THE NEW YORK STATE LAW REVISION COMMISSION

REPORT

on the

STATUTORY GIFTS RIDER TO POWERS OF ATTORNEY

September 1, 2010

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I. Introduction

Based on the recommendation of the Law Revision Commission,[1] the Legislature enacted and the Governor signed into law a new statute governing powers of attorney for financial and estate planning which became effective on September 1, 2009. Subsequently, in 2010, technical corrections were made to the new law. As part of those technical corrections, the Commission was directed to submit a preliminary report by September 1, 2010, on the statutory Gifts Rider component of powers of attorney and a final report on all aspects of powers of attorney by January 1, 2012.[2] Presented here is the Commission's preliminary report addressing the Gifts Rider.

II. Background

A power of attorney is a written instrument whereby an individual (the "principal") appoints another person (the "agent") to act on his or her behalf. This relationship is governed by the law of agency.[3] A common law general power of attorney spells out in detail each power given to the agent. In 1948, the Legislature created a statutory short form as an alternative to the typically lengthy common law power of attorney. The statutory short form simply listed an abbreviated statement for each of the powers an agent could be granted. A full description of each power was set out in the statute rather than on the form.[4] Like a common law power of attorney, the 1948 statutory short form power of attorney terminates when the principal revokes it, or when the principal dies or becomes incapacitated.

In 1975, the general obligations law was amended to create a "durable" power of attorney. This instrument permitted the agent to continue to act when a principal became incapacitated,

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[1] The Law Revision Commission was created by Chapter 597 of the Laws of 1934, which enacted Article 4-A of the Legislative Law. Additional background information about the Commission can be viewed at its website: http://www.lawrevision.state.ny.us.

[2] Laws of 2010, c. 340.

[3] *See, e.g., Semmler v. Naples,* 166 AD2d 751, 752 (3rd Dept.1990) ("The relationship between an attorney-in-fact and his principal has been characterized as agent and principal (*see*, *Cymbol v Cymbol,* 122 AD2d 771, 772; *Matter of De Belardino*, 77 Misc 2d 253, 256, aff'd 47 AD2d 589)"). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency §1.01. *See also* Restatement (Third) of Agency §§3.07 and 3.08; N.Y.Jur. Agency §63.

[4] 1948 N.Y. Laws, c. 442, as codified at N.Y. Gen. Bus. Law §422, as repealed by 1963 N.Y. Laws c. 576 and recodified at N.Y. Gen. Oblig. Law §5-1501. ("An Act to amend the General Business Law in relation to a statutory short form of general power of attorney."). This approach was modeled after New York's statutory short form deeds and mortgages. Report of the Law Revision Commission for 1946, 37, Legislative Document No. 65 (1946). *See also* N.Y. Real Prop L.§258.

provided the power of attorney contained language of "durability."[5] Over the past 35 years, the durable power of attorney has been widely used for financial and estate planning for older adults primarily because it obviates the need for a court appointed guardian if the principal becomes mentally incapacitated.

In 1996, further amendments to the general obligations law permitted the principal to authorize the agent to make gifts from the principal's property and change beneficiaries to retirement benefit plans.[6] These amendments, coupled with the already existing statutory authority of an agent to create trusts, change beneficiaries to a life insurance policy, and establish joint bank accounts and totten trusts, made it possible to tailor a power of attorney which permitted an agent to alter the principal's estate through gifts of the principal's assets to others or to the agent. Such assets could include securities and tangible personal property (typically subject to probate), jointly owned real property and jointly owned bank accounts (assets that pass by operation of law), property held in trust (assets that pass by contract) and proceeds from employee benefit plans and individual retirement accounts, life insurance policies, and annuity contracts (assets that pass by beneficiary designation).

