**Law Revision Commission Commentary**
**Title 15 of the general obligations law**

The title of title 15 of the general obligations law is amended to provide that the provisions of this title are applicable to statutory short form powers of attorney and other powers of attorney for financial and estate planning. This amended title clarifies the general understanding that general obligations law governs only powers of attorney that individuals create to appoint a person to assist them in personal financial and estate matters

**§ 5-1501 Definitions**

Certain terms which are used frequently throughout the statute and which are integral to the use of powers of attorney are clarified through the inclusion of definitions.

**1. "Agent"**

The terms "agent" and "attorney-in-fact" have been used interchangeably in prior versions of the statute. Subdivision (1) eliminates the confusion. The statute as amended refers to the attorney-in-fact as the "agent."

**2. "Benefits from governmental programs or civil or military service"**

This phase is defined to make clear that these benefits include Security, Medicare, and Medicaid.

**3. Capacity**

Case law suggests that a person executing a power of attorney requires the same mental capacity as one who enters a contract. *See generally Lounsberry v. Hull*, 144 Misc. 2d 707 (Sup. Ct. 1989))( i.e. "whether the [principal] was capable of comprehending and understanding the nature of the transaction at issue." (See *Smith v. Comas*, 173 AD2d 535, 535 (2d Dept. 1991), *lv denied* 80 NY2d 854; *see also Ortelere v. Teachers Retirement Bd of City of N.Y.*, 25 NY2d 196 (1969). Accordingly, capacity is defined to mean that the principal is capable of comprehending the nature and consequences of the act of executing, granting, revoking, amending, or modifying the power of attorney.

**4. Compensation**

The proposal permits the principal to choose whether or not his or her agent is entitled to reasonable compensation for services actually rendered on behalf of the principal under the power of attorney. *See* section 5-1506. The definition of compensation specifies that payment should come from the assets of the principal.

**5. "Financial Institutions"**

Much of the definition of "financial institution" derives verbatim from the original section 5-1504(1). Although the definition of "financial institution" originally included an extensive list of financial enterprises, there is no express reference to insurance companies or securities brokers, dealers, and firms. Because an agent may be authorized to perform transactions involving insurance and securities, under the Commission's Recommendation insurance companies and brokerage firms would be subject to the same rules as virtually all other financial institutions in regard to acceptance of a power of attorney. The list of financial institutions is not exclusive.

**6. "Incapacitated"**

Given the definition of capacity at section 5-1501(3 ), this term which is used throughout the statute is self-explanatory.

**7. "Internal Revenue Code"**

There are several provisions which reference provisions of the Internal Revenue Code, perhaps most notably, the federal gift tax exclusion amount at section 5-1514.

**8. "Monitor"**

The purpose of a monitor is to permit informal oversight of an agent, which is particularly useful if the principal has become incapacitated and the agent continues to have authority to act pursuant to a durable power of attorney or a springing durable power of attorney**.**

**9. "Person "**

The definition of "person" comes from section 11-A-1.2 of the estates, powers, and trusts law.

**10. "Power of attorney"**

The statute is aimed at the use of these documents for personal use by an individual including financial and estate plan but nothing in the statute is to be construed to bar the use of any other or different form of power of attorney by persons other than individuals.

**11. "Principal"**

The relationship of the principal and agent is governed by the law of agency as well as the general obligations law.

**12. "Record"**

The definition of "record" is modeled on the language used in the uniform power of attorney act adopted by the National Conference of Commissioners on Uniform State Laws, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm

**13. "Sign"**

The definition of "sign" accommodates the use of electronic signatures. The definition is modeled on the language defining the term "signature" in section 46 of the General Construction Law.

**14. "Statutory Major Gifts Rider"**

The concept of a "statutory major gifts rider" is new. It is used to supplement a statutory short form power of attorney. The statutory major gifts rider is for use only when the principal intends to authorize the agent to make transfers of the principal's property, or gifts larger than the $500 per donee annual limit permitted under the statutory short form power of attorney. To qualify as a "statutory major gifts rider," the supplementary document must be typed or printed in letters which are legible or of at least 12-point in size, contain the acknowledged signature of the principal and the signatures of two witnesses who are not named in the instrument as permissible recipients of gifts or other transfers, and include the exact wording of the statutory major gifts rider provided in the proposal at section 5-1514. A statutory major gifts rider and the statutory short form power of attorney it supplements must be read together as a single instrument.

**15. "Statutory Short Form Power of Attorney"**

The use of the statutory short form power of attorney has always been encouraged as a mechanism to insure more ready acceptance of the agent's authority to act on behalf of the principal and to overcome objections of financial institutions to common law general powers of attorney. To qualify as a "statutory short form power of attorney," the document must be typed or printed in letters which are legible or of at least 12-point in size, contain the acknowledged signature of the principal, and include the exact wording of the statutory short form provided in the proposal at section 5-1513. The statutory short form power of attorney may be used to authorize powers provided in sections 5-1502A through 5-1502N of the general obligations law, and may be modified as provided in section 5-1503, but it may not be modified to include any of the major gifting and transfer powers provided in section 5-1514. If the principal using a statutory short form power of attorney intends to grant his or her agent authority to make major gifts and other property transfers as provided in section 5-1514, she must execute a statutory major gifts rider to supplement the statutory short form power of attorney.

Nothing in the statute as amended would prevent the principal from executing a non-statutory power of attorney. However, a non-statutory power of attorney executed by an individual must comply with certain requirements of section 5-1501B. In the event a principal executing a non-statutory power of attorney intends to authorize an agent to make gifts and other property transfers, the non-statutory power of attorney must be signed and dated by the principal with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the manner described at paragraph (2) of subdivision (a) of section 3-2.1 of the estates, powers and trusts law.

## § 5-1501A Power of Attorney Not Affected by Incapacity

### 1. Durable Power of Attorney

A power of attorney is presumed to be durable unless the document expressly provides otherwise. This approach recognizes that most principals prefer that their powers of attorney remain in effect during any period of incapacity. The Commission's Recommendation recognizes that New York's law has distinguished the durable power from the older nondurable or general power of attorney by requiring the inclusion of a statement such as "'This power of attorney shall not be affected by my subsequent disability or incompetence,' or words of similar import . . . ." The intervening years have secured the durable power's place as the form of choice for most purposes, while the nondurable form predominates primarily in connection with real property transactions. Accordingly this section of the Commission's Recommendation acknowledges the broader usage of the durable power by making it the default form. This approach mirrors that used in the uniform power of attorney act adopted in 2006 by the National Conference of Commissioners on Uniform State Laws, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm

### 2. Conversion of Form to Nondurable or Springing Durable Power of Attorney

To convert the standard form to a nondurable power of attorney which will cease to be effective if the principal becomes incapacitated, the principal should include a statement such as "This Nondurable Power of Attorney will cease to be effective if I become incapacitated" in the section of the form labeled "modifications." The "modifications" section of the statutory short form should be used as the collection point for all modifications of the basic statutory form, including, here, language converting the form to a nondurable power of attorney. To convert the standard form to a springing durable power of attorney which is to take effect at a certain date or upon the occurrence of a stated contingency, language specifying that the power of attorney does not become effective until the date or contingency specified should likewise be added in the section of the form labeled "modifications." One of the more common contingencies listed is the principal's incapacity.

Although not incorporated into the Commission's Recommendation, a principal who wishes his or her power of attorney to be nondurable or to take effect upon the principal's incapacity should also complete an authorization for the release of protected health information related to his or her capacity, to ensure that federal medical privacy rules do not impede the termination or activation of the power of attorney as the case may be when the principal becomes incapacitated.

The need for an authorization form derives from the "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, which went into effect in April, 2003, a medical provider may not disclose an individual's protected health information to a third party 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 powers of attorney, could not be

disclosed to the agent, financial institutions, or other third parties, thwarting the principal's intention in creating the power of attorney.

The suggested form set out below meets 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. The authorization form should not be combined with any other document to create a compound form. *See* 45 C.F.R. section 164.508(b)(3).

If the principal is unable to execute the authorization 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 agent under a power of attorney is also the principal's health care agent, the agent cannot execute this document. For further discussion of the relationship between the Privacy Rule and powers of attorney, *see* the commentary to proposed section 5-1502K(1). The form provided below is intended to accompany a nondurable power of attorney, or a durable 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.

It should be noted that the form includes two alternative introductions, one corresponding to each of the two types of power of attorney.

The language at section number two is derived from section "I" in the current statutory short form power of attorney effective at a future time.

**AUTHORIZATION FOR RELEASE**
**OF PROTECTED HEALTH INFORMATION**
**RELATED TO CAPACITY**

*[for a nondurable power of attorney, insert this introduction]*
"NOTICE TO THE PRINCIPAL:
This authorization form should accompany your Nondurable Power of Attorney.

If you become incapacitated, third parties may require a medical statement confirming your condition, to assure them that your Power of Attorney has ceased to be effective."

*[for a springing power of attorney, insert this introduction]*
"NOTICE TO THE PRINCIPAL:
This authorization form should accompany your Durable Power of Attorney Effective at a Future Time (also known as a "Springing Power of Attorney") if you chose to make your document

effective on the signing of a written statement by a medical provider, certifying that you are suffering from diminished capacity that would prevent you from conducting my affairs in a competent manner. If you chose this approach and you become incapacitated, third parties may require a medical statement confirming your condition, to assure them that your Power of Attorney has taken effect."

