THE NEW YORK STATE
LAW REVISION COMMISSION

2003

REPORT ON PROPOSED REVISIONS TO THE GENERAL OBLIGATIONS LAW IN RELATION TO POWERS OF ATTORNEY

NEW YORK STATE
LAW REVISION COMMISSION

80 New Scotland Avenue
Albany, New York 12208

(518) 472-5858
(518) 445-2303 (fax)

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Michael J. Hutter
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Sanford S. Dranoff
Rose Mary Bailly, Executive Director

Ex-officio

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I. Introduction

The New York State Law Revision Commission has conducted an extensive study of the use of powers of attorney in New York and in other jurisdictions.[1] 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 financial exploitation of vulnerable adults. The general obligations law is silent regarding several

[1] In addition, 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, 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 various of these participants for further discussion.

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 has a duty to act on behalf of the principal, and the consequences of a third party's refusal to accept a valid power of attorney. For many of these, the common law likewise offers little or no guidance. In addressing these concerns, the Commission looked at the provisions as they relate to the principal, the attorney-in-fact, third parties, the potential for abuse, and general organization of the statute, in order to provide clarity and direction without burdening the utility of the power of attorney as an estate planning tool.

II. **Provisions Relating to the Principal**

A. Notice to the Principal

New York law requires inclusion of a prescribed warning in a valid Power of Attorney. The current statutory language states:

> CAUTION: THIS IS AN IMPORTANT DOCUMENT. IT GIVES THE PERSON WHOM YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY DURING YOUR LIFETIME, WHICH MAY INCLUDE POWERS TO MORTGAGE, SELL, OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU. THESE POWERS WILL CONTINUE TO EXIST EVEN AFTER YOU BECOME DISABLED OR INCOMPETENT.
> THESE POWERS ARE EXPLAINED MORE FULLY IN NEW YORK GENERAL OBLIGATIONS LAW, ARTICLE 5, TITLE 15, SECTIONS 5-1502A THROUGH 5-1503, WHICH EXPRESSLY PERMIT THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY.
> THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL OR OTHER HEALTH CARE DECISIONS. YOU MAY EXECUTE A HEALTH CARE PROXY TO DO THIS.
> IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.[2]

An often heard complaint about this warning is that it is too difficult to understand for most people. Other states have developed simpler language that provides more information. Pennsylvania's notice, for example, states:

> NOTICE

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[2] N.Y. Gen. Oblig. L. §§ 5-1501(1) and (1-a), and 5-1506(4).

> The purpose of this power of attorney is to give the person you designate (your "agent") broad powers to handle your property, which may include powers to sell or otherwise dispose of any real or personal property without advance notice to you or approval by you.
>
> This power of attorney does not impose a duty on your agent to exercise granted powers, but when powers are exercised, your agent must use due care to act for your benefit and in accordance with this power of attorney.
>
> Your agent may exercise the powers given here throughout your lifetime, even after you become incapacitated, unless you expressly limit the duration of these powers or you revoke these powers or a court acting on your behalf terminates your agent's authority.
>
> Your agent must keep your funds separate from your agent's funds.
>
> A court can take away the powers of your agent if it finds your agent is not acting properly.
>
> The powers and duties of an agent under a power of attorney are explained more fully in 20 Pa.C.S. Ch. 56.
>
> If there is anything about this form that you do not understand, you should ask a lawyer of your own choosing to explain it to you.[3]

Based on this and other examples, the Commission recommends that the cautionary statement read as follows:[4]

> CAUTION TO THE PRINCIPAL: This is an important document. As the "principal," you are giving the person whom you choose (called the "attorney-in-fact") powers during your lifetime to sell or otherwise dispose of your property and spend your money without advance notice to you or approval by you. The broad powers you can give your attorney-in-fact are explained in the New York General Obligations Law, Article 5, Title 15, Sections 5-1502A through 5-1502O and 5-1503. After careful consideration, you may decide to limit the powers you give your attorney-in-fact.

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[3] 20 Pa.. Cons. Stat. § 5601 (2002).

[4] The proposed language given here is for a Nondurable Power of Attorney. For a Durable Power of Attorney, the Commission recommends that the following additional language be included: "If you do not choose to revoke this Durable General Power of Attorney, the authority you confer in this document will continue to be effective even if you are no longer of sound mind." Additional recommended language for a General Power of Attorney Effective at a Future Time is: "This General Power of Attorney Effective at a Future Time is not effective until it is signed by the attorney-in-fact (or attorneys-in-fact if you designate two or more attorneys-in-fact to act together) AND the event you specify takes place."

> To ensure that your attorney-in-fact exercises the powers you grant, you can include special instructions requiring the attorney-in-fact to act on the powers. When your attorney-in-fact exercises the powers you grant, he or she must use due care to act for your benefit. Read the "Notice to the Attorney-in-Fact" near the end of this document to learn more about the duties and responsibilities of your attorney-in-fact.
>
> If you become incapacitated, this document is no longer effective, and your attorney-in-fact cannot continue to act on your behalf.
>
> You have the right to revoke or terminate this Nondurable General Power of Attorney at any time as long as you are of sound mind. The proper ways to revoke are explained in the New York General Obligations Law, Article 5, Title 15, Section 5-1509.
>
> This Nondurable General Power of Attorney does not authorize anyone to make medical or other health care decisions for you. You may execute a "Health Care Proxy" to do this.
>
> This Nondurable General Power of Attorney is not effective until it is signed by the attorney-in-fact (or attorneys-in-fact if you designate two or more attorneys-in-fact to act together).
>
> The law governing Powers of Attorney is found at the New York General Obligations Law, Article 5, Title 15. If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you."

This revised "caution" statement uses layperson's terms to explain to the principal the legal effect of a power of attorney and the obligations of the attorney-in-fact. A principal who understands the risks and obligations created in a power of attorney can be more active or vigilant in ensuring that the attorney-in-fact is acting appropriately. The instructions also provide notice to the principal on how the instrument may be revoked, to facilitate revocation in those instances where the principal has the capacity to revoke. Inclusion of the notice is also intended to avoid unnecessary legal consultation for the relatively simple matter of revocation.

B. Revocation

Although the statutory short forms inform the principal that the power of attorney "may be revoked by [the principal] at any time,"[5] and the general obligations law provides that the principal agrees "to indemnify and hold harmless any . . . third party" "unless and until actual notice of knowledge of such

[5] *See* N.Y. Gen. Oblig. L. §§ 5-1501(1), 1(a) and 5-1506.

revocation or termination shall have been received by such third party,"[6] the statute provides no guidance on how to revoke a power of attorney. Case law, likewise, provides little guidance. "As a general rule an attorney in fact's authority may be revoked by the principal either expressly or impliedly through words or conduct which are inconsistent with the continuation of authority."[7]

The Commission recommends providing specific direction for the revocation of powers of attorney by the principal and by operation of law.

1. Revocation by the Principal

The Commission's proposal 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 of a power of attorney that has been honored and retained by a third party; or (3) delivering a signed and dated revocation of power of attorney to the attorney-in-fact.

Option two, physical destruction of all originals and copies retained by third parties, provides a straightforward method of revocation that also ensures that third parties are aware of the principal's intent to revoke. Even if the attorney-in-fact does not make the power of attorney available to the principal for destruction, the principal can put all third parties on notice of his or her intent to revoke by destroying any copies retained by those parties. The principal can then deliver a written revocation to the attorney-in-fact to complete the revocation.

Option three, delivery of a written revocation to the attorney-in-fact, terminates the authority of the attorney-in-fact to act, even where the attorney-in-fact may contend that the principal lacks the capacity to revoke. If the attorney-in-fact continues to act, the attorney-in-fact may be subject to civil and criminal liability pursuant to the proposed new section authorizing civil proceedings.

However, the written revocation option also clarifies that third parties who have not received written notice of a revocation are not liable for acting in good faith upon the power of attorney. This is intended to prompt the principal to deliver written notice to third parties. An actual notice requirement is consistent with section 5-1504(4), which provides:

No financial institution receiving and retaining a statutory short form power of attorney

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[6] *Id.*

[7] *Zaubler v. Picone,* 100 A.D. 2d 620 (2d Dep't 1984), citing Restatement (Second) of Agency, § 119; *see also Edgarton v. Edgarton*, 54 N.Y.S. 2d 495 (N.Y. Sup. Ct., Madison Co. 1998) (holding that a naked power of attorney may be canceled by grantor by merely revoking the power, serving notice of such revocation on grantee of power, and forbidding him to act in grantor's behalf).

> properly executed in accordance with section 5-1501 or 5-1506 of this title . . . shall incur any liability by reason of acting upon the authority thereof unless the financial institution shall have *actually received*, at the office where the account is located, *written notice* of the revocation or termination of such power of attorney.[8] (emphasis supplied)

Similarly, a trustee of a lifetime trust must receive actual notice of a revocation of a trust before any liability can be incurred for acting in reliance on the trust instrument.[9]

Finally, the proposed revision provides that where a power of attorney has been recorded for property transactions pursuant to section 294 of the real property law, the principal must also record the written revocation pursuant to section 326 of the real property law.

2. Revocation by Operation of Law

The proposal provides that a power of attorney is revoked by operation of law in three circumstances: pursuant to court order, upon the death of the principal, and, for a nondurable power of attorney, upon the incapacity of the principal.