As a result, the breadth of the authority granted under a power of attorney has evolved over the years far beyond those originally envisioned by the 1948 or even the 1975 law. These gift giving powers can be used to: minimize the principal's income, estate, generation-skipping transfer or gift taxes; make the principal eligible for Medicaid; and continue a principal's past practice of making gifts. They can also be used to permit the agent to self-gift. The agent's gifting and self-gifting powers may deplete a principal's assets and leave him or her with little if any assets or income on which to live.[7]

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[5] Laws of 1975, c. 195, as codified at N.Y. Gen. Oblig. Law §5-1601, as amended and renumbered by 1994 Laws of New York, c. 694, as codified at N.Y. Gen. Oblig. Law §5-1501. In 1988, the General Obligations Law again was amended to allow creation of a springing power of attorney, an instrument which did not become effective until the occurrence of an event defined in the document. Laws of 1988, c. 210, as codified at N.Y. Gen. Oblig. Law §5-1602, as amended and renumbered by Laws of 1994, c. 694, as codified at N.Y. Gen. Oblig. Law §5-1506. The springing power of attorney has not proved as useful as originally thought, largely because of questions as to whether the triggering event (typically incapacity) has, in fact, occurred.

[6] Laws of 1996, c. 499. The 1996 amendments allowed the principal to authorize the agent to make gifts to the principal's parents, spouse, children and other descendants in amounts not to exceed $10,000, the federal annual gift tax exclusion amount then in effect (which could be modified pursuant to section 5-1503 to change the statutory gifting class and amount). The statute was also amended at that time to include powers for tax matters which allowed the agent to prepare, sign and file tax returns on behalf of the principal, and for retirement benefit transactions which allowed contributions to and withdrawals from retirement plans, change of investments and change of beneficiary designations.

[7] *See, e.g., Semmler v. Naples*, 166 A.D. 2d 751 (3rd Dep't 1990)(joint brokerage accounts with right of survivorship); *Mantella v. Mantella*, 268 A.D.2d 852 (3rd Dep't 2000)(transfer of real property); *Moglia v. Moglia*, 144 AD2d 347 (2d Dep't 1988)(conveyance of real property); *Matter of Francis,* 19 Misc.3d 536 (Surr. Ct., Westchester Co. 2008)(bank accounts, certificates of deposit, life tenancy with right of survivorship in real property); *Seeley v. Wisniewski*, Index No. 2286-03 (Sup. Ct., Suffolk Co., 2006)(real property as joint tenants with right of survivorship, changed the beneficiary on the IRA, cashed checks); *In re Rice*, 8 Misc.3d 1001(A) (Surr. Ct., Nassau Co., 2005)(gifts totaling $483,500, some of which were in excess of amount authorized in the power of attorney, and to persons outside the statutory gifting class); *Matter of Clinton*, 1 Misc.3d 913(A) (Surr. Ct., NY Co.,

Notably, the extent of the agent's authority was not evident on the statutory form and thus there was no reason for the principal to know he or she was granting such expansive gifting authority upon signing the document.[8] Indeed, given the general nature of the authority listed on the form, the principal probably would have been thinking of only more routine matters, such as the withdrawal of funds to pay bills, the need for more insurance or a different type of insurance, and communicating with personnel of a retirement plan. Unless someone explained the consequences, he or she could very well have been unaware that the agent automatically was empowered to alter his or her estate.

Prior to the 2009 amendments to the law, the statutory short form durable power of attorney was a deceptively simple instrument. Indeed, from 1948 until 1994, the agent was authorized to exercise any of the powers identified by their abbreviated terms listed at A through O on the statutory short form unless the principal crossed the term out and initialed the cross-out.[9] This method of choosing powers for an agent was counterintuitive and confusing because average individuals would assume that they should "simply initial the boxes which correlate to the power they wished to convey."[10] Consequently, a principal could inadvertently eliminate the very powers he or she wished to give the agent. A 1994 amendment rectified the problem of accidently eliminating powers intended to be conveyed by requiring the principal to initial each power granted the agent[11] so that, "greater consideration [will be given] by the principal of the breadth of authority being granted to the agent."[12] However, it did not address the fundamental

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2004)(totten trust); *Mandala v. Mandala*, Index: 003329/04 (Sup. Ct., Nassau Co., 2004)(beneficiary designation on life insurance policy); *In re Griffin,* 160 Misc. 2d 871 (Surr. Ct., Bronx Co., 1994)(beneficiary designation on retirement benefits); *In re Iannone*, 104 Misc. 2d 5 (Surr. Ct., Monroe Co., 1980)(joint bank account). *See also In re Ferrara*, 7 N.Y.3d 244, 249, 819 N.Y.S.2d 215, 217 (2006)(decedent died shortly after nephew had used power of attorney to self-gift approximately $800,000).