*[form resumes]*

Under federal medical privacy law, in order for your medical provider to be able to release this statement to your agent or any other person or persons you specify, your provider must have your authorization to do so, in writing. When completed and signed, this form becomes a valid authorization for release of this statement, if it is ever needed. If you have a Health Care Proxy in effect when you become incapacitated, your Health Care Agent named in your Health Care Proxy will be able to complete and sign this form on your behalf at that time.

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The purpose of this form is to allow the release of any written statement certifying that at the time of the statement, I am suffering from diminished capacity that would preclude me from conducting my affairs in a competent manner.

My name: _____ Date of birth:_____

Address: _____

_____

1. I, _____, hereby authorize

2. the following persons:
   (a) the physician or physicians named in my Power of Attorney;
   _____
   *print name(s)*
   (b) if the physician or physicians named in my Power of Attorney are unable to act, or if no physician or physicians are named in my Power of Attorney:
   (i)my regular physician, _____,or
   (ii) a physician who has treated me within one year preceding the date of the request for the written statement, or
   (iii) a licensed psychologist or psychiatrist

3. to release a written statement certifying that I am suffering from diminished capacity that would preclude me from conducting my affairs in a competent manner

4. to the following person or class of persons
   _____

5. at that person's request.

I hereby request that the person or persons releasing the statement also provide me with a copy of the statement.

This authorization will expire one year after my death, or when I revoke it, as specified below.

I understand that:

I may revoke this authorization in writing at any time by sending a signed and dated written statement to the person or class of persons I named above at paragraph 2, saying that I am revoking my authorization to disclose a statement about my incapacity.

My revocation will have no effect on information that my medical providers had released under this authorization before they received my revocation.

The written statement concerning my capacity may be redisclosed to other parties.

The persons described at paragraph 2, above, may not condition treatment, payment, enrollment or eligibility for benefits on whether I sign this authorization form.

If I have a Health Care Proxy in effect when I become incapacitated, my Health Care Agent named therein may complete and sign this form on my behalf, as my Personal Representative.

_____ _____

*Your signature* *Date*

***Alternative signature if this form is completed by Health Care Agent appointed under a Health Care Proxy:***

_____ _____

*Signature of Health Care Agent* *Date*

_____

*Print Health Care Agent's name*

_____ _____

*Health Care Agent's Street Address* *Phone*

_____

*City, State, Zip*

**5-1501B Creation of Valid Powers of Attorney; When Effective**

Every power of attorney, whether a statutory short form or a non-statutory power of attorney executed by an individual must satisfy certain general requirements.

**1. General Requirements**

Certain safeguards must be incorporated into every power of attorney for an individual, including those powers of attorney not based on the statutory short form. Accordingly, section 5-1501B(1) establishes that every power of attorney governed by title 15, to be valid, must include a cautionary statement to the principal, a notice to the agent, and the acknowledged signature of the principal. If the instrument is a non-statutory form, the cautionary statement and the notice must contain the exact wording of those provisions as they appear in the statutory short form. Additionally, the agent must sign the power of attorney and the agent's signature must be acknowledged in order for the agent's appointment to take effect. By signing the power of attorney, the agent also recognizes his or her fiduciary duties as explained in the notice.

**2. Execution Requirements for Non-statutory Forms**

If a power of attorney that is not based on the statutory short form allows the agent to make any gift or other transfer described in section 5-1514, it must be executed pursuant to the requirements for executing the statutory major gifts rider, namely, it must be signed and dated by the principal and agent with their signatures duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the manner described at paragraph (2) of subdivision (a) of section 3-2.1 of the estates, powers and trusts law. The heightened execution requirement ensures that such common law powers of attorney provide the principal with the same protections as the statutory major gifts rider.

A non-statutory form created by an individual which does not authorize gifts or other transfers requires only the standard execution, namely, the signatures of principal and agent(s) and their acknowledgment before a notary public.

**3. When the Power of Attorney is Effective**

The Commmission's Recommendation provides that that the power of attorney is valid when signed and acknowledged by the principal and the agent.

The power of attorney is effective as to an agent when that agent's signature is acknowledged on the instrument except in the case of springing powers of attorney – powers which take effect at a specified future time, or powers which take effect upon the occurrence of a specified contingency. Such springing powers of attorney take effect only when the date or contingency has occurred, and the agent's signature has been acknowledged.

**§ 5-1502A Construction – Real Estate Transactions**

Certain sections of the construction provisions have been modified to reflect the fact that significant gifting and creation or modification of trusts is precluded under the basic statutory short form power of attorney. Each of the provisions that relate to significant gifting and creation or modification of trusts is found at section 5-1514.

In this construction section, subdivisions (2) and (9) eliminate language that would allow the agent to revoke, create, or modify a trust.

**§5-1502B Construction – Chattel and Goods Transactions**

Subdivisions (2) and (7) eliminate language that would allow the agent under the basic statutory short form power of attorney to revoke, create, or modify a trust. The provision relating to creating or modifying a trust is found at section 5-1514.

**§5-1502C Construction – Bond, Share and Commodity Transactions**

Subdivisions (2) and (9) eliminate language that would allow the agent under the basic statutory short form power of attorney to revoke, create, or modify a trust. The provision relating to creating or modifying a trust is found at section 5-1514.

**§ 5-1502D Construction – Banking Transactions**

Subdivision (1) clarifies that the agent may continue any bank account, including a joint account or totten trust with the agent, made by or on behalf of the principal before the execution of the power of attorney.

Subdivision (2) clarifies that the agent may open new accounts for the principal under the basic statutory short form power of attorney, but these may not be joint accounts with any person unless their creation is authorized in a statutory major gifts rider to a statutory short form power of attorney or a in a non-statutory power of attorney signed and dated by the principal and agent with their signatures duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the manner described at paragraph (2) of subdivision (a) of section 3-2.1 of the estates, powers and trusts .

**§ 5-1502F Construction – Insurance Transactions**

In subdivisions (2) and (3), language allowing the agent to change or designate a beneficiary on a life insurance policy under the basic statutory short form power of attorney is removed. The language permitting termination of a life insurance policy is retained as a recognition that termination of a policy may be part of routine financial management – for example, because premiums are no longer affordable. To allow termination of life insurance policy for purposes of altering the principal's estate plan, the principal should grant such a power in the statutory major gifts rider to a statutory short form power of attorney or in a non-statutory power of attorney signed and dated by the principal and agent with their signatures duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the manner described at paragraph (2) of subdivision (a) of section 3-2.1 of the estates, powers and trusts .

**§ 5-1502G Construction – Estate Transactions**

The language in the final paragraph of section 5-1502G clarifies that the agent 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 in the

power of attorney or in existence at the time the principal executes the power of attorney. Unless the principal limits the attorney-in fact's authority, the agent can act as to all estates, trusts or other funds.

**§ 5-1502I Construction – Personal and Family Maintenance: De Minimis Gifting**

The Commission's Recommendation includes a new subdivision (14) in section 5-1502I. This new provision allows the agent to continue de minimis gifts on behalf of the principal, not to exceed a total of $500 per year to any person or charitable organization. This provision would allow any customary gifts for birthday, graduation, religious occasion, or other special occasions, to any person or charitable organization. No statutory gifting class is defined in order to obviate the need to identify all permissible recipients of gifts. However, a principal who wishes to modify the form to identify the permissible de minimis gift recipients by class, name, or other description may do so on the statutory short form power of attorney. If the principal wishes to authorize the agent to make gifts in larger amounts, the principal must do so by executing a statutory major gifts rider to a statutory short form power of attorney, or in a non-statutory power of attorney signed and dated by the principal with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the manner described at paragraph (2) of subdivision (a) of section 3-2.1 of the estates, powers and trusts .

The Commission's Recommendation also revises the caption of construction section 5-1502I to become "Construction – personal and family maintenance," to better reflect the intent of the section. This caption derives from the equivalent section of the revised uniform power of attorney adopted in 2006 by the National Conference of Commissioners on Uniform State Laws, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm

**§ 5-1502J Construction – Benefits from Governmental Programs and Civil or Military Service**

Section 5-1502J is revised from "Benefits from military service" to "Benefits from governmental programs and civil or military service" and the name of the statutory short form's corresponding power (J), is retitled as well. The section allows an agent to deal with a much broader array of government benefits than under current law and obviates the need for practitioners to continue to modify the power of attorney to add a power allowing the agent to act with respect to social security and other benefits.

**§ 5-1502K Construction – Health Care Billing and Payment Matters; Records, Reports and Statements**

Section 5-1502K is revised to include a new paragraph (1) to clarify that the authority 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 and the names of the construction section and the corresponding power at (K) in the statutory form are retitled as well. Thus, an agent given authority at "K" would be able to verify the accuracy of billing statements related to the principal's medical care. This clarification

removes any ambiguity about whether an agent acting under an existing or future power of attorney can access health care records in connection with the payment of health care bills. The current law which limits the authority of a third party to make health care decisions to a health care agent acting under a health care proxy or a guardian appointed by the court is not changed.

The ambiguity over the agent's authority to access health care billing records arises out of several factors. The first is the lack of express reference to medical records in current subdivision K on the three statutory short forms and in current construction section 5-1502K. Moreover, section 18 of the public health law does not include the agent under a power of attorney in the list of qualified persons entitled to access to a patient's health records, *See* public health law § 18(1)(g). This section refers only to lawyers who hold a power of attorney from an otherwise qualified person or the patient's estate specifically "authorizing the holder to execute a written request for patient information." An otherwise qualified person is the patient, article 81 guardian, parent of an infant, guardian of an infant, or distributee of deceased patient's estate if no executor or administrator has been appointed. As a result, health care providers have reportedly refused to make records available to an agent seeking clarification of a medical bill, without express language added to the power of attorney document authorizing such release.

