

RE:

Submitted by: New York State Law Revision Commission

MEMORANDUM IN SUPPORT

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

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

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

A. HIPAA Privacy Rule: The bill clarifies the effect of HIPAA's Privacy Rule on powers of attorney in two respects.

It addresses the Agent's access to medical records for bill payment by providing that the authority in the power of attorney relating to "records, reports and statements" as those terms are explained in section 5-1502K must be construed to include the authority to access medical records to pay bills.

It creates a HIPAA-compliant statutory form by which the Principal can authorize the release of otherwise protected health information to the Agent in order to learn if the Principal is incapacitated. Thus the Agent will be able to determine whether a nondurable power of attorney is terminated or a durable power of attorney contingent upon the Principal's incapacity, has become effective.

B. Principal: The bill adds a section to the statute that explains how the power of attorney can be revoked and provides a statutory form for revoking the power of attorney. It expands the Instructions to the Principal so that the Principal will be better informed about the serious nature of the document. It requires that the granting of authority to make major gifts and other asset transfers be witnessed in the same manner as a Will, thus alerting the Principal to the gravity of granting the Agent this type of authority. It allows the Principal to determine whether the Agent may make major gifts or other transfers to himself or herself. The bill also permits the Principal to appoint a designee to monitor the Agent's actions on behalf of the Principal.

C. Agent: The bill includes an explanation of the Agent's fiduciary duties. As part of the statutory short form it includes a notice to the Agent explaining the role of the Agent, the Agent's fiduciary obligations and the legal limitations on the Agent's authority. The Agent is required to sign the power of attorney as an acknowledgment of the Agent's fiduciary obligations. The bill also requires that in transactions on behalf of the Principal where a

handwritten signature is required, the signature of the Agent must disclose his or her relationship to Principal. The bill also provides that in any transactions (including electronic transactions) where the agent is purporting to act on behalf of the Principal, the Agent is attesting that the Agent is acting under a valid Power of attorney and within the scope of the authority conveyed by the instrument. The bill provides that the Principal may provide in the power of attorney that the Agent receive reasonable compensation if Principal so desires. Without this designation, the Agent is not entitled to compensation. The bill also provides that the Agent may resign informally if successor Agents exist, and formally in court if no successor Agents exist.

D. Third Parties: The bill expands the definition of “financial institution” to include securities brokers, securities dealers, securities firms, and insurance companies. It provides that third parties have the ability to refuse to accept powers of attorney based on reasonable cause. Reasonable cause includes the Agent’s refusal to provide an original or certified copy of the power of attorney, the third party’s good faith referral of the Principal and the Agent to the local adult protective services unit, the third party’s actual knowledge of a report to the local adult protective services unit by another person, actual knowledge of the Principal’s death, or incapacity of the Principal if the power of attorney is nondurable. The bill further provides that a financial institutions must accept a validly executed power of attorney and cannot require a power of attorney on the institution’s own form. The third party does not incur any liability in acting on a power of attorney unless the third party has actual notice that the power is revoked. A financial institution is deemed to have actual notice when the office where the account is located receives written notice, or when any other branch or office of the financial institution has had a reasonable opportunity to act upon such notice. The bill also creates a special proceeding to compel a third party to accept a power of attorney.

E. Other Major Provisions: The bill increases the amount of the gifting provision to that of the annual exclusion amount under the Internal Revenue Code. It adds a provision allowing gifting to a 529 account up to the annual gift tax exclusion amount. 529 accounts, authorized in the Internal Revenue Code at section 529, are tax-advantaged savings accounts for education expenses.

The bill amends the provisions regarding gift splitting to allow the Agent to make gifts to a defined list of relatives from the Principal’s assets up to twice the amount of the annual gift tax exclusions, with the consent of the Principal’s spouse.

STATEMENT IN SUPPORT: This bill has been introduced at the request of the New York State Law Revision Commission. About five years ago, it came to the Commission’s attention that although powers of attorney are extensively used in estate planning, their effectiveness is often frustrated by the lack of sufficient statutory direction. The absence of statutory guidance also creates the potential for financial exploitation, and has led to many instances where vulnerable adults lost their life savings to exploiters using powers of attorney. Based on this, the Commission proceeded to conduct a four year study of the use of powers of attorney in New York.