[8] The only statement on the form about gifting appeared at section M, the authority to make gifts in an annual amount of $10,000, an outdated reference to the federal gift tax exclusion amount in effect in 1996 when this section was added. The terms "(D) banking transactions," "(F) insurance transactions," and "(L) retirement benefit transactions" listed on the statutory form gave no hint that by initialing those terms, the principal was authorizing the agent to open joint bank accounts and totten trust accounts, and change beneficiary designations of insurance and retirement plans. Rather, the authority for those transactions was spelled out in separate statutory construction sections 5-1502D, 5-1502F, and 5-1502L.

[9] Laws of 1948, c. 442, as codified at N.Y. Gen. Bus. Law §422, as repealed by 1963 N.Y. Laws c. 576 and recodified at N.Y. Gen. Oblig. Law §5-1501. ("An Act to amend the General Business Law in relation to a statutory short form of general power of attorney.").

[10] 1994 Memorandum of the Assembly Rules Committee, c. 694 of the Laws of 1994.

[11] Laws of 1994, c. 694.

[12] 1994 Memorandum of the Assembly Rules Committee, c. 694 of the Laws of 1994. The law was amended again in 1996 to provide an alternative to initialing every item chosen by initialing only item Q, at which the principal or the drafter of the power of attorney would list all of the letters representing the powers chosen from Items A through O. Laws of 1996, c. 499.

problem that, unbeknownst to many principals, the powers conveyed by initialing the abbreviated terms often involved gifting authority.[13]

Execution of the document had remained the same since 1948. Only the principal's signature acknowledged by a notary public was required. Indeed, this simple execution, disparagingly referred to as a "drive-through" signing by some attorneys, like the provisions of the form itself, did little if anything to convey to the principal that he or she was authorizing the agent to handle her money and property in a way that could significantly affect his or her financial well-being. Most principals were likely unaware that they were signing a document more encompassing than a will.

III. The 2009 Power of Attorney Law

A. The Role of the Commission

The Commission began its study of powers of attorney in 2000. Throughout the course of its review, the Commission met with or heard from a diverse group including representatives from the State Office for Aging, the Office of Children and Family Services, the Office for the Prevention of Domestic Violence, the Attorney General's office, county district attorneys, the New York City Department for Aging, local area agencies on aging, hospitals, nursing homes, legal service providers, not-for-profit service providers, the land title insurance industry, the banking industry, attorneys representing various bar associations across the state, including the New York State Bar Association, and social workers and other attorneys in private practice.

In 2002, the Commission held a broad-based roundtable meeting at Brooklyn Law School at which a number of issues were explored. After that meeting, the drafting process commenced in earnest.

By 2004, the Gifts Rider had emerged as a way to emphasize the significance of an agent's gifting authority. During 2005 and 2006, the proposal was refined after further discussions with the leadership of Trusts and Estates and Elder Law sections of the New York State Bar Association, representatives of the American Bar Association, the Association of the Bar of the City of New York, and other attorneys.

On October 6, 2006, the Commission hosted a second roundtable meeting at Brooklyn Law School on the proposed Gifts Rider, among other topics. Thereafter, the Commission refined its proposal which was passed by the Legislature and signed into law by the Governor on January 27, 2009.[14]

B. The Gifts Rider

The new statute governing powers of attorney for financial and estate planning distinguishes between the use of a power of attorney for routine matters, such as paying bills, on

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[13] *See* note 8 *supra*.

[14] Laws of 2008, c. 644.

the one hand, and its use for giving gifts on the other. Consistent with a growing national trend to make the agent's gifting authority identifiable in express and specific provisions of the law,[15] the distinction between the two types of authority is made clear in a new section 5-1514 in which all gifting powers previously scattered throughout various sections of the general obligations law are consolidated, including previous default gifting provisions which now must be affirmatively chosen. Section 5-1514 provides that the principal using a statutory short form power of attorney must execute the statutory Gifts Rider to authorize the agent to:

make gifts up to a specified dollar amount, or unlimited in amount, and to any person or persons;[16]

open, modify or terminate a deposit account in the name of the principal and other joint tenants;

open, modify or terminate any other joint account in the name of the principal and other joint tenants;

open, modify or terminate a bank account in trust form and designate or change the beneficiary or beneficiaries of such account;

open, modify or terminate a transfer on death account and designate or change the beneficiary or beneficiaries of such account;

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;

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;

designate or change the beneficiary or beneficiaries of any type of retirement benefit or plan;

create, amend, revoke, or terminate an inter vivos trust;[17] and

create, change or terminate other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.