Second, the ambiguity created by the lack of express reference to medical records in section 5-1502K is exacerbated by the "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 agent if the agent can be characterized as the principal's "personal representative." Under the federal 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. section 164.502(g)(2).

Regarding access to records, the Privacy Rule 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 agent, who could be two different individuals. The general obligations law expressly prohibits the agent from making health care decisions for the principal ( *See* current sections 5-1501(1) and (1-a), 5-1502O, and 5-1506) which are defined by the public health law 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." *See* public health law sections 2980(4) and (6). While the principal may grant health care decision making authority to a third party by executing a health care proxy ( public health law section 2981), under the health care proxy law financial liability for health care decisions remains the obligation of the principal. *See* section 2987 of the public health law. As a practical matter, payment issues are left to the principal or the principal's agent. Section 5-1502K makes clear that an agent is an individual's "personal representative" for purposes of accessing medical records in connection with paying medical bills. The change in no way affects the authority of the health care agent to access medical records in connection with making health care decisions.

**§ 5-1502L Construction – Retirement Benefit Transactions**

Subdivision (2) is revised to remove language to allow the agent to designate a beneficiary of a retirement plan, and subdivision (4) removes language that would allow the agent to prepare, execute, and deliver a trust agreement. The provisions relating to designating or changing beneficiaries and creating or modifying a trust are found at section 5-1514. . If the principal wishes to authorize the agent to do these things, the principal must do so by executing a statutory major gifts rider to a statutory short form power of attorney, or in a non-statutory power of attorney signed and dated by the principal and agent with their signatures duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the manner described at paragraph (2) of subdivision (a) of section 3-2.1 of the estates, powers and trusts.

**§ 5-1502M Construction -- Certain Gift Transactions**

The entire section has been deleted and appears in a revised version at section 5-1514, preceding the statutory major gifts rider. Section 5-1502N, Construction – tax matters, is relettered to become 5-1502M.

**§5-1502O Construction – All Other Matters**

The proposal clarifies that the agent may not use "all other matters" as authorization to designate a third party to act as agent for the principal. The proposal does not create a new construction section to accompany the authority to delegate. The authority to delegate, which appears in the list of powers on the statutory short form at "O," is the only power without a corresponding construction section. Historically, the omission is due in part to its migration from a basic structural component of the original 1948 statutory power of attorney to its current place in the list of statutory powers. The original statutory short form power of attorney provided a list of powers, with instructions to the principal to cross off any unwanted powers. The next item on the form was the power to delegate. As a structural component of the power of attorney appearing separately from the list of powers, it apparently did not require its own construction section. However, this separate section provided no instructions indicating whether the principal had any choice as to whether to include it or not. *See* 1948 N.Y. Laws, c. 442.

In 1980, the Legislature moved the authority to delegate into the list of powers, to clarify the Legislature's intent that the principal be able to strike this power if the principal so wished. *See* L. 180, ch. 140. The change was prompted by concern that an attorney-in-fact "could pass the power of attorney on to another person without [the principal's] knowledge." *See* letter from Assemblyman R. Stephen Hawley to Richard A. Brown, Counsel to the Governor, May 19, 1980. The concern appears to have been that the authority to delegate might give the attorney-in-fact, rather than the principal, the power to designate a successor agent – at that time, the form did not provide for appointment of a successor – and that it also diluted the confidential nature of the attorney-in-fact's appointment by the principal. The Legislature has subsequently added a specific provision on the form where the principal may name one or more successor agents to take over if the original agent is unable or unwilling to act.

Writing in support of the 1980 change, the New York County Lawyers' Association suggested a different use for the delegation power: "The provision is important where it may not

be possible for the grantee to fulfill the object of the grantor without assistance from someone else at a particular time or place. The grantor may, of course, strike the provision if desired." *See* letter from Richard A. Givens, Chairman, Committee on State Legislation, to Richard A. Brown, May 20, 1980. Most of the few reported cases on delegation support this latter view, where courts have approved the attorney-in-fact's delegation of responsibility to an attorney-at-law with respect to a specific matter, such as pursuing an insurance claim ( *See In re Khoubesserian*, 264 A.D. 2d 599 (1st Dep't, 1999), signing a zoning protest (*Bismark v. Bayville*, 21 A.D.2d 797, (2d Dep't, 1964), or setting up a charitable organization (*In re Groedel*, 23 Misc.2d 1056 (Surr. Ct. N.Y. Co., 1960)). However, the attorney-in-fact's actions in a recent case illustrate the concern that prompted the Legislature's 1980 amendment. Here, the agent attempted to delegate all of his powers, in effect naming a successor agent, and then, in an attempted do-over, assigned the power of attorney to a third party. *See Ferry v. Ferry*, 13 A.D.3d 765 (3d Dep't 2004). Meanwhile, the principal revoked the original power of attorney and executed a new one. The trial court suspended all of the powers of attorney and never had to rule on the delegation/assignment issues.

General agency principles provide some guidance with respect to powers of attorney and delegation. The traditional view is that "the relation of principal and agent is a fiduciary one in which the principal ordinarily relies on the personal qualities of the agent; unless the transaction includes no element of discretion, the one appointed to conduct it cannot properly appoint another to perform it. . . ." Restatement 2d Agency § 78, comment (a). *See also In re Estate of Jones*, 1 Misc. 3d 688 (2003). The proper delegation of performance to another extends to ministerial "acts involving no discretion and regarded as mechanical" (Restatement 2d Agency § 78, comment (b)) or to "acts requiring professional assistance" (§ 41, comment (a)).

**§ 5-1503 Modifications of the statutory short form power of attorney and of the statutory major gifts rider**

See discussion at sections 5-1513 and 5-1514 respectively regarding modification of a statutory short form power of attorney and of the statutory major gifts rider.

**§ 5-1504 Acceptance of Powers of Attorney**

The provisions of this section, coupled with provisions related to signatures and revocation, are intended to alleviate concerns about accepting powers of attorney. For example, the 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 agent 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 agent'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. (*See* section 5-1507(2).) Thus, even where an agent falsely attests to the validity of a power of attorney, the third party who relies on the signature of the agent will escape liability unless the third party had actual notice that the power of attorney was no longer valid.

**1. § 5-1504(1)(a) Refusal to Honor Power of Attorney for Reasonable Cause**

This section permits 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." Paragraph (a) defines reasonable cause to include specific circumstances where the power of attorney is invalid or where the agent's motives or exercise of authority are suspect. The list of circumstances is not intended to be exclusive. One such circumstance is where the third party has made a good faith referral of the principal and agent to Adult Protective Services. Under section 473-b of the social services law, a third party who makes a good faith referral to any local social services district is immune from any civil liability arising from such referral. The Gramm-Leach Bliley Act (15 U.S.C. section 6802(e)(3) permits financial institutions to disclose personal financial information to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability. Another example of reasonable cause appears in subparagraph (a)(3), where the third party has actual knowledge that someone else has made a report to Adult Protective Services. The circumstances listed are not exclusive. They are intended to provide guidance for a third party who must weigh whether to accept the instrument presented.

### 2. § 5-1504(1)(b)(1) 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. § 5-1504(1)(b)(2) and (3) Third Party's Refusal Based on Lapse of Time Unreasonable

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, or because there is a lapse of time between the date of acknowledgment of the signature of the principal and the date of acknowledgment of the signature of any agent.

### 4. § 5-1504(2) Court Ordered Acceptance of Power of Attorney

One of the goals of the original legislation that created the statutory short form in 1948 was to encourage financial institutions to accept such documents. The anticipated acceptance did not follow. Nor did it follow when title 15 was amended in 1986 to make it unlawful for a financial institution to refuse to accept a statutory short form power of attorney. In the Commission's discussions with many attorneys over the course of its study of the issues and drafting process, it became clear that all too often financial institutions refuse to accept statutory short form powers of attorney and insisted on the use of their own forms instead. Consequently, to effectuate acceptance of the statutory short form, the subdivision provides that a special proceeding may be commenced to compel acceptance. A special proceeding is the exclusive remedy to compel acceptance and the relief available against a third party in this circumstance is limited to injunctive relief. *See* section 5-1510(2)(i).

### 5. § 5-1504(3) Actual Notice of Revocation and Financial Institutions

Third parties are shielded from liability for unknowingly acting upon a power of attorney that has been revoked either by the principal or by operation of law. Specifically, 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.

In addition, subdivision (3) provides 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 and the financial institution has had a "reasonable opportunity to act" on such notice. The language "reasonable opportunity to act" is derived from section 4-403(1) of the uniform commercial code, regarding a bank customer's "stop order" to stop payment of a check.

At least one court in New York, *Gornicki v. M & T Bank* , 162 Misc.2d 471, 617 N.Y.S.2d 448 (1994), addressed the reasonable opportunity to act on a revocation of a power of attorney. The principal had gone to the bank branch where the account was opened to revoke the power of attorney. The bank's assistant manager noted the revocation on the original document. One hour later, the bank teller cashed a check for the agent on the principal's account. The principal sued the bank to recover the funds. The bank moved for summary judgment. The power of attorney form, which was a bank POA form provided that "a reasonable time for [the bank] to act on any notice of cancellation [of the power of attorney] will not end until at least the close of business of the next banking day after [the bank] receive[s] the notice." The bank relied on UCC section 4-303 in support of its motion.