Revocation by court order is consistent with both the mental hygiene law (MHL) and proposed section 5-1508 (civil proceedings). MHL section 81.29(d) authorizes a court, upon a finding of incapacity and appointment of a guardian, to "modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, 5-1601, or 5-1602 of the general obligations law." In addition, the proposal authorizes a court to revoke a power of attorney where it determines that the power of attorney was wrongfully procured, or where the attorney-in-fact is unfit or the court has approved the resignation of an attorney-in-fact and there is no alternate attorney-in-fact appointed.

Second, a power of attorney is revoked by operation of law upon the death of the principal. However, the attorney-in-fact's authority to act under the power of attorney, and/or a third party's reliance on the power of attorney are not terminated until such party has actual notice of the principal's death. The approach set forth in this section is modeled on that adopted by California, Pennsylvania, and Minnesota, among others.[10]

Third, a general, non-durable, non-springing power of attorney will be revoked by operation of law when the principal becomes incapacitated.

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[8] *See also Ferrentino v. Dime Savings Bank*, 159 Misc. 2d 690 (N.Y. Sup. Ct. Suffolk Co. 1993).

[9] *See* N.Y. Est. Powers & Trusts L. § 7-1.17.

[10] *See, e.g.*, Cal. Prob. Code §§ 4152, 4153 (West 2003); 20 Pa. Cons. Stat. § 5605 (2002); Minn. Stat. § 523.20 (2002).

3. Revocation of Attorney-in-Fact's Authority and Authority to Gift to Former Spouse Upon Divorce from Principal

The proposal addresses two authorities affected by the divorce of a principal. When the principal names his or her spouse as attorney-in-fact, and is later divorced, the attorney-in-fact's authority is revoked by operation of law. Similarly, when the principal names his or her spouse as a permissible recipient of gifting in the power of attorney, and is later divorced, the power to gift to the former spouse is revoked by operation of law. Both provisions are based on the assumption that a principal who executed a power of attorney naming his or her spouse as attorney-in-fact or as a permissible recipient of gifting and is subsequently divorced would not want the former spouse to serve as attorney-in-fact or to receive gifts. The estates, powers, and trusts law contains similar provisions.[11] The proposal applies to the designation of the former spouse as attorney-in-fact, and has no effect on the validity of the power of attorney for any joint or successor attorneys-in-fact. Proposed revocation of the authority to gift to the former spouse likewise does not affect gifting to other recipients. This revocation affects both the statutory gifting authority to the spouse ("making gifts to my spouse, children and more remote descendants, and parents . . ."), where the gifting class is determined at the time of the contemplated gift, rather than at the time of execution of the power of attorney, and gifting where the spouse is included by name in the gifting class.

4. Revocation Form

The Commission recommends that the revised statute provide a revocation form for the principal to use, if he or she wishes.

C. Designated Recipient of Attorney-in-Fact's Record of Transactions

The Commission's proposal permits the principal to designate a person or persons who will have the authority to request and receive a complete record of all receipts, disbursements and transactions entered into by the attorney-in-fact on behalf of the principal. The attorney-in-fact has the obligation to maintain such records pursuant to proposed section 5-1505. In designating a recipient for the record of transactions, the principal has a simple means to ensure that someone has the ability to review the attorney-in-fact's acts without incurring the effort and expense of a court proceeding.

III. **Provisions Relating to the Attorney-in-Fact**

A. Notice to the Attorney-in-Fact

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[11] *See, e.g.*, N.Y. Est. Powers & Trusts L. §§ 5-1.2 (disqualification as surviving spouse) and 5-1.4 (revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment or other provision in will to former spouse).

Another often cited problem in the current statute is the lack of any notice, statutory or otherwise, advising the attorney-in-fact that he or she has a fiduciary duty to the principal. Several states address this problem by requiring a valid power of attorney to include language indicating that the attorney-in-fact has a fiduciary duty to the principal.[12] Of these, both California and Pennsylvania require the agent to sign the power of attorney and acknowledge these duties.[13] For example, in Pennsylvania, an agent has no authority to act as agent under the power of attorney unless the agent has first executed and affixed to the power of attorney an acknowledgment in substantially the following form:[14]

> I, _____, have read the attached power of attorney and am the person identified as the agent for the principal. I hereby acknowledge that in the absence of a specific provision to the contrary in the power of attorney or in 20 Pa.C.S. when I act as agent:
>
> I shall exercise the powers for the benefit of the principal.
>
> I shall keep the assets of the principal separate from my assets.

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[12] *See, e.g.,* Cal. Prob. Code § 4128 (West 2003); 20 Pa. Cons. Stat. § 5601 (2002); Tex. Prob. Code Ann. § 490 (West 2003); Colo. Rev. Stat. § 15-1-1302 (2002); Okla. Stat. tit. 15, § 1003 (2003).

[13] California probate code section 4128 requires a valid power of attorney to include the following language:

> By acting or agreeing to act as the agent (attorney-in-fact) under this power of attorney you assume the fiduciary and other legal responsibilities of an agent. These responsibilities include:
>
> 1. The legal duty to act solely in the interest of the principal and to avoid conflicts of interest.
>
> 2. The legal duty to keep the principal's property separate and distinct from any other property owned or controlled by you. You may not transfer the principal's property to yourself without full and adequate consideration or accept a gift of the principal's property unless this power of attorney specifically authorizes you to transfer property to yourself or accept a gift of the principal's property. If you transfer the principal's property to yourself without specific authorization in the power of attorney, you may be prosecuted for fraud and/or embezzlement. If the principal is 65 years of age or older at the time that the property is transferred to you without authority, you may also be prosecuted for elder abuse under Penal Code Section 368. In addition to criminal prosecution, you may also be sued in civil court.
>
> I have read the foregoing notice and I understand the legal and fiduciary duties that I assume by acting or agreeing to act as the agent (attorney-in- fact) under the terms of this power of attorney.

[14] 20 Pa. Cons. Stat. § 5601 (2002).

I shall exercise reasonable caution and prudence.
I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

_____ _____

(Agent) (Date)

The Commission's proposal is based in large measure on these models. The Commission recommends that the power of attorney include a notice to the attorney-in-fact, followed by the attorney-in-fact's signed acknowledgment.[15] The proposed notice and acknowledgment are as follows:

NOTICE TO THE ATTORNEY-IN-FACT:
This Nondurable General Power of Attorney is valid only if the principal is of sound mind when the principal signs it. As the "attorney-in-fact," you are given specific powers to engage in financial or property transactions or both on the principal's behalf in accordance with the terms of this document. If the principal becomes incapacitated or dies, you will no longer have the authority to act. As the attorney-in-fact, you are entitled to receive reimbursement for reasonable expenses actually incurred in connection with the performance of your duties.

As the attorney-in-fact, you have a duty (called a "fiduciary duty") to the principal. Your fiduciary duty requires that you:

1. act solely in the best interest of the principal and avoid conflicts of interest between the principal and you or any other person;

2. keep the principal's property separate and distinct from any property you own or otherwise control;

3. keep a complete record of all receipts, disbursements, and transactions entered into by you as attorney-in-fact, or your authorized delegate, on behalf of the principal and make such record available in accordance with Article 5, Title 15, Section 5-1505 of the New York General Obligations Law; and

4. provide written notice to the principal and to the successor attorneys-in-fact in the order of their appointment if you are unwilling or unable to act.

As the attorney-in-fact, you are not entitled to use the principal's money or property for your own benefit or to make gifts to yourself or others unless this document specifically gives you the

[15] *See also* the discussion on signature of the attorney-in-fact below at III.D.

authority to do so. Your fiduciary duty is explained more fully in the New York General Obligations Law, Article 5, Title 15, Section 5-1505. If you violate your fiduciary duty, you may be liable for damages and you may be subject to criminal prosecution.

If the principal has included special instructions requiring you to exercise the powers you are granted, then you must act in accordance with those instructions.

Signature requirement: In any transaction where you are acting as the attorney-in-fact under the authority of this document and where the signature of the attorney-in-fact OR principal is required, you shall disclose your relationship as attorney-in-fact to the principal by writing the name of the principal and signing your own name as "attorney-in-fact," in accordance with the New York General Obligations Law, Article 5, Title 15, Section 5-1505.

The law governing Powers of Attorney is found at the New York General Obligations Law, Article 5, Title 15. If there is anything about this document or your duties under it that you do not understand, you should ask a lawyer to explain it to you."

With this notice, the attorney-in-fact is informed of his or her fiduciary duties from the start and of the significance of signing a document as attorney-in-fact.

ACKNOWLEDGMENT OF APPOINTMENT:[16]

I, _____ *(print your name)*, have read the foregoing Nondurable General Power of Attorney and am the person identified therein as attorney-in-fact for _____ *(print name of principal)*, the principal named therein.

I acknowledge my fiduciary duty and acknowledge and accept the provisions of any special instructions contained herein that require me to exercise powers.

In Witness Whereof I have hereunto signed my name this ____ day of _____, 20___

ATTORNEY(S)-IN-FACT sign(s) here: ==> _____

[16]The sample acknowledgment provided here is for a Nondurable General Power of Attorney. Equivalent proposed acknowledgments for a Durable General Power of Attorney and a General Power of Attorney Effective at a Future Time differ as they refer to the name of the document. The General Power of Attorney Effective at a Future Time contains the following additional language: "I understand that my appointment takes effect upon written certification of the occurrence of the event specified in the foregoing document."