The above list makes the expansive nature of an agent's potential gifting authority crystal clear. It also highlights the importance of bringing this information to the principal's attention.

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[15] *See* discussion *infra* at p.10.

[16] A gift or other transfer to an individual authorized by this subdivision may be made outright, to a trust established or created for such individual, to a Uniform Transfers to Minors Act account for such individual (regardless of who is the custodian), or to a tuition savings account or prepaid tuition plan as defined under section 529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account). *See* 5-1514(3).

[17] The trust powers, like the others moved to section 5-1514, may allow the agent to make significant changes to the principal's estate plan. Whether alone or coordinated with gifting and analogous powers, a trust can be an important vehicle for asset protection, tax planning, or planning for the long term benefit of family, among other goals.

A similar gifting provision can be found in the Uniform Power of Attorney Act[18] promulgated by the National Conference of Commissioners on Uniform State Laws.

As the comment to that provision notes,

> [t]he rationale for requiring a grant of specific authority to perform [these acts] is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advice before granting authority to an agent.[19]

Under the 2009 statute, a statutory form power of attorney involving authority for gift transactions must be accompanied by a Gifts Rider.[20] The statutory Gifts Rider has three parts in which gifts can be authorized. Section (a) permits statutorily identified gifts in the annual gift tax exclusion amount[21] to a statutorily identified class of people – the principal's spouse, parents, children, and more remote descendants.[22] Section (b) permits modifications for custom-drafted gifting that includes gifts less than or in excess of the annual gift tax exclusion amount or to other beneficiaries, and other types of donative transfers.[23] Conflicting interpretations have arisen as to whether a principal wishing his or her agent to make gifts to the beneficiaries identified in section (a) in amounts that exceed the federal gift tax exclusion must complete both sections (a) and (b). We plan to study this issue and elicit views on how best to resolve this conflict. Section (c) permits self-gifts to the agent.

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[18] The Uniform Power of Attorney Act is hereinafter sometimes referred to as UPOAA.

[19] UPOAA §201(a), Comment, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm#TOC1_36. At one time during the development of the Gifts Rider, it was suggested that all the powers listed under 5-1514 appear on the face of the Gifts Rider, as is the case in the model form of the UPOAA (section 301). This suggestion was not adopted because it raised concerns on the one hand, that such a list would not be helpful to a principal who would be unlikely to understand the meaning and scope of such authority without legal advice, and on the other hand, that a detailed list of gifting powers on Gifts Rider would be a road map for larceny for an agent intent on exploiting a principal. It was thought that the best course was for a principal to have the assistance of an attorney when contemplating gifting authority.

[20] This instrument was called a Major Gifts Rider in Chapter 644. Its name was changed in Chapter 340 of the laws of 2010.

[21] The annual federal gift tax exclusion gifts is currently $13,000.

[22] Such gifts also include gifts to section 529 education accounts, and gift splitting from the principal's assets, if the principal's spouse consents. *See* section 5-1514(6).

[23] A list of such modifications is included at subdivision (3) of section 5-1514.

The power of attorney must be signed by the principal and his or her appointed agent and their signatures notarized.[24] The Gifts Rider must be signed by two witnesses, one of whom may be the notary who has taken the acknowledgment.[25] We have discovered that the Gifts Rider statutory form includes a line for a notary's acknowledgment of the principal's signature. It is not clear that the acknowledgment of the principal's signature on the Gifts Rider is required by the statute so this is another matter on which we will focus during the next year.

C. The 2010 Technical Corrections

After the enactment of the 2009 statute, the Commission, the sponsors of the bill, and numerous interested parties, including attorneys who practice in the field, developed a technical corrections bill that passed both houses of the Legislature and was signed by the Governor on August 13, 2010 as Chapter 340. This legislation clarified, among other things, that certain powers of attorney used for business and commercial purposes are excluded from the statute under section 5-1501C; that the Gifts Rider is unnecessary to authorize transactions that are not gifts, e.g., regular sales of real property; that executing a new power of attorney does not automatically revoke a prior power of attorney unless the principal expressly revokes it; and that a notary who takes the acknowledgment of the signature on the power of attorney can also act as a witness to a Gifts Rider or non-statutory power of attorney with gifting authority. As noted earlier, Chapter 340 also directed the Commission to study the Gifts Rider and the implementation of the 2009 and 2010 amendments in their entirety.