The court noted that this argument essentially meant that the bank could act negligently within that one day and still not be held responsible for failing to act on the revocation. The court denied the bank's motion. It stated that under UCC section 4-103, a bank cannot disclaim responsibility for its negligence but that the parties to an agreement could establish standards by which the bank's conduct could be judged unless such standards were manifestly unreasonable. The standard of timeliness adopted by the bank had to be examined to determine if it was manifestly unreasonable and that such an examination required looking at all the acts and circumstances.

The court noted that while there were no reported New York cases on the timeliness of a bank's actions on a stop payment order or other notice to the bank, other jurisdictions have interpreted the language of "a reasonable opportunity to act" in section 4-303 to require a consideration of all the facts and circumstances including the bank's own procedures, such as those involving computer technology and when tellers at a branch receive notice of a stop payment order.

New York cases involving the timeliness of a stop order are also instructive. In *Dunbar v. First National Bank of Scotia*, 63 A.D.2d 755, 404 N.Y.S.2d 722 (3d Dept.1978), the appellate court upheld a jury verdict finding that the bank had a reasonable opportunity to act on a stop order within an approximately 3 hour time period. The evidence was that the stop payment order for a check was made out at 9:05 a.m. at the main branch of the bank, telephone calls to the branch officers of the bank and the tellers at drive-in windows were completed by 9:25 am, and the stop order was to sent to the tellers at the main branch but not circulated until 11:55 a.m. On the same morning sometime after the Stop Order was received but before the teller who cashed the check had received notice, the wife of the payee of the check attempted to cash the check, which was taken to a bank officer for approval and then cashed. In *Hughes v. Marine Midland Bank, N.A.*, 484 N.Y.S.2d 1000 (N.Y.City Ct.1985), the court held that a period of "[a] full banking day, a full weekend, and a portion of the next banking day . . .was time enough to act as a matter of law" and that the bank was liable for its failure to act even though the stop payment order contained an incorrect check number. The court noted that the bank had

the computer capability to identify the correct check based on the other accurate information that the customer had provided to it.

**6. § 5-1504(4) The invalidity of the provision as it relates to a particular institution shall not invalidate it as to other institutions.**

This language is carried over from the current section 5-1504. It appears to address a lingering concern that certain financial institutions may not be subject to the general obligations law. Under longstanding federal common law, states have the legitimate power to make laws that apply to all persons within their jurisdictions and to their own financial institutions, but cannot make special laws applicable to federal banks.*Easton v. Iowa,* 23 S.Ct. 288, 292 (1903)([N]ational banks are subject to the laws of a state in respect of their affairs, unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies, or conflict with the paramount law of the United States."); *First Nat. Bank in St. Louis v. State of Missouri at inf.of Barrett,* 44 S.Ct. 213, 215 (1924). *See also* 12 USCA § 1846(a). This rule is interpreted to mean that states may make laws that apply generally to all banks, such as civil rights legislation prohibiting geographic discrimination in lending,[“] *People v. Calandra,* 164 A.D.2d 638 (1st Dep't. 1991); Banking Law 9-f(3), laws governing tax escrow accounts,[§]Real Property Tax Law 952 et seq., and statutes providing for the establishment of trusts, Banking Law §§ 14(1)(c); 100-c (7), and that these laws may apply to federal banks. *Calandra* at 642. The definition of "financial institution" in current section 5-1504 and new section 5-1501, and 5-1504's requirement that financial institutions honor a properly executed statutory short form power of attorney apply generally to a wide range of institutions, and not specifically to federally regulated entities.

**7. 5-1504(5) Agent's Affidavit Stating That Power of Attorney is in Full Force**

To encourage third parties' acceptance of powers of attorney, the Commission's Recommendation allows a third party to require the agent execute an affidavit stating that the power of attorney is in full force and effect. The affidavit is conclusive proof to the third party that the power of attorney is valid and has not been terminated or revoked.

**§ 5-1505 Duties of an Agent**

The Commission's Recommendation expressly prescribes the legal responsibilities of the agent under a power of attorney. This approach is consistent with that of the estates, powers and trust law (EPTL) and the surrogate's court procedure act (SCPA), which specifically address the duties and obligations of other types of fiduciaries. *See, e.g.*, EPTL sections 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 estate); and SCPA sections 711 (suspension, modification or revocation of letters or removal for disqualification or misconduct) and 719 (describing when letters may be suspended, modified or revoked, or a lifetime trustee removed or his powers suspended or modified, without process).

**1. Standard of Care**

Subdivision (1) sets forth the 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. An express standard of care is included to guide the agent in the exercise of his or her duties.

**2. Statement of Fiduciary Duties**

Subdivision (2) codifies the common law duties of an agent. The Third Department has 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 agent 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.*)." *Mantella v. Mantella*, 268 AD2d 852 (2000).

A power of attorney cannot be drafted to include an exculpatory clause exonerating the agent from this fiduciary duty. *In re Mueller*, 19 Misc.3d 536, 853 N.Y.S.2d 245 (NY Sur. Ct. 2008).

The Commission's Recommendation also clarifies that the duty to keep the principal's property separate and distinct does not apply to property that was jointly owned by the principal and agent before the execution of the power of attorney, or to property that became jointly owned because of the agent's exercise of transfer and self-gifting authorities under the statutory major gifts rider. An agent attempting to side-step this prohibition by transferring the principal's funds into the pre-existing joint account would be in violation of fiduciary duty, and of the terms of the statutory major gifts rider if self-gifting is not authorized.

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." (2A NY Jur 2d Agents & Indep. Contractors section 239). In *In re Garson*, the First Department stated, "[the Agent's] failure to produce contemporaneous records of the cash payments he made on [the Principal's] behalf, allegedly for her living expenses as well as to fund gifts, rendered him liable to her estate for the unaccounted amount." 17 A.D.3d 243 (1st Dep't 2005). The guardianship court in *Garson,* 2 Misc.3d 847 ((Sup. Ct. N.Y. Co. 2003), examining the attempted reconstruction of over three years of undocumented cash transactions, noted

that the Agent claimed: to have replenished the cash in the Principal's purse each week so that there was always $400-$600 on hand; to have made cash payments to the Principal's aides; to have paid rent, utilities, telephone, car service, club membership, and medical insurance in cash, although check registers indicate that those same items had been paid by check, and to have made cash payments for the Principal's dining expenses and for medications purchased at a local pharmacy, although the Principal's credit card statements indicated that these same items had sometimes been paid by this credit card. The attorney-in-fact's failure to keep any contemporary records of cash withdrawals and expenditures proved costly, as he was required to reimburse the Principal's estate $163,000 plus interest.

To codify the common law obligation as a formal accounting would unduly impede the use of powers of attorney. To strike a balance, this section requires the agent to maintain a record of receipts, disbursements, and transactions, and to make that documentation available at all times to the principal. The agent has 15 days to respond to a request for the record by certain other individuals, including the monitor, a co-agent or successor agent acting under the power of attorney, an official representing a government entity investigating an allegation of abuse, a court evaluator acting pursuant to a guardianship proceeding under article 81 of the mental hygiene law, a guardian ad litem appointed pursuant to section 1754 of the surrogate's court procedure act, the guardian or conservator of the principal's estate, or the personal representative of the estate of a deceased principal. If the agent fails to produce the record, the person who is authorized to request the record may commence a special proceeding to compel the agent to produce the record. *See* section 5-1510(1).

The agent must also disclose his or her identity as agent whenever he or she is acting for the principal, pursuant to the provisions of section 5-1507(1).

### 3. Consequences for Breach of Fiduciary Duty

Paragraph (b) of subdivision (2) provides that the agent may be subject to liability for conduct or omissions which violate the agent's fiduciary duty.

### 4. Limits on the Liability of Agent

Paragraph (c) of subdivision (2) establishes that the agent is not liable to third persons where the agent's action is authorized at the time, and is consistent with the prescribed fiduciary duties and obligations set forth in this section.

### 5. Resignation of Agent

Subdivision (3) provides the procedure for the resignation of an agent who has signed the power of attorney. The agent who intends to resign should provide written notice to the principal, and to the agent's co-agent, and to any successor agents named in the power of attorney, or to the monitor, if one has been appointed, or to the principal's guardian, if one has been appointed.

If the agent knows or has reason to believe that the principal is incapacitated, and the agent has no knowledge that there is a co-agent, successor agent, monitor, or guardian, then the agent may resign by providing written notice to Adult Protective Services or by petitioning the court to approve the resignation. This approach provides notice to APS or the court that an incapacitated principal may be in need of a guardian or some other intervention.

These procedures do not apply to agents who are designated in the power of attorney but have not yet accepted appointment by signing the power of attorney.

**§ 5-1506 Compensation**

The Commission's Recommendation addresses the lack of express provision in the law for compensation of an agent unless he or she is acting with respect to the administration of an estate. *See* surrogate's court procedure act section 2112. 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 agent who is unrelated to the principal, where the two parties are related, "it is presumed that the services of the agent to a principal were rendered in consideration of love and affection, without expectation of payment." *Mantella v. Mantella*, 268 AD2d 852 (3d Dept. 2000).

"Normally, while the principal is not disabled, such service will be infrequent and will not involve substantial time. However, with the prospect that if the principal becomes disabled or incapacitated, substantial time, effort, and expense may be required of the attorney-in-fact and any successor attorneys-in-fact extending over a long period of time, compensation may be important." *See* California Law Revision Commission, Statutory Comment, Cal. Prob. Code § 4204 (West 1994).