B. Duties of Attorney-in-Fact and Standard of Care

Under current New York law, no statute specifies that the attorney-in-fact has a fiduciary obligation to the principal, or identifies the duties or standard of care of an attorney-in-fact. As a result, common law is the sole source of obligations and restrictions on an attorney-in-fact.[17] In contrast, other states have, to varying degrees, set forth the duty and/or standard of care of the attorney-in-fact by statute. Notable examples include the statutes of Arizona,[18] California,[19] Florida,[20] Illinois,[21] Minnesota,[22] New Jersey,[23] and Pennsylvania.[24] Texas,[25] Colorado[26] and Oklahoma[27] achieve a similar result by requiring that the power of attorney state that the attorney-in-fact owes a fiduciary duty. The Commission recommends that the general obligations law include a provision setting forth the fiduciary duties of the attorney-in-fact. This approach is consistent with those used in the estates, powers and trust law and the surrogate's court procedure act, which specifically address the duties and obligations of other types of fiduciaries.[28]

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[17] *See, e.g., Mantella v. Mantella*, 268 A.D.2d 852 (3d Dep't 2000) ("The relationship between an attorney-in-fact and principal has been characterized as agent and principal with the attorney-in-fact under a duty to act with the utmost good faith toward the principal in accordance with the principles of morality, fidelity, loyalty and fair dealing.").

[18] Ariz. Rev. Stat. §14-5506 (2003).

[19] Cal. Prob. Code §§ 4266, 4232 (West 2003).

[20] Fla. Stat. ch. 709.08(8) (2002)

[21] 755 Ill. Comp. Stat. 45/2-7 (West 2003).

[22] Minn. Stat. § 523.21 (2002).

[23] N.J. Stat. Ann. § 46:2B-8.13 (West 2003).

[24] 20 Pa. Cons. Stat. § 5601 (2002).

[25] Tex. Prob. Code Ann. § 490 (West 2003).

[26] Colo. Rev. Stat. § 15-1-1302 (2002).

[27] Okla. Stat. tit. 15 § 1003 (2003).

[28] *See, e.g.*, N.Y. Est. Powers & Trusts L. §§ 11-1.6 (property held as a fiduciary to be kept separate); and 11-4.7 (liability of personal representative for claims arising out of the administration of

The Commission's proposal codifies the common law duties of an attorney-in-fact, namely, to act in the best interest of the principal, to keep the principal's property separate from the property of the attorney-in-fact, and to keep records and provide them upon demand by specific individuals.

The Third Department recently summarized the duties to act in the best interest of the principal and to keep the principal's property separate from the property of the attorney-in-fact as follows:

> '[a] power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal' (*Moglia v. Moglia*, 144 AD2d 347, 348). The relationship between an attorney-in-fact and his principal has been characterized as agent and principal with the attorney-in-fact under a duty to act with the utmost good faith toward the principal in accordance with the principles of morality, fidelity, loyalty and fair dealing (*see Semmler v. Naples*, 166 AD2d 751, 752, appeal dismissed 77 N.Y.2d 936). 'Consistent with this duty, an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship' (*id.*). In the event such a gift is made, there is created a presumption of impropriety which can only be rebutted with a clear showing that the principal intended to make the gift (*see id.*).[29]

The obligation to keep records and provide them upon demand to specific individuals likewise stems from common law. Under general agency law principles, "the duty of an agent to account for moneys of his or her principal coming into the agent's hands is well recognized. Where one assumes to act for another he or she should willingly account for such stewardship."[30] Similarly, by statute, a fiduciary must account for all transactions made in his or her fiduciary capacity.[31]

The Commission's proposal also provides the standard of care which an attorney-in-fact must exercise. This approach is similar to that taken in other states.[32] It is the same standard of care imposed on other fiduciaries, i.e. the standard that would be observed by a prudent person dealing with the property of another. This express standard of care is included to guide the attorney-in-fact in the exercise of his or

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the estate); and N.Y. Surr. Ct. Proc. Act §§ 711 (suspension, modification or revocation of letters or removal for disqualification or misconduct); and 719 (in what cases letters may be suspended, modified or revoked, or a lifetime trustee removed or his powers suspended or modified, without process).

[29] *Mantella v.Mantella*, 268 A.D. 2d 852 (3d Dep't 2000).

[30] 2A NY Jur 2d Agents & Indep. Contractors § 239 (1998).

[31] *See*, *e.g.*, N.Y. Surr. Ct. Proc. Act §§ 708, 2307, and 1502.

[32] *See, e.g.*, Cal. Prob. Code § 4231 (West 2003); Colo. Rev. Stat. § 15-14-606 (2002); Fla. Stat. ch. 709.08; 755 Ill. Comp. Stat. 45/2-7 (West 2003); Me. Rev. Stat. Ann. tit. 18-A § 5-508 (2003).

her duties.

Also included in this proposal is the requirement that an attorney-in-fact who is unwilling or unable to act must provide written notice to the successor attorneys-in-fact in the order of their appointment. Under a nondurable general power of attorney, the attorney-in-fact who is unwilling or unable to act must also provide written notice to the principal.

C. Duty to Act

Despite the emphasis on the advantages of a power of attorney as an inexpensive and effective alternative to a guardianship proceeding when and if the principal becomes incapacitated, a power of attorney is wholly *ineffective* if the attorney-in-fact refuses to act on its authority. However, as one commentator explained, "[t]he current law in most states is that an attorney-in-fact can pick and choose when to act, even after the principal loses competence."[33]

New York's few published cases on the subject do not provide a clear answer as to whether an attorney-in-fact is under a duty to act. In *Matter of Wingate*,[34] the court revoked a power of attorney in a guardianship proceeding for the principal. The court determined that the attorney-in-fact's failure to sell shares in the principal's cooperative apartment so that the principal could remain in a nursing home constituted a breach of fiduciary duty. However, the court imposed no liability on the attorney-in-fact for failure to act. In *Matter of Rochester Hospital*,[35] the court revoked a power of attorney appointing the principal's son as attorney-in-fact, where the attorney-in-fact, without any apparent reason, failed to assist in the completion of a Medicaid application for the hospitalized and incapacitated principal. Although the court did not explicitly state that the attorney-in-fact had breached his fiduciary duty, the court cited the son's unwillingness or inability to act as the reason for revoking the power of attorney. While these cases suggest that an attorney-in-fact has a duty to act, both courts chose to revoke the power of attorney rather than to impose liability on the attorney-in-fact who failed to act.

Under common law agency principles, if an agent is employed by a unilateral contract in which the agent does not promise to act, the agent has no duty to act and cannot be held liable for failing to act. The agent *does* have a duty to act if the agent has undertaken to act or has caused the principal to rely on the

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[33] *See* Carolyn Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574, 610 (1996).

[34] 169 Misc. 2d 701 (N.Y. Sup. Ct. Queens Co. 1996).

[35] 158 Misc. 2d 522 (N.Y. Sup. Ct. Monroe Co. 1993).

assumption that he or she will do so.[36] In the context of powers of attorney, a principal might execute a durable power of attorney but avoid informing the designated attorney-in-fact. When the designation is later discovered, the designee may be unwilling or unable to accept the duties of an attorney-in-fact. Here the attorney-in-fact has made no promise to act, and under agency principles has no duty to act. However, a designee who has agreed to act as attorney-in-fact may later be unwilling or unable to accept the duties of attorney-in-fact when the time comes to act. Here the attorney-in-fact has caused the principal to rely on the assumption that the designee will act, and yet it seems harsh to hold a reluctant or unwilling attorney-in-fact liable for failing to exercise the authority accepted earlier under what may have been different circumstances. On the other hand, if the principal is, in fact, incapacitated when the time comes for the attorney-in-fact to act, the principal's affairs will be left unattended.

The Commission recommends adoption of the approach used in other states which permit the principal and attorney-in-fact to form an enforceable agreement within the power of attorney instrument.[37] If the attorney-in-fact agrees to act, he or she will be liable for any harm caused by his or her action or inaction. With this approach, the attorney-in-fact's liability is clearly prescribed from the onset and the principal has a means of ensuring that his or her intent and interests are reasonably protected. However, if the power of attorney instrument does not impose a duty to act on the attorney-in-fact, or if the attorney-in-fact refuses to agree to accept such duty, the attorney-in-fact will not be held liable for failing to act.

Thus, pursuant to the proposed amendment to section 5-1503,[38] the principal may require the attorney-in-fact to exercise the powers granted in the power of attorney. The attorney-in-fact must sign and acknowledge his or her acceptance of this obligation for it to be enforceable. Proposed amended section 5-1505[39] provides that where an attorney-in-fact has agreed to exercise designated powers on behalf of the principal, but is no longer able or willing to fulfill this obligation, the attorney-in-fact must seek court approval of his or her resignation by commencing a special proceeding pursuant to proposed section 5-1508.[40] The requirement of court approval is intended to safeguard a principal who has taken steps to ensure that his or her affairs will be attended to upon incapacity. This provision is consistent with the law

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[36] *See* 2A NY Jur. 2d Agency & Indep. Contractors § 210 (1998) *citing* Restatement 2d, Agency §§ 377, 378.