The power of attorney is without question an effective tool for attorneys and the public at large for estate planning and for avoiding the expense of guardianship. This popularity has also led to its use for transactions far more complex than were originally contemplated by the law, particularly in the area of gift giving. As the population ages, the use of the power of attorney is likely to become even more widespread. The power of attorney is a deceptively simple document. It can be obtained from any number of websites on the Internet or in a stationery

store and its execution merely requires the Principal's signature and the acknowledgment of a notary public. But this simple procedure belies the extraordinary power that this instrument can convey.

The instrument's power is demonstrated by the fact that the potential authority of the Agent can include power over assets that usually pass by Will as well as those that pass outside a Will, such as life insurance or retirement benefits. The Principal can delegate these sweeping powers to the Agent, who in turn can exercise them without notice to the Principal. The fact that the statutory short form contains a Cautionary Notice to the Principal underscores the power entailed in the document's use.

The Agent's actions are difficult to monitor. Unless the instrument is a springing power of attorney, i.e., one that becomes effective upon the occurrence of a specified event such as the Principal's incapacity, the Agent can act immediately and without notice to the Principal. Under a durable power of attorney, which continues in effect after the Principal's incapacity, the Agent continues to act when an incapacitated Principal is no longer able to review the Agent's actions.

Despite the broad authority associated with this important and popular legal tool, there are several gaps in the governing statute. The statute is silent as to:

- ✓ the Agent's fiduciary obligations and accountability,
- ✓ the manner in which the Agent should sign documents where a handwritten signature is required,
- ✓ the manner in which the Principal can revoke the document,
- ✓ the circumstance under which a third party may refuse to accept a power of attorney,
- ✓ the procedure to compel a third party to accept a power of attorney.

The statute is also silent as to the effect of the HIPAA's Privacy Rule¹ on powers of attorney. The Privacy Rule, which became effective in April 2003, is a very complex federal regulation addressing the confidentiality of an individual's health information. The Privacy Rule has affected powers of attorney in two separate, immediate, and significant ways. First, it prevents the Agent's access to medical records for verifying the accuracy of a medical bill, which impairs the Agent's ability to act in the best interest of the Principal. Second, it bars the Agent's access to medical information about the Principal's capacity. Thus an Agent acting pursuant to a non-durable power of attorney which terminates upon the Principal's incapacity cannot learn if he or she still has authority to act. An Agent whose authority comes into existence when the Principal loses capacity through a springing durable power of attorney cannot learn if he or she has acquired the authority to act. In both cases, the Privacy Rule directly obstructs the careful planning the Principal has put in place.

Additionally, it is well recognized that the combined effect of the simplicity and potency of using a power of attorney creates the potential for financial exploitation. The New York State Elder Abuse Summit convened in May 2004 made its number one issue reform of powers of attorney to address their use in financial exploitation. The New York State Elder Abuse Coalition's Final Report, TARGET ELDER ABUSE (January 2005), likewise identifies reform of powers of attorney to address financial abuse as a top priority. In 2004, the Legislature passed and the Governor signed into law several amendments to article 81 of the mental hygiene law, one of which partially addresses the problem of financial exploitation through powers of attorney. The mental hygiene law now permits courts to revoke powers of attorney in a

¹ Health Insurance Portability and Accountability Act of 1996, Public Law 104 -191. *See* Privacy Rule at 45 C.F.R. Parts 160, 164.

guardianship proceeding when the Agent has abused the power of attorney or otherwise violated his or her fiduciary duty.

In March 2002, the Commission hosted a Roundtable Discussion to explore these issues relating to powers of attorney with participants from the Judiciary, prosecutors and adult protective service investigators from around the state, representatives from the Office for Children and Family Services, the Office for the Aging, the Attorney General's Office, the Lawyers' Fund for Client Protection, attorneys with trust and estates and elder law practices, and legislative staff. Thereafter, over the next two and half years, members of the Commission and its staff had further discussions with interested individuals, including representatives from the Trusts & Estates Section and the Elder Law Section of the New York State Bar and the banking community. Based on input from these various groups the Commission has refined its proposal.

Based on its study, the Commission concluded that powers of attorney should continue to be a flexible instrument that can be used and adapted to fulfill the Principal's reasonable intentions. However, the Commission also believes that the general obligations law's silence on several significant aspects of powers of attorney can serve to frustrate the proper use of the power of attorney. Common law likewise offers little or no guidance. This bill amends the statute to provide clarity and direction and to deter and curb financial exploitation without unduly burdening the utility and simplicity of the power of attorney.

FISCAL IMPLICATIONS: None

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