Other states permit compensation and reimbursement to varying degrees. Arkansas and California provide that an agent is entitled to reasonable compensation. Indiana, Missouri, New Jersey, Pennsylvania and Vermont permit the principal to limit compensation to which the agent is otherwise entitled. In contrast, Arizona does not permit compensation of an agent unless the terms of compensation are detailed in the power of attorney. Similarly, Colorado, Georgia, and Illinois 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 adopted in the Commission's Recommendation is a hybrid of several of these alternatives. It provides that an agent is not entitled to compensation unless the principal specifically authorizes it. Accordingly, the statutory short form allows the principal to authorize compensation.

Section 5-1510(2)(d) authorizes certain persons, including an agent, to commence a special proceeding to determine if an agent is entitled to compensation, and whether compensation paid to an agent is reasonable.

Finally, section 5-1506 provides that the agent is entitled to reimbursement for reasonable expenses actually incurred in connection with his or her duties as agent. This approach is consistent with general agency rules and statutory rules governing trustees and fiduciaries. *See, e.g.*, *James T. Kelly Jr., P.E., P.C. v. Schroeter*, 209 A.D.2d 737 (3d Dept. 1994); estates, powers and trusts law section 7-2.3(2); and surrogate's court procedure act section 2307.

**§ 5-1507 Signature of Agent**

The lack of statutory guidance as to how the agent must sign a document where e or she is acting on behalf of the principal creates problems in determining which transactions were made by the agent on behalf of the principal.

Section 5-1507 prescribes the manner in which the agent must sign whenever he or she is acting on behalf of the principal under the authority of the power of attorney. Specifically, whenever the hand-written signature of the agent is required, the agent must write the principal's name and sign his or her own name as agent for the principal. This approach is consistent with New York agency law. *See* 2A NY Jur 2d Agency and Independent Contractors § 198.

This provision will protect the Agent who is acting properly and facilitate the identification of relevant transactions when there are allegations of abuse of a power of attorney.

The Commission's Recommendation also addresses the various forms of non-hand-written signatures, such as electronic signatures and other procedures associated with various on-line or electronic transactions, and transactions at automatic teller machines (ATMs). *See* section 5-1501(13). Such signatures are not subject to the special requirements for the form of hand-written signatures.

The section provides that any signature, hand-written or otherwise, constitutes an attestation by the agent that he or she is acting under the authority and within the scope of a valid power of attorney. This follows the approach adopted in Minnesota. *See* Minn. Stat. Ann. § 523.18 (West 2002).

Subdivision (1)(b) clarifies that third parties incur no liability for accepting a signature that does not meet the requirements of this section. The signature requirement is didactic as to the agent, and is not intended to create a new duty in third parties to verify the correct form of the agent's signature.

**§ 5-1508 Co-Agents and Successor Agents**

As has always been the law, the Commission's Recommendation allows the principal to name more than one agent in a power of attorney, and to designate whether the agents must act jointly or separately in exercising their authority. In the absence of the principal's instructions that concurrent agents are to act separately, the agents must act jointly.

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

A third party may be reluctant to recognize the remaining agents' authority to act without receiving written explanation of the emergency or action to be taken and of the reason for the other agent's absence, and thus it would be appropriate for the agents execute a notarized affidavit with such explanations. It is not anticipated that an agent's absence on account of illness would trigger the need for release of the agent's confidential medical records to the third party, unless the power of attorney affirmatively so requires. The delay in complying with such a requirement, involving the absent agent's formal authorization for the release of such records, delivery of the authorization to the agent's medical provider, and release of the records to the third party, could prevent the remaining agents from protecting the principal's interests. *See* Comments at section 5-1502K and 45 C.F.R. section 164.508(a)(1), pertaining to authorizations pursuant to the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

A principal may designate one or more successor agents to act if the authority of a predecessor agent terminates or if a predecessor agent is unable or unwilling to act. The successor agent is subject to the same duties and liabilities as any other agent.

If the principal still has capacity upon discovering that an agent is unable to act, it would be appropriate to execute a new power of attorney.

A co-agent or a successor agent who has signed the power of attorney has the authority to request and receive the record of all prior transactions entered into by the predecessor agent on behalf of the principal. Pursuant to section 5-1505(2)(a)(3)(ii), the predecessor agent must make the record available within 15 days of the written request. If the agent fails to comply, the co-agent or successor agent may bring a special proceeding under section 5-1510(1).

**§ 5-1509 Appointment of Monitor**

Section 5-1509 permits the principal to designate a monitor or monitors who will have the authority to request and receive a complete record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal. The agent has the obligation to maintain such records pursuant to section 5-1505 and the common law imperatives imposed on a fiduciary. The monitor's role is particularly important if the principal has become incapacitated. In such an event, the agent acting pursuant to a durable power of attorney can continue to act, a reversal of the result at common law; however, the incapacitated principal can no longer direct the Agent. While the continuation of the durable power of attorney is valuable for continuing financial management on behalf of an incapacitated principal, this provision permits the principal

to arrange for the agent's accountability. The agent must provide a copy of the record, upon request, to the monitor. Thus, someone with the authority can review the agent's acts without incurring the effort and expense of a court proceeding unless the agent declines to provide information to the monitor. *See* proposed section 5-1505(2)(a)(3). The agent is entitled to compensation for reasonable expenses incurred in making the record available. *See* section 5-1506(b).

The monitor is also authorized to seek records held by third parties such as banks or other financial institutions. This is consistent with the provisions of the Gramm-Leach Bliley Act governing disclosure of customer information by financial institutions. 15 U.S.C.§ 6802(e)(3)(E)(" [The statute] shall not prohibit the disclosure of nonpublic personal information . . . to persons acting in a fiduciary or representative capacity on behalf of the consumer").

The monitor is not unlike a trust protector. *See, e.g.,* Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?,* 27 Cardozo L. Rev. 2807, 2807 (2006)(noting that "estate planners are using [a trust protector] as a device that adds flexibility to long-term trusts and that increases the settlor's ability to control trustee behavior long after the time when the settlor has died or has otherwise become unable to direct the trustee.").

**§ 5-1510 Special Proceedings**

Section 5-1510 authorizes a special proceeding pursuant to CPLR article four to alleviate the need to commence a plenary action based on common-law principles to challenge any aspect of a power of attorney or any act by an agent. A special proceeding may be commenced for the following purposes: (1) compelling the agent to make available the record of transactions made on behalf of the principal; (2) determining the validity of the power of attorney, (3) determining whether the principal had capacity when the power of attorney was executed; (4) determining if the power of attorney was wrongfully procured through duress, fraud, or undue influence; (5) determining compensation issues; (6) approving the record of transactions entered into on behalf of the principal; (7) removing the agent; (8) determining how multiple agents must act; (9) construing any provision of a power of attorney. Additionally, an agent seeking court approval of his or her resignation may commence a special proceeding; or (10) compelling acceptance of the power of attorney (in which case relief is limited to an order compelling acceptance).

The speed and ease of special proceedings make them the appropriate procedural choice for such petitions where the principal's finances are in actual or potential jeopardy. Use of special proceedings in this context is consistent with their use in other circumstances, such as in matters relating to health care proxies (*see* public health law section 2992) and express trusts (*see* civil practice law and rules section 7701). Petitions brought under this section are limited to the jurisdiction of the supreme court.

**1. § 5-1510(1) Petition to Compel the Agent to Make Records Available**

Subdivision (1) permits certain persons and government agencies to petition to compel an agent 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. *See* section 5-1505(2)(a)(3) requiring the agent to provide a record of transactions upon or within 15 days of written request.) This approach is modeled 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. *See Matter of Guardianship of Kent*, 188 Misc. 2d 509 (Sup. Ct. Dutchess Co. 2001). *See also In re Garson (Gershenoff)*, 17 A.D.3d 243 (1st Dep't 2005).

However, permitting unrestricted access to an incapacitated principal's affairs is inconsistent with public policy. Thus, to minimize frivolous fishing expeditions, this section authorizes only specific persons to request and receive the record or to compel production of the record.

### 2. § 5-1510(2)(a) Determining Whether a Power of Attorney is Valid

Subdivision 5-1510(2)(a) permits various persons to seek a determination from a court as to whether a power of attorney meets the requirements of section 5-1501B(1) which sets out the requirements for a valid power of attorney and section5-1503 provides the lawful modifications that may be made to a statutory short form power of attorney.

### 3. § 5-1510(2)(b) Determining Whether a Principal had Capacity to Execute a Power of Attorney

Pursuant to the definition set forth in 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 attorney or any provision in a power of attorney. Subdivision (2)(b) of section 5-1510 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.

### 4. § 5-1510(2)(c) Determining Whether the Power of Attorney was Wrongfully Procured

Subdivision 5-1510(2)(c) provides the civil mechanism whereby a court may revoke the power of attorney where the power of attorney has been wrongfully procured through duress, fraud, or undue influence.

### 5. § 5-1510(2)(d) Determining Compensation

Section 5-1506 permits the principal to choose whether the agent should be compensated. Subdivision 5-1510(2)(d) permits the agent or others to petition the court to determine if an agent is entitled to compensation or, if compensation has been made, whether such compensation is reasonable.

### 6. § 5-1510(2)(e) Order Approving the Record

Subdivision (2)(e) of section 5-1510 permits the agent or others to petition the court to approve the record of transactions entered into by the agent on behalf of the principal. An agent might seek such approval in conjunction with turning over the principal's assets to another fiduciary such as the guardian of the principal's property

### 7. § 5-1510(2)(f) Removal of Agent

This provision permits a petition to remove the agent for breach of the fiduciary duties set forth in section 5-1505.