[37] *See, e.g.*, Cal. Prob. Code § 4230 (West 2003); Mo. Rev. Stat. § 404.705 (2003).

[38] "Modifications of the statutory short form power of attorney."

[39] "Exercise of authority; standard of care; fiduciary relationship; liability; jurisdiction."

[40] "Civil proceedings."

governing health care proxies.[41] The Commission's proposal also provides that if an attorney-in-fact is not under a duty to act, the attorney-in-fact *may* seek court approval of his or her resignation. This option is included for the attorney-in-fact who is unable or unwilling to serve, but wants to protect the interests of the principal.

D. Signature of Attorney-in-Fact

1. Acknowledgment of Fiduciary Duties

Under current law, an attorney-in-fact is not required to sign a power of attorney. The Commission's proposal provides that the attorney-in-fact must sign the power of attorney. In signing, the attorney-in-fact acknowledges his or her fiduciary duties as explained in the notice. This approach is consistent with that of other states.[42]

2. Lapse of Time Between Signatures

It is permissible for the attorney-in-fact to sign and acknowledge the power of attorney at some date after the principal has executed the instrument. This permissible lapse of time may appeal to a principal who is reluctant to inform his or her designated attorney-in-fact of the existence of a power of attorney prior to actual need for its use.

A successor attorney-in-fact is not expected to execute the instrument unless the first named attorney-in-fact is unwilling or unable to act. Here again, it is permissible for the successor to sign and acknowledge the form some time after the principal has executed it.

3. Signature of Attorney-in-Fact as Attestation of Validity

The lack of statutory guidance as to how the attorney-in-fact must sign a document where he or she is acting on behalf of the principal has given rise to problems in determining which transactions are the attorney-in-fact's, and which are the principal's.

The Commission's proposal 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. Specifically, the attorney-in-fact must write the principal's name and sign his or her own name as attorney-in-fact for the

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[41] If an agent designated in the health care proxy is unable or unwilling to fulfill his or her obligations under the proxy, a special proceeding may be commenced to remove the agent. *See* N.Y. Pub. Health L. § 2992.

[42] *See, e.g.*, Cal. Prob. Code § 4128 (West 2003); 20 Pa. Cons. Stat. § 5601 (2002).

principal. This approach is consistent with New York agency law.[43] In addition, the proposal provides that such a signature constitutes an attestation by the attorney-in-fact that he or she is acting under the authority and within the scope of a valid power of attorney. Thus, if the attorney-in-fact signs on behalf of the principal even though he or she knows that the power of attorney is invalid, he or she will be liable for the consequences of the transaction. This follows the approach adopted in Minnesota.[44]

E. Compensation

Current law has no provision for compensation of an attorney-in-fact unless he or she was acting with respect to the administration of an estate.[45] In all other matters, there is no express right to compensation or reimbursement for expenses incurred in the course of acting under the power of attorney. Although there are no published decisions dealing with compensation of an attorney-in-fact who is unrelated to the principal, where the two parties are related, "it is presumed that the services of the attorney-in-fact to a principal were rendered in consideration of love and affection, without expectation of payment."[46] Normally, while the principal is not disabled, such service will be infrequent and will not involve substantial time. However, the prospect of the principal's disability or incapacity, requiring the attorney-in-fact's time, effort, and expense over a long period of time may make compensation important.[47]

Other states permit compensation and reimbursement to varying degrees. Arkansas[48] and

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[43] *See* 2A NY Jur 2d Agency and Indep. Contractors § 198 (1998).

[44] *See* Minn. Stat § 523.18 (2002). Other states accomplish the equivalent of an attestation by permitting third parties to demand an affidavit from the attorney-in-fact attesting to the validity of the power of attorney. *See, e.g.*, Cal. Prob. Code § 4305 (West 2003); Fla. Stat. § 709.01 (2002); N.J. Stat. Ann. § 46:2B-8.5(c) (West 2003).

[45] *See* N.Y. Surr. Ct. Proc. Act § 2112 (compensation of persons acting under powers of attorney or other instruments).

[46] *Mantella v. Mantella*, 268 A.D.2d 852 (3d Dep't 2000).

[47] *See* California Law Revision Commission, Statutory Comment, Cal. Prob. Code § 4204 (West 1994).

[48] *See* Ark. Code Ann. § 28-68-310 (Michie 2002).

California[49] provide that an attorney-in-fact is *entitled* to reasonable compensation. Indiana,[50] Missouri,[51] New Jersey,[52] Pennsylvania[53] and Vermont[54] permit the principal to limit compensation to which the attorney-in-fact is otherwise entitled. In contrast, Arizona[55] does not permit compensation of an attorney-in-fact unless the terms of compensation are detailed in the power of attorney. Similarly, Colorado,[56] Georgia,[57] and Illinois[58] permit the principal to choose whether compensation should be permitted by so designating in the respective statutory short form power of attorney (i.e., the principal must check the box, fill in the blank, strike out the sentence, etc.).

The compensation approach proposed by the Commission is a hybrid of some of these initiatives. It provides that an attorney-in-fact is not entitled to compensation unless the principal specifically authorizes it. Accordingly, the statutory short forms allow the principal to list the name of each attorney-in-fact who will be entitled to receive reasonable compensation.

The Commission's proposal would authorize certain persons, including an attorney-in-fact, to commence a special proceeding to determine if an attorney-in-fact is entitled to compensation, and whether compensation paid to an attorney-in-fact is reasonable.

Finally, the Commission's proposal provides that the attorney-in-fact is entitled to reimbursement for reasonable expenses actually incurred in connection with his or her duties as attorney-in-fact. This

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[49] *See* Cal. Prob. Code § 4204 (West 2003).

[50] *See* Ind. Code § 30-5-4-5 (2002).

[51] *See* Mo. Rev. Stat. § 404.725 (2003).

[52] *See* N.J. Stat. Ann. § 46:2B-8.12 (West 2003)

[53] *See* 20 Pa. Cons. Stat. Ann. § 5609 (2002).

[54] *See* Vt. Stat. Ann. tit. 14 § 3504(d) (2002).

[55] *See* Ariz. Rev. Stat. § 14-5506 (2003).

[56] *See* Colo. Rev. Stat. § 15-1-1302 (2002).

[57] *See* Ga. Code Ann. § 10-6-142 (2002).

[58] *See* 755 Ill. Comp. Stat. 45/3-3 (West 2003).

approach is consistent with general agency rules and statutory rules governing trustees and fiduciaries.[59]

F. Resignation

The Commission's proposal provides a procedure by which an attorney-in-fact who is unwilling to act or continue to act may resign after the principal has become incapacitated and is thus unable to appoint a successor attorney-in-fact. If the terms of the power of attorney require the attorney-in-fact to act, the attorney-in-fact subject to this requirement must seek court approval of his or her resignation to terminate liability as attorney-in-fact. This approach also provides notice to the court that the incapacitated principal may be in need of a guardian or some other intervention.

The proposal further provides that if an attorney-in-fact is not under a duty to act, the attorney-in-fact *may* seek court approval of his or her resignation. This option is included for the attorney-in-fact who is unable or unwilling to serve, but wants to protect the principal.

IV. **Provisions Relating to Third Parties**

A. Definitions

The Commission's proposal defines "third party" to mean a financial institution or person. Much of the definition of "financial institution" is taken verbatim from section 5-1504(1). Although the definition of "financial institution" in section 5-1504 includes an extensive list of financial enterprises, there is no express reference to securities brokers, dealers, and firms, and insurance companies. Because an attorney-in-fact may be authorized to perform transactions involving securities and insurance, the Commission recommends that brokerage firms and insurance companies be subject to the same rules as virtually all other financial institutions in regard to acceptance of a power of attorney.

The definition of "person" included in the Commission's proposal is taken from section 11-A-1.2 of the estates, powers, and trusts law (definitions and fiduciary duties).

B. Acceptance

An often heard complaint is that financial institutions are reluctant to accept statutory short form powers of attorney even though current law makes such refusal unlawful. Case law is scant on refusal to honor a power of attorney, and provides little guidance. For example, in a published case involving a claim of unlawful refusal to accept a power of attorney, the First Department was able to resolve the case without

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[59] *See, e.g., James T. Kelly Jr., P.E., P.C. v. Schroeter*, 209 A.D.2d 737 (3d Dep't 1994), N.Y. Est. Powers & Trusts L. § 7-2.3(2); and N.Y. Surr. Ct. Proc. Act § 2307.

offering an interpretation of what "unlawful" means.[60] Rather, the court essentially acknowledged that it is unclear whether such refusal is a tortious act.[61]

The Commission recommends amendments to section 5-1504 to encourage routine acceptance of statutory short form powers of attorney. Several of these proposed provisions, together with provisions related to signatures and revocation, are intended to alleviate concerns about accepting powers of attorney. For example, the new reasonable cause provisions in this section are intended to clarify when a third party can refuse a power of attorney. At the same time, this and other sections clarify that a third party will not be liable for acting at the direction of an attorney-in-fact unless the party has actual notice that the power of attorney is invalid for specific reasons. Most significant, perhaps, is the provision providing that the attorney-in-fact's signature in a transaction made on behalf of the principal constitutes an attestation to the validity of the power of attorney and his or her authority.[62] Thus, even where an attorney-in-fact falsely attests to the validity of a power of attorney, the third party who relies on the signature of the attorney-in-fact will escape liability unless the third party had actual notice that the power of attorney was no longer valid.

