; or (3) delivering a signed and dated revocation. New section 5-1509 also includes a revocation form which the principal may use.

Section 30 adds a new section 5-1510, which provides that powers of attorney validly executed in other jurisdictions must be accepted as valid for use in New York.

STATEMENT IN SUPPORT: This bill has been introduced at the request of the New York State Law Revision Commission. The Commission conducted an extensive study of the use and abuse of powers of attorney in New York and in other jurisdictions. In addition to this research, the Commission hosted a Roundtable Discussion on March 22, 2002 that included participants from the Legislature and the Judiciary, legislative staff, prosecutors and adult protective service investigators from around the state, representatives from the Office for Children and Family Services, Office for the Aging, the Attorney General's Office, and the Lawyers' Fund for Client Protection, and lawyers specializing in trust and estates practice. The members of the Commission and its staff also met on separate occasions with several of these participants for further discussion.

Based on its study, the Commission has determined that while powers of attorney are an extensively used part of estate planning, the lack of sufficient statutory direction can frustrate the effective use of powers of attorney and creates the potential for systematic financial exploitation of vulnerable adults. The general obligations law is silent regarding several significant aspects of the use of powers of attorney. It provides no guidance as to how a principal can revoke a power of attorney, how an attorney-in-fact is to sign a document on behalf of the principal, the nature and consequences of the fiduciary obligation of the attorney-in-fact, whether the attorney-in-fact can access the principal's health care records, whether the attorney-in-fact has a duty to act on behalf of the principal, the

consequences of a third party's refusal to accept a valid power of attorney, and the validity of powers of attorney validly executed in other jurisdictions. For many of these aspects, the common law likewise offers little or no guidance. The Commission's proposal amends the general obligations law to provide clarity and direction.

Concomitantly, many of the provisions of the Commission's proposal address the growing concern over the use of powers of attorney in the financial exploitation of vulnerable adults.

Newspaper headlines,¹ case files of adult protective services,² and court decisions³ attest to the growing problem of financial exploitation in New York. Other states, including California, New Jersey, Pennsylvania, Texas, Florida, Minnesota, Missouri, and Vermont, have adopted statutes addressing similar concerns. Their initiatives include:

- 1) Requiring the attorney-in-fact to acknowledge his or her fiduciary duties as part of the execution of a valid power of attorney.
- 2) Enacting statutes that specify the attorney-in-fact's fiduciary duties
- 3) Establishing a procedure for adult protective services investigators and others to obtain a

¹ "Schenectady prosecutors say two men took \$1.2 million from woman who suffered from Alzheimer's." (4/13/02 Times Union B3, 2002 WL 8901043); "A Bay Ridge attorney surrendered to police yesterday on charges that he stole more than \$2 million from 10 clients, including the life savings of a 90-year-old distant relative..." (3/21/02 Newsday A08, 2002 WL 2734109; *see also*, 3/21/02 NY Post 12, 2002 WL 15214151); "DeWitt police say an assistant bank manager was accused of befriending an 85-year-old customer, persuading the woman to grant her power of attorney and then stealing \$93,597.07 of her retirement savings." (5/17/02 Syracuse Newspapers A1, 2002 WL 5999091); "Two New York City women were arraigned Thursday in City Court on charges they stole thousands of dollars from an elderly Ukrainian man living in Syracuse. . . Court papers indicate the women also had been trying to use power of attorney papers to withdraw more than \$300,000 from the victim's account at the Self-Reliance Ukrainian Federal Credit Union." (7/26/02 Syracuse Newspapers B2, 2002 WL 6010204); "The daughter of a retired subway conductor who cashed nearly \$35,000 of her dead father's pension checks [using a power of attorney] has been charged with grand larceny." (6/4/01 NY Daily News 1, 2001 WL 17953625); "A pioneer New York businesswoman-socialite who helped shape the public-relations industry spent her final years shut away in a nursing home while a relative grabbed control of her multimillion-dollar estate." (6/5/01 NY Post 17, 2001 WL 19772645); "A housekeeper allegedly stole more than \$435,000 from a 93-year-old Forest Hills widow and then moved in on an incapacitated retired police officer, trying to sell his co-op apartment." (8/3/01 Newsday A17, 2001 WL 9243923; *see also*, 8/3/01 NY Daily News 4, 2001 WL 23588223); "A disbarred lawyer and a nursing home official admitted bilking 16 nursing home patients out of more than \$2.1 million. They picked people who had no one to watch out for them and emptied their bank accounts." (1/15/02 NY Daily News 2, 2002 WL 3163918).

² Comments of representatives of Adult Protective Services and Office of Children and Family Services at Law Revision Commission Roundtable, March 22, 2002..

³ *See, e.g., In re Butin*, 750 N.Y.S.2d 619 (2nd Dept. 2002); *Hill v. Bulden*, 191 Misc.2d 354 (Sup. Ct. 2002); *Goldstein v. Block*, 288 A.D.2d 182, 733 N.Y.S.2d 98 (2nd Dept. 2001); *In re Prosperi*, 286 A.D.2d 99, 731 N.Y.S.2d 154 (1st Dept. 2001); *People v. Camiola*, 225 A.D.2d 380, 639 N.Y.S.2d 35 (1st Dept. 1996); *People v. De Leo*, 185 A.D.2d 374, 585 N.Y.S.2d 629 (3rd Dept. 1992); *Matter of Warren L. Boulanger*, 107 A.D.2d 28, 485 N.Y.S.2d 285 (2d Dept. 1985); *In re Guardianship of Kent*, 188 Misc.2d 509, 729 N.Y.S.2d 352 (N.Y. Sup. 2001); *In re Jennie Fanelli*, N.Y.L.J. (Sup. Ct. N.Y. Co.) Feb. 23, 1998; *In re Johnson*, 172 Misc.2d 684, 658 N.Y.S.2d 780 (Sup. Ct. Suff. Co. 1997); *In re Kustka*, 163 Misc.2d 694, 622 N.Y.S.2d 208 (Sup. Ct. Queens Co. 1994); *In re Rochester Hospital (Levin)*, 158 Misc.2d 522, 601 N.Y.S.2d 375 (Sup. Ct. Monroe Co. 1993). *See also In re Kuperman*, 285 A.D.2d 200, 728 N.Y.S.2d 67 (2nd Dept. 2001). *See generally, Fitzgerald v. Fitzgerald*, 753 N.Y.S.2d 570 (3rd Dept. 2003).

record of the attorney-in-fact's acts under the power of attorney.

In contrast, New York's power of attorney law is largely defined by common law principles that are often difficult to discern and inadequate to address the problem of power of attorney abuse.

The Commission recommends, therefore, that the General Obligations Law be amended to affirmatively establish measures clarifying the use and acceptance of powers of attorney and preventing abuse without burdening the utility of the power of attorney as an estate planning tool.

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.