### 8. § 5-1510(2)( g) Determining how multiple agents must act

This provision permits a petition to clarify the relationship of multiple agents.

### 9. § 5-1510(2)(h) Construing any provision of a power of attorney

This provision will be particularly helpful when the statutory short form power of attorney or statutory major gifts rider have been modified in a manner that is confusing. .

### 10. § 5-1510(2)(i) Compelling acceptance of a power of attorney

This provision limits the relief available from the court to an order compelling the third party to accept the power of attorney.

### 11. § 5-1510(2) Order Approving Resignation of Agent

Subdivision (2) also provides an alternative procedure whereby an agent wishing to resign after the principal has become incapacitated and unable to appoint a successor agent may do so. The agent could commence such a proceeding if the agent has reason to believe that there is no designated successor agent or that no designated successor agent is willing or able to act. This approach provides notice to the court that an incapacitated principal may be in need of a guardian or some other intervention. *See* section 5-1505(3). A resigning agent who is delivering the principal's property and the agent's records of transactions to a successor agent or to the principal's legal representative may commence a proceeding in order to obtain court recognition of these actions under subparagraph (2). It is quite likely that a corporate fiduciary will find this procedure helpful when resigning as agent.

## § 5-1511 Termination or Revocation

In the past there has been no specific guidance on how to revoke a power of attorney. The statutory forms of power of attorney have stated generally that "[t]his [nondurable, durable or general - effective at a future time] power of attorney may be revoked by me at any time." The principal agrees to indemnify and hold harmless any third party "unless and until actual notice of knowledge of such revocation or termination

shall have been received by such third party. . .." *Id.* Case law, likewise, has provided 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." *Zaubler v. Picone,* 100 A.D.2d 620 (2d Dept. 1984), citing Restatement (Second) of Agency, § 119; *see also Edgarton v. Edgarton*, 54 N.Y.S.2d 495 (N.Y.Sup.Ct.1944) ("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.").

Section 5-1511 identifies the circumstances and events which terminate the power of attorney and specific direction for the revocation of powers of attorney by the principal and by operation of law. It is based in part of section 110 of the Uniform Power of Attorney Act adopted in 2006 by the National Conference of Commissioners on Uniform State Laws, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm

The Commission's Recommendation sets out a lengthy list of events which terminate a power of attorney some of which are highlighted here.

### 1. § 5-1511(1) Termination Generally

Subdivision (1) directs that a power of attorney is terminated when A power of attorney terminates when: (a) the principal dies, (b) the principal becomes incapacitated, if the power of attorney is not durable; (c) the principal revokes the power of attorney; (d) the principal revokes the agent's authority and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve; (e) the agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve; (f) the authority of the agent terminates and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve; or (g) the purpose of the power of attorney is accomplished.

The power of attorney is also terminated when a court order revokes the power of attorney as provided in section 5-1510 or in section 81.29 of the mental hygiene law. 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 title 15 of article 5 of the general obligations law. In addition, section 5-1510 authorizes a court to revoke a power of attorney where it determines that the power of attorney was wrongfully procured, or where the agent is unfit or the court has approved the resignation of an agent and there is no alternate agent appointed.

### 2. § 5-1511(2)(c) Revocation of Agent's Authority Upon Agent's Divorce from Principal

Subdivision (2)(c) addresses the effect by the divorce of a principal. When the principal names his or her spouse as agent, and is later divorced, the agent's authority

would be revoked by operation of law. Similarly, in section 5-1514(8) 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 would be 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 agent or as a permissible recipient of gifting and is subsequently divorced would not want the former spouse to serve as agent or to receive gifts. The estates, powers, and trusts law contains similar provisions. *See, e.g.*, estates, powers and trusts law sections 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). Revocation of the authority to gift to the former spouse 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.

**3. § 5-1511(3) Revocation of the Power of Attorney**

Subdivision (3) provides the methods by which a principal may revoke a power of attorney: (a) in accordance with the terms of the power of attorney or (b) by delivering a written, signed and dated revocation of the power of attorney as follows:

(1) to the agent, and the agent must comply with the principal's revocation notwithstanding the actual or perceived incapacity of the principal unless the principal is subject to a guardianship under article eighty-one of the mental hygiene law; and

(2) to any third party that the principal has reason to believe has received, retained, or acted upon, the power of attorney

If the agent continues to act after receiving notice of the revocation, the agent may be subject to liability pursuant to section 5-1510 authorizing civil proceedings.

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. *See* 5-1504(3). *See also Ferrentino v. Dime Savings Bank*, 159 Misc. 2d 690 (Sup. Ct. Suffolk Co. 1993); *Parr v. Reiner*, 133 Misc. 2d 914 (Sup. Ct., Suffolk Co. 1986)*, aff'd,* 143 A.D.2d 427, 532 N.Y.S.2d 574 (2nd Dept. 988)(acts of an agent after his authority has been revoked binds a principal as against third parties who act in good faith without notice of revocation). 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. *See* estates, powers and trusts law section 7-1.17.

Finally, subdivision (4) 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. However, notwithstanding the recording of a power of attorney, a third party must have actual notice of the revocation. *See, e.g., Parr v. Reiner*, 133 Misc. 2d 914 (Sup. Ct. Suffolk Co. 1986), *aff'd,* 143 A.D.2d 427, 532 N.Y.S.2d 574 (2nd

Dept.1988)(lenders were entitled to rely on the actual notice provisions contained in the power of attorney notwithstanding the recording of the revocation was done pursuant to the real property law section 326); Laws of 1986, c. 215, amending the general obligations law that third parties were held harmless for relying on a power of attorney unless they had received actual notice of revocation in order to require banks to accept powers of attorney.)

The execution of a new power of attorney revokes any and all prior powers of attorney unless the principal provides otherwise. If the principal grants the same authority to agents acting under different powers of attorney, the principal should indicate whether the agents are to act jointly or separately. Such a circumstance could arise if the principal grants authority over a particular bank account to one agent and an umbrella document granting the standard banking authority, which would encompass all bank accounts, to another agent. The potential exists for the principal to have executed multiple powers of attorney either intentionally or unintentionally. In either case, the presentation to third parties of different powers of attorney by different agents or the same agent poses a litany of concerns. The proposal draws a bright line to facilitate acceptance by third parties.

### 4. Revocation Form

Below is a suggested form that the principal may use to revoke a power of attorney. It is not a statutory form but it may be a useful guide.

**REVOCATION OF POWER OF ATTORNEY**

**NOTICE TO THE PRINCIPAL**
This Revocation is valid without an acknowledgment by a Notary Public.
If your revoked Power of Attorney was recorded at the county clerk's office, you must have your signature on this Revocation notarized and file a copy of this Revocation in the same place.

This document is intended to constitute a Revocation of a Power of Attorney pursuant to Article 5, Title 15 of the General Obligations Law:

I, _____, the principal,

do hereby revoke, cancel, terminate, and make void any Power of Attorney executed by me before this date.

Notice of this Revocation of Power of Attorney shall be binding on agent(s) appointed pursuant to any Power of Attorney executed by me before this date, and on every other person and entity to which a copy of the Revocation is given. A copy of this Revocation shall be as effective as an original. Any third party who receives a properly executed copy of this Revocation may act in accordance with it and will be indemnified by me for claims that arise against the third party because of reliance on this revocation.

In Witness Whereof I have hereunto signed my name on _____, 20__.

_____
(sign your name)"
(acknowledgment if document is to be recorded)

**§ 5-1512 Powers of Attorney Executed in Other Jurisdictions**

Section 5-1512 is added to make it clear that powers of attorney validly executed in other jurisdictions are valid in New York. The purpose of this provision is to facilitate the use of such documents. While many jurisdictions have requirements that are similar in nature to the ones in this proposal, e.g., the requirement that the agent 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. *See* section 2990 of the public health law (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 section 3-5.1(c) of the estates, powers and trusts law (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).

Under the Commission's Recommendation, valid out-of-state powers of attorney are valid in New York but enforceability is an issue for the agent and the third party to address on an individual basis. Third parties will be held harmless if they accept such a power of attorney accompanied by an affidavit executed by the agent. *See* section 5-1504(5).

**§ 5-1513 Statutory Short Form Power of Attorney**

**1. Single Form**

The Commission's Recommendation includes a revised statutory short form power of attorney to reflect the recommended substantive changes. The Recommendation provides a single statutory short form power of attorney. The form creates a durable power of attorney. If the principal wishes to convert the form to a nondurable or springing power of attorney, he or she may insert the appropriate statement within the section on the form labeled "modifications."

**2. Form Limited to Management of Principal's Financial Matters**

Powers of attorney may serve two very different purposes: management of the principal's everyday financial affairs, and reorganization or distribution of the principal's assets in connection with estate, financial, and long term care planning. While New York has long permitted the use of the statutory short form power of attorney for both

purposes, the Commission's Recommendation separates the two purposes by creating a new, supplemental form exclusively for gifting and transfers in connection with estate, financial, and long term care planning.

The basic form allows the appointment of the agent or agents, and, if desired, a separate monitor. It indicates the principal's wishes with respect to revocation of any previous powers of attorney, compensation for the agent and other matters, and grants the agent authority to act on any or all of a broad list of important financial matters such as paying bills, filing tax returns, and balancing bank statements. This basic form allows only de minimis gifts of up to $500 per recipient per year. *See* comment 8 in this section, below, and section 5-1502I(14). If the principal wishes to authorize the agent to act on estate planning matters such as making annual exclusion gifts or changing beneficiary designations, he or she must use the additional, supplementary form known as the "statutory major gifts rider" or use a non-statutory power of attorney a in a non-statutory power of attorney signed and dated by the principal and agent with their signatures duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the manner described at paragraph (2) of subdivision (a) of section 3-2.1 of the estates, powers and trusts. The basic form provides a checkbox by which the principal indicates that there is an accompanying statutory major gifts rider.