1. Refusal to Honor Power of Attorney for Reasonable Cause

The Commission's proposal would permit third parties -- both financial institutions and persons as those terms are defined in section 5-1501 -- to refuse to honor a power of attorney for "reasonable cause." Reasonable cause is defined to include specific circumstances where the power of attorney is invalid or where the attorney-in-fact's motives or exercise of authority are suspect. The circumstances listed are not exclusive.

One such circumstance is where the third party has made a good faith report to Adult Protective Services of suspected abuse of the principal, or where the third party has actual knowledge that someone else has made such a report. This is the approach taken in a provision recently enacted in Pennsylvania which provides:

[a]ny person who is given instructions by an agent in accordance with the terms of a power

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[60] *Solovay v. Greater New York Savings Bank*, 198 AD 2d 27 (1st Dept. 1993). *Solovay* involved a suit by an attorney-in-fact against a bank's counsel alleging that counsel conspired with the bank to manufacture an excuse to refuse a power of attorney and counsel failed to inform the bank of its statutory duty to honor a statutory short form power of attorney. The court, however, affirmed the dismissal of the case for failure to state a cause of action. "Even if [refusal to honor an allegedly valid power of attorney] were a tortious act, [the Bank's counsel] did not commit it, the Bank did."

[61] *Id.* at 28.

[62] *See* proposed section 5-1507.

of attorney shall comply with the instructions . . . Reasonable cause under this subsection shall include, but not be limited to, a good faith report having been made by the third party to the local protective services agency regarding abuse, neglect, exploitation or abandonment . . ."[63]

2. Third Party's Demand for Completion of its own Power of Attorney Unreasonable

Refusal to accept a power of attorney solely because it is not on the third party's own form does not constitute reasonable cause.

3. Third Party's Refusal Based on Lapse of Time Unreasonable

This revision provides that it is unreasonable for a third party to refuse to honor a power of attorney solely because there is a lapse of time between its execution by the principal and presentment to the third party.[64]

Likewise, refusal to honor a power of attorney because there has been a lapse of time between the dates of the principal's and attorney-in-fact's signatures does not amount to reasonable cause.

4. Actual Notice of Revocation and Financial Institutions

This proposed revision protects third parties from liability for unknowingly acting upon a power of attorney that has been revoked either by the principal or by operation of law. Specifically, the Commission proposes that 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.

To improve the effectiveness of an attempted revocation, this proposal gives a financial institution a reasonable amount of time to act on a revocation sent to an office other than the one where the account is located. The Commission proposes that actual notice for a financial institution occurs when written notice of the event causing revocation is received at the office where the account is located received, or three days after written notice is received at another branch or office of the financial institution.

In addition, to assist all third parties in recognizing a revocation, the Commission proposes the creation of a revocation form for the principal to use.[65]

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[63] 20 Pa. Cons. Stat. § 5608 (2002).

[64] This provision is modeled on Cal. Prob. Code § 4127 (West 2003).

[65] *See* proposed section 5-1509(6).

5. Consequences of Refusal to Honor a Power of Attorney

Given the express direction and protection afforded third parties who honor a power of attorney, the Commission proposes that those who continue to refuse to honor a power of attorney without reasonable cause can be compelled to honor a power of attorney via a special proceeding described in proposed section 5-1508. The petitioner in such a proceeding may be entitled to attorney's fees upon a court's determination that the refusal to honor was made without reasonable cause. This approach parallels that adopted in California and Florida.[66] The section further provides that a civil proceeding pursuant to proposed section 5-1508 shall be the exclusive remedy to compel acceptance of a power of attorney.

V. **Provisions Relating to Abuse of Powers of Attorney**

Recent newspaper headlines attest to the problem of financial exploitation accomplished with a power of attorney in New York.

> *"Schenectady prosecutors say two men took $1.2 million from woman who suffered from Alzheimer's."*[67]
>
> *"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. . ."*[68]
>
> *"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."*[69]
>
> *"Two New York City women were arraigned Thursday in City Court on charges they stole thousands of dollars from an elderly Ukranian 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 Ukranian Federal Credit Union."*[70]
>
> *"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*

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[66] *See* Cal. Prob. Code § 4306 (West 2003); Fla. Stat. ch. 709.08 (2002).

[67] Albany Times Union, April 13, 2002, at B3, *available in* 2002 WL 8901043.

[68] Newsday March 21, 2002, at A08, *available in* 2002 WL 2734109; *see also* New York Post march 21, 2002 at 12, *available in* 2002 WL 15214151.

[69] Syracuse Newspapers, May 17, 2002, at A1, *available in* 2002 WL 5999091.

[70] Syracuse Newspapers, July 26, 2002 at B2, *available in* 2002 WL 6010204.

grand larceny."[71]

"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."[72]

"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."[73]

"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."[74]

Case files of adult protective services[75] and court decisions[76] likewise attest to the problem of financial exploitation through powers of attorney.

In reviewing these reports and cases, the Commission found that the general obligations law has significant gaps where it comes to deterring, uncovering, and halting financial abuse carried out through a power of attorney. Case law does not adequately fill these gaps. To address the shortcomings of the

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[71] New York Daily News, June 4, 2001, at 1, *available in* 2001 WL 17953625.

[72] New York Post, June 5, 2001, at 17, *available in* 2001 WL 19772645.

[73] Newsday, August 3, 2001, at A17, *available in* 2001 WL 9243923; *see also* New York Daily News, August 3, 2001, at 4, *available in* 2001 WL 23588223.

[74] New York Daily News, January 15, 2002 at 2, *available in* 2002 WL 3163918.

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

[76] *See, e.g., In re Butin,* 750 N.Y.S.2d 619 (2d Dep't 2002); *Hill v. Bulden,* 191 Misc.2d 354 (N.Y. Sup. Ct. Putnam Co. 2002); *Goldstein v. Block*, 288 A.D.2d 182 (2d Dep't 2001); *In re Prosperi*, 286 A.D.2d 99 (1st Dep't 2001); *People v. Camiola,* 225 A.D.2d 380 (1st Dep't 1996)*; People v. De Leo*, 185 A.D.2d 374 (3d Dep't1992); *Matter of Warren L. Boulanger,* 107 A.D.2d 28 (2d Dep't 1985); *In re Guardianship of Kent*, 188 Misc.2d 509 (N.Y. Sup. Ct. Dutchess Co. 2001); *In re Jennie Fanelli*, 2/23/98 N.Y.L.J. at 28 (N.Y. Sup. Ct. New York Co. 1998); *In re Johnson,* 172 Misc.2d 684 (N.Y. Sup. Ct. Suffolk Co. 1997); *In re Kustka,* 163 Misc.2d 694 (N.Y. Sup. Ct. Queens Co. 1994); *In re Rochester Hospital (Levin),* 158 Misc.2d 522 (N.Y. Sup. Ct. Monroe Co. 1993). *See also In re Kuperman*, 285 A.D.2d 200 (2d Dep't 2001). *See generally Fitzgerald v. Fitzgerald,* 753 N.Y.S.2d 570 (3d Dep't 2003).

statute, the Commission recommends a number of reforms.[77] These proposed reforms, listed below, are addressed in greater depth in other sections of this report.

A. Deterring abuse

The Commission's proposals would assist in deterring abuse by educating both the principal and the attorney-in-fact.

The revised cautionary statement to the principal will educate the principal as to the extent of the attorney-in-fact's authority.

The newly added notice to the attorney-in-fact will educate the attorney-in-fact and the principal in layperson's terms about the fiduciary duty that the attorney-in-fact owes the principal, and warns the attorney-in-fact that a violation of that fiduciary duty may make the attorney-in-fact liable to civil or criminal proceedings.

The attorney-in-fact must acknowledge the fiduciary duty by signing the power of attorney. If the attorney-in-fact does not sign the power of attorney the attorney-in-fact has no authority to act.

The statutory short form notifies the principal that he or she may appoint a person or persons to have the authority to request information regarding the attorney-in-fact's transactions on behalf of the principal. Because the designee or designees will be listed on the form, the attorney-in-fact will be on notice from the beginning of this third party with an independent right to request and scrutinize the record.

When the attorney-in fact acts under the authority of the power of attorney, and the signature of the attorney-in-fact or principal is required, the attorney-in-fact must disclose his or her relationship as attorney-in-fact to the principal by writing the name of the principal and signing his or her own name as "attorney-in-fact." This form of signature prevents any confusion as to which transactions are the principal's, and which are the attorney-in-fact's. It also attests that the attorney-in-fact has authority to engage in the transaction and has no knowledge of the revocation of the power of attorney.

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[77] As noted elsewhere in this report, many of these proposals are based on initiatives undertaken in other states. In tandem with reforms to powers of attorney, many states, including New York, are pursuing other avenues to prevent, uncover, and halt financial abuse. Among these are new criminal statutes addressed at financial and other abuse of the elderly and disabled, training programs to help bank personnel spot trouble, expansion of the list of persons who must report suspected abuse, sting operations, and public awareness campaigns. *See* Julia C. Calvo, *Summary of Enacted DPA Legislation, 2000 - 2002*, <www.abanet.org/aging/summarydpastatutes.pdf>

B. Uncovering abuse

The Commission's proposals would assist in uncovering abuse by permitting certain individuals to hold the attorney-in-fact accountable and by permitting third parties to refuse to accept the power of attorney under certain circumstances, and to challenge the power of attorney.