**3. "Caution" Statement to the Principal**

The 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 agent. A principal who understands the risks and obligations created in a power of attorney can be more active or vigilant in ensuring that the agent is acting appropriately.

**4. Notice to the Agent**

The Commission's Recommendation requires a notice called "Important Information for the Agent," informing the agent of his or her fiduciary duties and of the significance of signing a document as agent. The notice explains that when an agent accepts authority granted under the power of attorney, the agent enters into a special legal relationship with the principal, encompassing several legal responsibilities: to act according to any instructions from the principal, or where there are none, in the principal's best interest; to avoid conflicts of interest; to keep the principal's property separate; to keep a record of all transactions conducted on the principal's behalf, and to disclose the agent's identity as agent whenever acting on behalf of the principal. The notice also cautions the agent that he or she may not make gifts to himself or herself or anyone else unless there is a statutory major gifts rider attached that specifically grants that authority. If there is authority, the agent must act according to the principal's instructions, or, if none, in the principal's best interest. At the end of the notice is a brief acknowledgment form, where the agent acknowledges his or her fiduciary duty (i.e. "legal responsibilities") to the principal, and signs. The power of attorney is effective as to an agent as of the date of this acknowledged signature, except in the case of springing

powers of attorney, for which there is an additional prerequisite. *See* section 5-1501B.

### 5. Instruction as to How to Revoke a Power of Attorney

To fill a gap in the law regarding how to revoke a power of attorney, the Commission's Recommendation creates a new section specifically addressing revocation (*see* section 5-1511) and cites to this section on the statutory short form.

Additionally, the form explains that the execution of a new power of attorney revokes any and all prior powers of attorney unless the principal provides otherwise. (*See* section 5-1511(6).) Revocation of a prior document by executing a new one mirrors the approach used in New York's health care proxy law. S*ee* section 2985(1)(c) of the public health law. In many instances, this provision will simplify the process of revoking a prior power of attorney, as the principal who is merely executing a new power of attorney need not also execute a separate revocation form. Instructions on the form explain to the principal that if the prior power of attorney has been in active use, the principal should provide a copy of the new power of attorney to the prior agents and to the financial institutions where her accounts are located. *See* section 5-1511 at paragraph (3)(b) and subdivision (5). If the principal intends to override the default provision, the form instructs her to so state, and also to indicate whether any agents granted identical powers under different powers of attorney are to act together or separately. This provision is meant to assist the principal in clarifying her intent.

This section of the form is also intended to assist third parties who are presented with multiple powers of attorney to better ascertain whether or not they are meant to be in concurrent use.

### 6. Modifications

The statutory short form power of attorney and the revisions to section 5-1503 direct the principal to use the section labeled "modifications" for any modifications to the form. The intent of this instruction is to highlight any modifications and to discourage subtle changes to the statutory language in the form (such as substitution of a custom-drafted power for an unneeded one in the statutory list) that may be difficult for a reader to discover. This instruction is also intended to avoid any change to the language of a listed power that may create confusion as to whether or to what extent the statutory power's associated construction section applies.

Any additional language authorized by section 5-1503, such as language eliminating or supplementing a power, or making an additional provision, must be included in this section. This section must also be used for other modifications as directed on the form, including: converting the default form to a nondurable or springing power of attorney, overriding the default provision that revokes any and all prior powers of attorney, indicating whether agents granted identical powers in multiple powers of attorney are to act together or separately, or providing specific fee instructions if the principal wishes to compensate her agents.

Gathering all such changes in a single section instead of scattered about the form is also intended to assist the agent in understanding the principal's intent and any related instructions.

**7. Monitor**

The form allows the principal to appoint a monitor. The monitor has the authority to request and receive the records of transactions done or made on the principal's behalf by the agent.

The designation of a "monitor" is optional. It ensures that the principal has a simple means to ensure that someone has the ability to review the agent's acts without incurring the effort and expense of a court proceeding. A monitor of a power of attorney can ensure that the principal's intentions and best interests are honored and respected by the agent. This option is particularly important when the principal has lost capacity and can no longer direct or remove an agent. While the continuation of the durable power or springing durable power of attorney is valuable for continuing financial management on behalf of the incapacitated principal, it is sound planning to arrange for a third party to be able to request the agent to account for his actions.

**8. Compensation**

The form allows the principal to indicate whether or not the agent is entitled to reasonable compensation for services actually rendered on the principal's behalf under the power of attorney. The form makes it clear that payment would come from the principal's assets. It also allows the principal to define "reasonable compensation" in the "Modifications" section of the form.

At the same section, the form explains that the agent is entitled to be reimbursed for reasonable expenses incurred on the principal's behalf.

**§ 5-1514. Grant of Powers to Make Major Gifts and Other Transfers**

The Commission's Recommendation allows the principal to add an optional rider to the statutory short form power of attorney in which the principal may authorize the agent to make major gifts and other transfers.

Allowing the use of a statutory short form power of attorney for major gifts and other transfers creates potential confusion about the principal's decision about the grant of such powers, as explained below and fails to underscore the power entailed in the document's use. The transfers at issue in the Court of Appeals' decision in *Matter of Ferrara*, 7 N.Y. 3d 244 (2006), illustrate the point. The agent (the principal's nephew) made transfers pursuant to a modified gifting power authorizing gifts to himself in unlimited amounts, including transfers of certificates of deposit, proceeds of multiple bank accounts, proceeds of the sale of stock, and proceeds from the sale of the principal's house, totaling $820,541. All of these transfers were accomplished by the agent in a two-week period between the execution of the power of attorney and the principal's death.

These transfers went unchallenged until the Salvation Army, as sole beneficiary under the principal's will, commenced a discovery and turnover proceeding in Surrogate's Court. The Salvation Army followed the appeals process all the way to the Court of Appeals, which held that any gifts the agent made, including gifts to himself, were required to be made on the basis of either specific instructions from the principal or, in the absence of such instructions, in the principal's best interest. The Court held that the agent had failed to demonstrate that the transfers were in the principal's best interest.

**Gifting standard**

In *Ferrara*, section 5-1502M of the general obligations law construed the phrase in the statutory short form which provides "making gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate $10,000 to any person in any year." Section 5-1502M provides that in exercising this authority, the agent may make gifts to the described class, including the agent if he or she is within the class "only for purposes *which the agent reasonably deems to be in the best interest of the principal*, specifically including minimization of income, estate, inheritance, generation-skipping transfer or gift taxes . . ."(emphasis added). Pursuant to a statutory short form power of attorney that had been modified in accordance with section 5-1503, the agent in *Ferrara* was authorized to make gifts to himself and the principal's brother in unlimited amounts. In support of his actions, the agent argued that the best interest standard of section 5-1502M was not applicable because of the modification. The Court of Appeals rejected that argument and held that nothing in either section 5-1502M or 5-1503 indicated that the best interest requirement is waived when the statutory short form power of attorney is modified pursuant to 5-1503 with language to increase the amount of the gifts and/or expand the class of beneficiaries of the gifts. The court noted that 5-1503 was not intended as "an escape hatch from the statute's protection." *Id*. at 253. Moreover, the court found that the "best interest" requirement is "consistent with the fiduciary duties that courts have imposed on attorneys-in-fact." 7 N.Y. 3d at 245. Thus, by itself, the grant of self-gifting authority in the power of attorney was not sufficient to support the nephew's gifting to himself virtually all of his uncle's assets "to do as [he] wished." 7 N.Y. 3d at 249.

According to *Ferrara,* the agent must act in accordance with the principal's instructions or expressed intent, and in the absence of instructions or expressed intent, in the best interest of the principal. In describing what factors the agent should consider in determining a gift to be in the principal's best interest, the court interpreted section 5-1502M broadly to include "financial, estate [as well as] tax planning techniques and objectives." *Id.* at 253. The inclusion of the terms "financial" and "estate" planning is significant because gifts – or even self-gifts – that are part of a financial or estate plan would be acceptable, even though they might not necessarily involve tax advantages. *Id.* at 253; *accord Matter of Shah*, 95 N.Y.2d 148, 159 (2000)(planning to take advantage of government benefits, including Medicaid benefits, is in a person's best interest); *see also In re Estate of Longhine*, 15 Misc.3d 1106(A)(Surr. Ct. Wyoming Co.2007)(the "common sense presumption" that a person would take advantage of public benefits "is similar to the presumption that a testator will desire to reduce taxes to the greatest extent possible.")(citations omitted)*; In re Will of Kamp ex rel. Kamp*, 7 Misc.3d 615, 621 (Surr. Ct. Broome Co. 2005) (citing the holding of *Shah*); *In re Forrester*, 1 Misc.3d 911(A)

(Sup. Ct. St. Lawrence Co., 2004) (Medicaid planning is in the incapacitated person's best interest).