The principal's designee may request information regarding the attorney-in-fact's transactions on behalf of the principal at any time.

The record of all receipts, disbursements, and transactions entered into by the attorney-in-fact on behalf of the principal must be made within 15 days of written request by (1) a government entity or official acting in the course of an assessment of a complaint of abuse or neglect, (2) a court evaluator pursuant to article 81 of the mental hygiene law in a proceeding alleging that the principal is incapacitated, (3) the guardian or conservator of the estate of the principal if such record has not already been provided to the court evaluator, or (4) the personal representative of the estate of the deceased principal if such record has not already been provided to the guardian or conservator.

A financial institution can refuse to honor a power of attorney if (1) the attorney-in-fact refuses to provide an original or certified copy of the power of attorney, (2) the financial institution has made a report to local adult protective services regarding physical or financial abuse, neglect or exploitation, or abandonment of the principal by the attorney-in-fact, (3) the financial institution has actual knowledge or such a report by any person, or (4) the financial institution has actual knowledge of the principal's death.

A civil proceeding may be commenced to determine (1) if the principal had capacity to execute the power of attorney (2) the validity of the power of attorney, or (3) if the power of attorney was wrongfully procured.

If the petitioner proves that the principal was a vulnerable adult at the time the principal executed the power of attorney in a proceeding to determine if the power of attorney was wrongfully procured or whether the attorney-in-fact has violated the fiduciary duties, the attorney-in-fact must prove by clear and convincing evidence that the principal had capacity at the time of execution of the power of attorney and that the attorney-in-fact did not act wrongfully in procuring the power of attorney.

C. Halting Abuse

The Commission's proposals would assist in halting abuse by permitting third parties to challenge the power of attorney and to seek removal of the attorney-in-fact.

A civil proceeding may be commenced to remove the attorney-in-fact on the grounds that the attorney-in-fact has violated or is unfit, unable or unwilling to perform the fiduciary duties and the principal lacks capacity to give or revoke the power of attorney, or is a vulnerable adult.

A civil proceeding may also be commenced to determine (1) if the principal had capacity to execute the power of attorney (2) the validity of the power of attorney, or (3) if the power of attorney was wrongfully procured.

The attorney-in-fact may be subject to civil and criminal liability if he or she: (1) transfers property to himself or herself without specific authorization in the power of attorney, (2) acts wrongfully in procuring any power of attorney or any authority provided in a power of attorney, and takes control of the principal's assets or property. (3) acts in an unauthorized manner or violates the standard of care or fiduciary duty, or (4) acts under a power of attorney with actual knowledge that it has been revoked.

VI. Provisions Relating to Civil Proceedings

A. Type of Proceeding

Under current law, legal challenge of any aspect of a power of attorney or any act by an attorney-in-fact has to be brought by plenary action based on common-law principles. The proposed amendments to the general obligations law are intended to codify the common law in many respects, thus making it less burdensome to know the rules governing powers of attorney. The ready availability of this information in the statute should also facilitate bringing any action to challenge the attorney-in-fact. Moreover, if the principal's finances are in actual or potential jeopardy, speed and easy access to the courts are necessary. Therefore, the Commission recommends that a special proceeding pursuant to article four of the CPLR would be the appropriate method for bringing claims regarding powers of attorney. Use of special proceedings in this context is consistent with their use in other circumstances, such as in matters relating to health care proxies[78] and express trusts.[79] Petitions brought under this section are limited to the jurisdiction of the supreme court.

B. Petition to Compel the Attorney-in-Fact to Make Records Available

Although under common law, courts can require an accounting, *sua sponte*,[80] New York's general obligations law currently does not require that an attorney-in-fact provide a record of transactions undertaken under the authority of a power of attorney. Section 81.44 of New York's mental hygiene law permits a guardian to petition the court to order an attorney-in-fact to render an accounting. However, forcing an attorney-in-fact to account under this section requires the commencement of an article 81 proceeding against the principal and a judicial finding of the principal's incapacity. The lack of a compulsory accounting mechanism under the general obligations law poses an obstacle for concerned third parties, who

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[78] *See* N.Y. Pub. Health L. § 2992.

[79] *See* N.Y. C.P.L.R. § 7701.

[80] *See Matter of Morrison*, 268 A.D.2d 435 (2d Dep't 2000).

face substantial legal and financial obstacles if they seek court intervention in halting suspected financial abuse by the attorney-in-fact. In addition, an attorney-in-fact who knows that his or her actions may come under scrutiny may be less likely to abuse the power of attorney.

While the benefits of authorizing third parties to compel an accounting by the attorney-in-fact are recognized, a critical issue is who should have standing to petition for such an accounting. Other states have adopted a variety of approaches, some restrictive and some more expansive. Some states, such as Illinois, require an agent for an incapacitated principal to provide an accounting to certain elder abuse investigators.[81] Pennsylvania allows adult protective service investigators access to an agent's records without court intervention. If denied, they may petition the court to compel an accounting. However, the investigative agency bears the burden of establishing that the principal is unable to consent to such disclosure. Additionally, Pennsylvania does not specifically allow any other interested third parties to seek an accounting, though the agent must account "whenever directed to do so by the court . . ."[82]

New Hampshire permits human service investigators to seek an accounting, but further expands this right to additional third parties including relatives,[83] who have a specific purpose. A New Hampshire court may also consider a petition from a third party if the party can demonstrate his or her interest in the welfare of the principal and the lack of capacity of the principal to bring the petition.[84]

Similarly to New Hampshire, California and Missouri identify interested persons who may petition a court to rule on the legality of a particular action by the attorney-in-fact, compel accountings or terminate the power of attorney.[85]

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[81] *See* 755 Ill. Comp. Stat. 45/2-7.5 (West 2003).

[82] 20 Pa. Cons. Stat. § 5610 (2002).

[83] N.H. Rev. Stat. Ann. § 506:7(I) (2002). "A petition may be filed . . . *(*c) To compel the agent to submit an accounting or to report his acts as agent to any of the persons designated in subparagraph I(a)-(g), if such person has made a written request of the agent for an accounting or a report and the agent has not complied with the request within 60 days after the request was made. . ." N.H. Rev. Stat. Ann. § 506:7(III) (2002).

[84] "[T]he court may entertain a petition from any other interested party who demonstrates to the satisfaction of the court the following:(a) Sufficient knowledge of the principal to demonstrate interest in the welfare of the principal; and (b) The lack of capacity of the principal to bring such a petition." N.H. Rev. Stat. Ann § 506:7(II) (2002).

[85] Jonathan Federman & Meg Reed, *Abuse and the Durable Power of Attorney: Options for Reform*, Government Law Center (1994) at 66.

New Jersey's statute gives the right to compel an accounting to other fiduciaries. An heir or "next friend" to the principal may seek an accounting upon persuading the court that the principal is incapacitated and the agent may be engaging in abusive conduct.[86]

The Commission recommends an approach that addresses the desire to make an attorney-in-fact accountable, but does not subject the attorney-in-fact to endless requests and court proceedings, and to limit public access to the principal's affairs. The Commission's proposal is modeled both on other states' approaches, and on common law governing the authority of a court to order an accounting where four factors are present: (1) a fiduciary relationship; (2) entrustment of money or property; (3) no other remedy; and (4) a demand and refusal of an accounting.[87] Subdivision (1) of proposed section 5-1508 permits the principal, his or her designee, and limited categories of other persons and government agencies to petition to compel an attorney-in-fact to produce a record of receipts, disbursements and transactions undertaken under the authority of the power of attorney where the record has been requested but refused.[88]

C. Determining Whether a Power of Attorney is Valid

Proposed sections 5-1501A, 5-1501B, and 5-1501C provide that, to be valid, every power of attorney must contain certain language and notices, and section 5-1503 provides the lawful modifications that may be made to a statutory short form power of attorney. Subsection 5-1508(2)(a) permits various persons to seek a determination from a court as to whether a power of attorney meets these and other requirements.

D. Determining Whether a Principal had Capacity to Execute a Power of Attorney

Pursuant to the definition set forth in proposed section 5-1501, the principal must possess the requisite capacity to execute a lawful power of attorney. This means that the principal is capable of comprehending the nature and consequences of the act of granting, revoking, or amending a power of

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[86] N.J. Stat. Ann. § 46:2B-8.13(b) (West 2003) provides: "The attorney-in-fact shall maintain accurate books and records of all financial transactions. The principal, a guardian or conservator appointed for the principal, and the personal representative of the principal's estate may require the attorney-in-fact to render an accounting. The Superior Court may, upon application of any heir or other next friend of the principal, require the attorney-in-fact to render an accounting if satisfied that the principal is incapacitated and there is doubt or concern whether the attorney- in-fact is acting within the powers delegated by the power-of-attorney, or is acting solely for the benefit of the principal."

[87] *See Matter of Guardianship of Kent*, 188 Misc. 2d 509 (N.Y. Sup. Ct. Dutchess Co. 2001).

[88] *See* proposed section 5-1505(3)(a)(3) requiring the attorney-in-fact to provide a record of transactions within 15 days of written request for the record.

attorney or any provision in a power of attorney. Proposed subdivision (2)(b) of 5-1508 permits various persons to seek a determination from a court as to whether a principal possessed the requisite capacity when he or she executed the power of attorney.

E. Determining Whether the Power of Attorney was Wrongfully Procured

Under proposed section 5-1505(4)(a)(2), an attorney-in-fact is subject to civil liability and criminal prosecution if he or she wrongfully procures a power of attorney, for example, by misrepresenting the nature of the document he or she is signing, or by threatening the principal with physical abuse or nursing home placement. Section 5-1508(2)(c) provides the civil mechanism whereby a court may revoke the power of attorney or revoke the authority of the attorney-in-fact where the power of attorney has been wrongfully procured.

F. Burden of Proof

Where there are allegations of the principal's incapacity at the time of execution, wrongful procurement of the power of attorney, or violation by the attorney-in-fact of his or her fiduciary duties, the corresponding subdivisions of section 5-1508 place the burden of proof on the attorney-in-fact if it has been shown that the principal was a vulnerable adult at the time in question. Ordinarily, the party challenging the capacity of a party to a contract has the burden of proof.[89] However, courts have shifted the burden of proof to the party asserting capacity in proceedings alleging fraudulent procurement or fiduciary misconduct where there is a fiduciary or confidential relationship.[90] In *Greiff*, the Court of Appeals stated,

> [t]his court has held, in analogous contractual contexts, that where the parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed . . . to disprove fraud or overreaching.[91]

This rule was recently applied to invalidate certain beneficial transfers made by an attorney-in-fact under a power of attorney executed by "an elderly person, in declining health" for whose care the attorney-in-fact "had assumed complete responsibility."

G. Removal of Attorney-in-Fact

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[89] *See, e.g., Matter of Estate of Obermeier*, 150 A.D.2d 863 (3d Dept. 1989).

[90] *See Matter of Greiff v. Greiff*, 92 N.Y.2d 341 (1998); *Matter of Gordon v. Bialystoker Center & Bikur Cholim*, 45 N.Y.2d 692 (1978); *Ten Eyck v. Whitebeck*, 156 N.Y. 341 (1898); *Sepulveda v. Aviles*, 762 N.Y.S.2d 358 (1st Dept. 2003).

[91] *Greiff* at 345.

This provision permits a petition to remove the attorney-in-fact for breach of the fiduciary duties set forth in section 5-1505, including those instances where the attorney-in-fact is subject to an express agreement in the power of attorney to act in certain transactions or types of transactions, but refuses to act.

H. Compensation of Attorney-in-Fact

Proposed section 5-1506 permits the principal to determine whether the attorney-in-fact is entitled to compensation. Subsection 5-1508(2)(d) permits the attorney-in-fact or others to petition the court to determine if an attorney-in-fact is entitled to compensation or, if compensation has been made, whether such compensation is reasonable.

I. Order Approving Resignation of Attorney-in-fact

If the terms of the power of attorney require the attorney-in-fact to act, the attorney-in-fact subject to this requirement must seek court approval of his or her resignation to terminate liability as attorney-in-fact.

The proposal further provides that if an attorney-in-fact is not under a duty to act, the attorney-in-fact *may* seek court approval of his or her resignation.

J. Compelling a Third Party to Honor a Power of Attorney

Pursuant to the amendments to section 5-1504, under this proposal, a third party must accept a valid power of attorney unless reasonable cause exists to refuse. This paragraph permits the petitioner to enforce the provisions of section 5-1504.

K. Award of Attorney's Fees

The Commission proposes that the court have discretion to award reasonable attorney's fees to the petitioner if the attorney-in-fact has violated his or her fiduciary duty or unjustifiably failed to produce a record of transactions upon request, or to the attorney-in-fact if it determines the proceeding was commenced without reasonable cause.

The authority to award attorney's fees is consistent with the approach taken in other New York statutes and common law. For example, mental hygiene law section 81.35 provides that "the court may fix the compensation of any attorney or person prosecuting the motion [to remove a guardian who is guilty of misconduct]. It may compel the guardian to pay personally the costs of the motion if granted." A court may award fees to an estate's fiduciary in a will contest where the contest is found to be frivolous or brought

in bad faith.[92]

In addition, in proceedings commenced to compel a third party to honor a power of attorney, subsection (6) permits the court to award attorney's fees to the petitioner if the court determines that the refusal was made without reasonable cause, as expressed in section 5-1504.

VI. General Housekeeping Matters

A. Reorganization of the General Obligations Law

Section 5-1501 provides model statutory short forms for durable and nondurable powers of attorney and 5-1506 provides the form for powers of attorney effective at a future time. This arrangement is confusing. Two different types of powers of attorney are addressed in one section and various statutory rules are included within and throughout the prescribed form language.

The Commission proposes reorganizing sections 5-1501 and 5-1506 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). In order to create a more reader-friendly format, in each section, the first part prescribes the requirements for that power of attorney, followed by a model statutory short form.

This revision requires that certain safeguards be incorporated in every power of attorney, including those not based on the statutory short form. Accordingly, proposed sections 5-1501A, 1501B, and 1501C establish that every power of attorney, to be valid, must include a cautionary statement to the principal, notice to the attorney-in-fact, and the signature of the attorney-in-fact.

B. Definitions

1. Attorney-in-fact

In prior versions of the statute, the terms "agent" and "attorney-in-fact" were used interchangeably in some sections, while in the construction sections, the term "agent" referred either to an agent, generally, or to an attorney-in-fact. The Commission's proposal eliminates the confusion by making the usage of these two terms consistent throughout the statute.

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[92] *See* N.Y. Surr. Ct. Proc. Act § 2302(3)*; see also* N.Y. C.P.L.R. § 8303-a (court may award costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death); *Entertainment Partners Group v Davis,* 198 A.D.2d 63 (1st Dep't 1993) (award of attorney's fees in SLAPP suit when suit is brought in bad faith, without a reasonable basis in law or fact and cannot be supported by a good faith argument).

2. Capacity

The Commission proposes that, following the approach adopted in other states, mental capacity for executing a power of attorney should be the same as for entering a contract,[93] i.e. "whether the [principal] was capable of comprehending and understanding the nature of the transaction at issue."[94] Accordingly, the Commission proposes defining capacity to mean that at the time the power of attorney is executed, the principal is capable of comprehending the nature and consequences of the act of executing and granting the power of attorney. The term "incapacitated" is defined to mean to be without capacity.

3. Compensation

The Commission proposes that the principal be permitted to choose whether or not his or her attorney-in-fact is entitled to reasonable compensation for services actually rendered on behalf of the principal under the power of attorney.[95] The definition of compensation clarifies that payment should come from the assets of the principal.

4. Person

The definition of "person" included in the Commission's proposal is taken from section 11-A-1.2 of the estates, powers, and trusts law (definitions and fiduciary duties).

5. "Vulnerable Adult"

The term "vulnerable adult" pertains where there is an allegation that the attorney-in-fact procured a power of attorney from an individual who may not be incapacitated within the meaning of article 81 of the New York mental hygiene law, but who nevertheless is vulnerable to undue influence or coercion. The language is modeled on that used in section 473(1) of the social services law.

C. Estate Matters Authority

The Commission proposes adding new language to section 5-1502G 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. Unless the principal limits the attorney-in

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[93] *See generally,* Cal. Prob. Code. § 4022 (West 2003).

[94] *See Smith v. Comas*, 173 A.D.2d 535, 535 (2d Dep't 1991); *see also Ortelere v. Teachers Retirement Bd of City of N.Y.*, 25 N.Y.2d 196 (1969).

[95] *See* proposed section 5-1506.

fact's authority, the attorney-in-fact can act as to all estates, trusts or other funds.

D. Authority to Access Health Care Records

The Commission proposes that the authority with respect to "records, reports and statements" at "K" on all three statutory short forms be revised to include "health care billing and payment matters." The corresponding proposed new paragraph (1) added to construction section 5-1502K clarifies that the authorization to act with respect to records, reports and statements includes the authorization to access records relating to the provision of health care and to make decisions relating to payment for health care services to which the principal or the principal's health care agent has consented. This clarification removes 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. The proposed amendment does not change current law, which limits the authority of a third party to make health care decisions to a health care agent or a guardian appointed by the court.

The ambiguity over the attorney-in fact's authority arises out of two factors. The first factor is the lack of express reference to medical records in subdivision K on the statutory short forms and in construction section 5-1502K. As a result, many health care providers have refused to make records available to an attorney-in-fact seeking clarification of a medical bill, without express language added to the power of attorney document authorizing such release. The providers have based their refusal on physician-patient confidentiality under medical ethics rules and on the statutory physician-patient privilege. The proposed new language in section 5-1502K eliminates the need to add express permission in the power of attorney. The ambiguity created by the lack of express reference to medical records in section 5-1502K is compounded by the recently implemented "Privacy Rule" under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which creates national standards limiting access to an individual's medical and billing records to the individual and the individual's "personal representative." Under the Privacy Rule, health information relating to billings and payments may be available to an attorney-in-fact only if the attorney-in-fact can be characterized as the principal's "personal representative" as defined in the Privacy Rule. Under the regulations, the "personal representative" for an adult or emancipated minor is defined as "a person [who] has authority to act on behalf of a individual who is an adult or an emancipated minor in making decisions related to health care . . ." 45 C.F.R. § 164.502(g)(2).