**Clarification of Statutory Ambiguity**

First, the gifting and transfer provisions have been scattered among other more arguably routine provisions. The statutory gifting authority has been listed thirteenth of sixteen powers and authority over insurance transactions and retirement benefit transactions, which can include changing beneficiaries, were listed sixth and twelfth (L) respectively, and all of them could have been easily overlooked. Unlike the gifting power, the insurance and retirement benefit powers listed on the form gave no hint that their construction sections allowed the agent to change beneficiary designations. In giving the agent authority over insurance policies and retirement benefits, the principal may have been thinking of more routine matters, such as the need for more insurance or a different type of insurance, and might be unaware that she had given the agent authority that could alter her estate plan or reduce her property.

Second, the statutory short form did not indicate that the agent may be able to engage in self-gifting or to designate himself as the beneficiary of the principal's insurance policies and retirement benefits. The insurance and retirement benefit constructions sections contained a slightly different statutory self-gifting class than that in the gifting construction section.

The potential for confusion was compounded by a third factor, namely, the ambiguity of the law regarding these types of transactions. On the one hand, the statutory construction sections for the authority to open joint bank accounts, and to change beneficiaries to insurance policies and retirement plans, did not require that in order to exercise such authority the agent also be granted authority to make gifts or vice versa. So it might have appeared from a reading of the statute, that an agent could open a joint bank account and make changes in beneficiary designations without having separate gifting authority. On the other hand, cases interpreting the statute have appeared to hold that gifting authority must be granted *in addition to* granting authority over joint bank accounts and insurance and retirement benefits, if the principal intends to authorize the agent to open joint bank accounts with the principal and change the beneficiaries of the principal's insurance policies and retirement benefits. *See, e.g., Matter of Griffin*, 160 Misc.2d 871, 874 (Surr. Ct., Bronx Co., 1994) ("Assuming arguendo that respondent had been validly appointed as decedent's attorney-in-fact to act on her behalf in the selection of a retirement benefit, this status by itself would have given respondent the power but not the right to name herself as one of the beneficiaries of the retirement benefit. Respondent, as decedent's attorney-in-fact, does not have the right to use the power of attorney to make a gift to herself absent an explicit authorization from decedent to use the power for that purpose."); *Mandala v. Mandala* 003329/04 (Sup. Ct., Nassau Co. 2004) (noting that although respondent argued that she had the statutory authority to change decedent's life insurance beneficiary designation to benefit herself, the self-gifting creates a presumption of impropriety that can be rebutted only with a clear showing that the principal intended to make the gift), and *Semmler v. Naples*, 166 A.D. 2d 751 (3d Dep't, 1990) (no evidence that decedent intended to allow diversion of her funds into a joint account with rights of survivorship in the agent).

Finally, modifications to the statutory short form to authorize significant transfers, like the powers listed explicitly on the form, may have been buried in legal text and failed to attract the principal's attention to the significance of these modifications.

The principal should have the ability to grant the agent gifting and other authority to transfer assets as the principal sees fit, but it should be a knowing and willing grant, and not one that is an unwitting consequence of statutory obfuscation.

Accordingly, the Commission's Recommendation provides a standard statutory form for routine financial management, and a separate rider for major gifts and other transfers. If used, the statutory major gifts rider must be executed together with a power of attorney. The statutory major gifts rider may be omitted if the principal has no need of it.

To highlight the importance of the major gifts rider, the Commission's Recommendation requires that the principal sign it before two witnesses or acknowledge her signature before two witnesses. A similar procedure is required for wills under section 3-2.1 of the estates, powers and trusts law. The heightened execution requirement reflects the fact that the power of attorney is potentially as powerful, if not more so, than a will as a means for transferring assets. A will can transfer only probate assets, while the use of a power of attorney may result in a change of beneficiary in non-probate assets such as life insurance and retirement plans as well as a transfer of assets that would become probate assets when the Principal dies.

The statutory major gifts rider updates the current statutory gifting authority to match provisions of the Internal Revenue Code at section 2503(b) regarding the annual federal gift tax exclusion, and allows the principal to identify other types of gifts and property transfers that the agent is authorized to make. The statutory major gifts rider is also the instrument in which the principal can grant specific authority for an agent to make major gifts to himself or herself. Allowing the principal to make an affirmative grant of this authority is intended to resolve any potential ambiguity under the current statute as to whether self-dealing is permissible. *See Salvation Army v. Ferrara,* 3 Misc. 3d 944, 775 N.Y.S.2d 470 (Surr. Ct. Rockland Co. 2004), aff'd, 22 AD 3d 578 (2d Dept. 2005), rev'd 7 N.Y.3d 244 (2006).

Section 5-1514 containing the statutory major gifts rider collects all of the permissible gifting and transfer powers that were otherwise scattered throughout the construction sections, and the major gifts rider form presents a place where the principal may make an affirmative selection of what powers to grant. The major gifts rider also transforms the various default self-gifting provisions that appear in several construction sections into affirmative choices.

Nothing in or about the major gifts rider is intended to change current law regarding the gifting and property transfer authority that an agent can exercise, provided, of course, that the principal has granted that authority in the power of attorney in the first place. If the agent is granted such authority, the agent must exercise that authority in the best interest of the principal unless the principal has provided specific instructions about

the exercise of the authority. *See In re Ferrara*, 7 NY3d 244 (2006); *Matter of Shah*, 95 N.Y.2d 148 (2000).

The preparer of the statutory major gifts rider must be identified in an section at the end of the form.

### 1. Statutory Gifting Power

The gifting authority that has appeared at "(M)" on the statutory short form, and its corresponding construction section, 5-1502M in title 15, have been revised and renumbered to become part "A" of the statutory major gifts rider at subdivisions 10 and 6 of section 5-1514, respectively. The authority, as explained in the construction language, permits 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 by adding the appropriate language in part "B" of the major gifts rider, just as she may do on the current statutory short form power of attorney.

#### a. Amount of Gifts

The gifting authority that appeared at "(M)" had been limited to gifts of $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, (*see* section 2503(b)(2) of the Internal Revenue Code), this 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.

#### b. Section 529 Accounts

Current law allows gifts to be made either outright or in trust. This revision to the statutory gifting authority 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 account” 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 revision in the construction of certain 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 $12,000 per donee, a gift to a beneficiary's account in that year may not exceed $12,000, or $24,000 if the principal's spouse consents to gift splitting. The 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 Major Gifts Rider contains additional language expressly authorizing it.

**c. Gift Splitting**

The Commission's Recommendation allows 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 Agent 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 $12,000, and where the married principal has two children, one grandchild, and one parent, the agent could gift up to $24,000 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 $24,000 is made to each of the four recipients, the total would come to $96,000.

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 subdivision (6)(a)(3) of section 5-1514. This provision permits the agent to consent, on behalf of the principal, to gift splitting from the assets of the principal's spouse. The gifting class includes only the principal's issue, (but not the parents of either the principal or the principal's spouse) because only the children and other descendants would constitute the natural recipients of gifting from both spouses.

**2. Modifications**

Below the statutory gifting power, the form provides a place at part "B" for custom-drafted gifting in excess of the annual gift tax exclusion amount or to other beneficiaries, or other types of transfers. This section of the form provides a separate warning to the principal: "Granting such powers to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death." A list of such modifications is included at subdivision (3) of section 5-1514:

> (1) open, modify or terminate a deposit account in the name of the principal and other joint tenants;
> (2) open, modify or terminate any other joint account in the name of the principal and other joint tenants;
> (3) open, modify, or terminate a bank account in trust form as described in section 7-5.1 of the estates, powers and trusts law, and designate or change the

beneficiary or beneficiaries of such account;
(4) open, modify, or terminate a transfer on death account as described in part four of article thirteen of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account;
(5) change the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal;
(6) procure new, different or additional contracts of insurance on the life of the principal or annuity contracts for the benefit of the principal and designate the beneficiary or beneficiaries of any such contract;
(7) designate or change the beneficiary or beneficiaries of any type of retirement benefit or plan;
(8) create, amend, revoke, or terminate an inter vivos trust;
(9) create, change or terminate other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.

See sections 5-1502A through 5-1502N of these comments, discussing conforming amendments to the construction sections for the basic, statutory short form power of attorney. Also collected here are the trust powers which appear in several current construction sections. The powers with regard to totten trust accounts and transfer-on-death security accounts are new.

The purpose of this section of the form is to allow the principal to make an affirmative grant of specific powers, reversing the approach in current law, by which the principal may select them inadvertently by initialing powers whose descriptions on the form give no indication of what extraordinary powers lie within.

### 3. Authorization for the Agent to Make Gifts to Himself or Herself

Because self-gifting of life insurance, retirement benefits, and outright gifts of up to $10,000 if the agent is a member of a defined class of relatives, and if the principal selects the respective powers on the statutory form have appeared only in the construction sections, and not on the statutory form, the principal may have been unaware that she was granting these default provisions.

Part "C" of the form allows the principal to grant specific authority for an agent to make major gifts to himself or herself. Allowing the principal to make an affirmative grant of this authority is intended to bring this separate decision to the principal's attention.

### 4. § 5-1514(8) Revocation of Authority to Gift to the Former Spouse Upon Divorce from the Principal

This subdivision addresses one of two authorities affected by the divorce of a principal. *See* section 5-1511(2)( c) (revocation of agent's authority upon divorce from the principal). 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. This provision is based on the assumption that a

principal who executed a power of attorney naming his or her spouse as agent or as a permissible recipient of gifting and is subsequently divorced would not want the former spouse to serve as agent or to receive gifts. The estates, powers, and trusts law contains a similar provision. *See* estates, powers and trusts law sections 5-1.2 (disqualification as surviving spouse). Revocation of the authority to gift to the former spouse does not affect gifting to other recipients. This revocation affects both the statutory gifting authority to the spouse ("to make 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.