The general obligations law limits the authority of the attorney-in-fact to financial matters, and expressly prohibits the attorney-in-fact from making health care decisions for the principal. *See* N.Y. Gen. Oblig. Law §§ 5-1501(1) and (1-a), 5-1506O, and 5-1506. The public health law defines a health care decision as "any decision to consent or refuse to consent to health care." "Health care," in turn, is defined as "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition." N.Y. Pub. Health Law §§ 2980(4) and (6).

The principal may grant health care decision making authority to a third party only by executing a health care proxy pursuant to section 2981 of the public health law. The health care proxy law makes

clears that financial liability for health care decisions remains the obligation of the principal. *See* N.Y. Pub. Health Law § 2987. As a practical matter, payment issues are left to the principal or the principal's attorney-in-fact. The Privacy Rule regarding access to records does not take into account a statutory structure such as New York's, which divides responsibilities for health care decisions and bill paying between two representatives, the health care agent and the attorney-in-fact. The proposed amendment to section 5-1502K makes clear that an attorney-in-fact is an individual's personal representative for purposes of accessing medical records in connection with paying medical bills. The amendment in no way affects the authority of the health care agent to access medical records in connection with making health care decisions.

E. Authorization for the Release of Protected Health Information Related to Capacity

These new, separate forms are intended to accompany a nondurable general power of attorney, or a durable general power of attorney effective at a future time if the triggering event is the principal's incapacity. In the former, the principal wants the document to cease to be effective when he or she becomes incapacitated, and in the latter, the principal wants it to take effect when he or she becomes incapacitated. This form is necessary to obtain from a medical provider a written statement of the principal's incapacity.

The need for such a form derives from the recently implemented "Privacy Rule" under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which creates national standards protecting the privacy of an individual's medical records. Under the Privacy Rule, a provider may not disclose an individual's protected health information without a valid authorization. *See* 45 C.F.R. section 164.508(a)(1).

Without a valid authorization, a doctor's written certification that an individual is incapacitated, necessary for either triggering or terminating the abovementioned powers of attorney, could not be disclosed to the attorney-in-fact, financial institutions, or other third parties, thwarting the principal's intention in creating the Power of Attorney.

These forms meet the requirements for a valid authorization listed in the Privacy Rule at 45 C.F.R. section 164.508(c), namely: a description of the information to be disclosed, the person or class of persons authorized to request disclosure, a description of the purpose for the disclosure (e.g. "at that person's request"), an expiration date, the signature of the principal or, alternatively, his or her "personal representative," the date of signature, and several required statements.

If the principal is unable to execute this form due to incapacity, the principal's health care agent appointed under the principal's health care proxy could do so in his or her role as "personal representative," since the health care agent's authority begins when the principal becomes incapacitated. *See* 45 C.F.R. section 164.502(g) and New York public health law section 2981(4). Unless the attorney-in-fact is also the principal's health care agent, the attorney-in-fact cannot execute this document. Where

the principal has no health care agent, the principal should be aware that the effectiveness of his or her power of attorney may depend upon the principal's execution of this authorization form at the same time as the power of attorney.

F. Gifting Authority

The gifting authority at "(M)" on all three statutory short forms, and its corresponding construction section, 5-1502M, have been revised to permit annual exclusion gifts as defined in the Internal Revenue Code, gifts to section 529 education accounts, and gift splitting from the principal's assets, if the principal's spouse consents.

This revision retains the gifting class (the principal's spouse, children and more remote descendants, and parents) provided in the current gifting authority. A principal who wishes to modify the class to exclude any of these persons or to include others may do so as a permissible modification under section 5-1503.

1. Amount of Gifts

The current gifting authority at "(M)" limits gifts to $10,000 per person per year, reflecting the amount of the federal annual gift tax exclusion in effect when this authority was added to the general obligations law. Because the Internal Revenue Code now requires adjustment of this amount in $1,000 increments to keep pace with increases in the cost of living,[96] this proposed revision ties the permissible gifting amount to the gift tax exclusion in effect at the time of the gift. Linkage to the corresponding federal gift tax exclusion ensures that the gifting authority is not restricted to an amount lower than that authorized by law.

2. Section 529 Accounts

Current law allows gifts to be made either outright or in trust. This proposed revision to section 5-1502M (Construction -- certain gift transactions) permits gifts also to an existing or new account established for the benefit of a donee under section 529 of the Internal Revenue Code (qualified state tuition programs). Authorization for such accounts, commonly known as "529 accounts" or "section 529 accounts," was added to the Internal Revenue Code after the most recent revision of the general obligations law. The subsequent widespread use of 529 accounts for saving for higher education has prompted their inclusion in this proposed revision.

Section 529 allows a gift to a qualified account for a designated beneficiary to be treated as a completed gift to the beneficiary. As such, the gift is eligible for the annual gift tax exclusion under section 2503(b) of the Internal Revenue Code. The intent of this proposed revision in the construction of certain

[96] *See* section 2503(b)(2) of the Internal Revenue Code.

gift transactions is to allow only annual exclusion gifting (and gift splitting, where applicable). Thus, in a year when the annual gift tax exclusion amount is $11,000 per donee, a gift to a beneficiary's account in that year may not exceed $11,000, or $22,000 if the principal's spouse consents to gift splitting. This provision does not authorize gifts in excess of the annual exclusion amount for the purpose of spreading an excess contribution over a 5-year period under section 529(c)(2)(B) of the Internal Code, unless the statutory short form power of attorney contains additional language expressly authorizing it.

3. Gift Splitting

The Commission proposes allowing gift splitting from the principal's assets. Gift splitting, authorized by section 2513 of the Internal Revenue Code, allows one spouse to gift up to twice the annual gift tax exclusion amount per donee, per year, with the consent of the non-donor spouse. In the context of a power of attorney, gift splitting allows the attorney-in-fact to make such gifts from the principal's assets, with the consent of the principal's spouse. For example, in a year when the annual federal gift tax exclusion amount is $11,000, and where the married principal has two children, one grandchild, and one parent, the attorney-in-fact could gift up to $22,000 to any or all of these four people from the principal's assets, with the consent of the principal's spouse. If the maximum allowable gift of $22,000 is made to each of the four recipients, the total would come to $88,000.

The class of permissible split gifting recipients includes the principal's parents, children and other descendants. Inclusion of the principal's parents in this provision distinguishes it from the parallel split gifting provision at newly renumbered subdivision (3) of construction section 5-1502M. Subdivision (3) permits the attorney-in-fact to consent, on behalf of the principal, to split gifting from the assets of the principal's spouse. The subdivision (3) gifting class includes only the principal's issue, (but not the parents of either the principal or the principal's spouse) presumably because only the children and other descendants would constitute the natural recipients of gifting from both spouses.

G. "All Other Matters"

The Commission proposes removing from this section the language prohibiting the attorney-in-fact from making health care decisions for the principal, and adding it to amended section 5-1502K(1), which clarifies that the attorney-in-fact has the authority to make decisions relating to payment for health care services, while the authority to make decisions relating to the provision of health care services is limited to the principal or the principal's health care agent.

H. Multiple Attorneys-in-Facts and Successor Attorneys-in-Fact

The statute continues the requirement that if the principal designates more than one attorney-in-fact, the attorneys-in-fact must act jointly or separately in exercising their authority. In the absence of the principal's instructions that the attorneys-in-fact are to act separately, the attorneys-in-fact must act jointly.

As a generally recognized practice, if a permanent vacancy occurs, the remaining attorneys-in-fact may exercise the authority conferred as if they are the only attorneys-in-fact. If an attorney-in-fact is unavailable because of absence, illness, or other temporary incapacity, the other attorneys-in-fact may exercise the authority under the power of attorney as if they are the only attorneys-in- fact, where necessary to accomplish the purposes of the power of attorney or to avoid irreparable injury to the principal's interests.

A principal may designate one or more successor attorneys-in-fact to act if the authority of a predecessor attorney-in-fact terminates. The successor attorney-in-fact is subject to the same duties and liabilities as any other attorney-in-fact

I. Consistency with Guardianship Law

This provision eliminates the word "guardian" to make this section consistent with section 81.22(b)(2) of the mental hygiene law. Pursuant to section 81.22(b)(2), a guardian is prohibited from revoking any appointment or delegation made by the incapacitated person, including a power of attorney.

J. Powers of Attorney Executed in Other Jurisdictions

The Commission proposes to add section 5-1510 to make it clear that powers of attorney validly executed in other jurisdictions must be accepted as valid for use in New York. The purpose of this provision is to facilitate use and enforceability of such documents. While many jurisdictions have requirements that are similar in nature to the ones included in the Commission's proposal, e.g., the requirement that the attorney-in-fact sign the power of attorney, others do not have such requirements. Nevertheless, when a power of attorney is valid in the jurisdiction of execution, that validity should permit the power's use in another jurisdiction. Such treatment of a power of attorney is consistent with New York's treatment of health care proxies and wills executed in other jurisdictions. [97]

[97] *See* N.Y. Pub. Health L. § 2990 (a health care proxy or similar instrument executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction shall be considered validly executed for purposes of the Public Health Law) and N.Y. Est. Powers & Trusts L. § 3-5.1(c) (a will disposing of personal property wherever situated, and real property in New York is valid and admissible to probate in this state if it is in writing, signed by the testator, and executed and attested in accordance with the law of the jurisdiction in which the will was executed, at the time of execution).