IV. A Preliminary Review of the Gifts Rider

The Commission has spoken or met with, or heard from, attorneys, social services providers, and other individuals and organizations concerned about powers of attorney, including many of the same groups and individuals consulted prior to the statute's enactment. We surveyed legal service providers and area agencies on aging about their experience with the new law and the desirability of educating the public and service providers about the new law. We also spoke with the chairwoman of the state bar's working group on powers of attorney who indicated that the working group is preparing its own survey, the results of which will not be available until well after September 1, 2010, the due date of this Report.

The discussions and comments thus far have proved invaluable to our analysis of the current state of the law, particularly the Gifts Rider.

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[24] Section 5-1501B(1). The agent need not sign at the same time as the principal. *See* section 5-1501B(1)(c).

[25] Section 5-1501B(2)(a). In lieu of a Gifts Rider, a principal may execute a non-statutory form power of attorney for gifting transactions signed by the principal and two witnesses. Section 5-1501B(2)(b).

A. Highlighting an Agent's Gifting Authority

Consolidating the agent's gifting authority provisions in a Gifts Rider permits the principal to give informed consent to any gifting authority and advises the agent and third parties of the agent's authority. Thus, it reduces, if not eliminates altogether, the ambiguity and confusion about the gifting authority inherent in the prior law and the prior statutory form.

Notably, this is not the first time that the statute governing powers of attorney has been amended to call the principal's attention to the significance of his or her decisions. As mentioned earlier, the 1994 amendment that required the principal to initial each power granted to the agent was intended to assure the principal's participation in the choice of powers rather than, as the Memorandum of the Assembly Rules Committee noted, "passive acceptance of what was on the form."[26] The Gifts Rider accomplishes what the 1994 amendment did not, namely to bring to light all the gifting authority heretofore masked by the abbreviated terms on the statutory form and scattered throughout the statutory definitions of those terms.

Spotlighting an important decision through the use of a separate document is similar to the New York requirement for attorney-executors. Thus, under the Surrogate's Court Procedure Act, an attorney who is also designated as executor under a will must disclose to the testator in a separate document the commissions to which the attorney-executor is entitled. That document must be signed by the testator and one witness.[27] Requiring the testator to sign a second document is designed to educate the testator about the additional fees from the estate to which the attorney is entitled.

Focusing the principal's attention on an agent's authority to self-gift is similar to what New York already requires for self-gifting by trustees. Before 2003, the law prohibited a settlor from creating any self-gifting provisions for the trustee, for fear that doing so would create a "general power of appointment," which would lead to the trust property being included in the estate of the trustee. Section 10-10.1 of the Estates, Powers and Trusts Law permits a trust to authorize a trustee to make gifts to himself or herself provided the gifts are for the trustee's health, education, maintenance or support (collectively known as an "ascertainable standard" under the Internal Revenue Code). The settlor can override the "ascertainable standard" only by express reference to the language of section 10-10.1.[28]

As noted earlier, requiring express authorization for specific gifts reflects a national trend "among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and beneficiary designations." [29] This specificity is required by section 201 and the

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[26] 1994 Memorandum of the Assembly Rules Committee, c. 694 of the Laws of 1994.

[27] N.Y. SCPA 2307-a, as amended by the Laws of 2003, c. 633.

[28] *Id*.

[29] UPOAA §201(a), Comment (citations omitted), available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm#TOC1_36.

model form of the recently revised Uniform Power of Attorney Act adopted in 2006 by the National Conference of Commissioners on Uniform State Laws. The catalyst for this format came from the results of a national survey conducted by the joint Editorial Board for Uniform Trust and Estate Acts.[30] The survey results "demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should [among other things] require gift making authority to be expressly stated in the grant of authority . . . ."[31]

Maryland[32] and Virginia[33] are the most recent states to adopt the approach of the Uniform Power of Attorney Act.[34] Virginia's 2010 statute mirrors the Uniform Power of Attorney Act. Maryland's 2010 statute significantly expands on the approach of the Uniform Power of Attorney Act, adopting two statutory forms: a general grant of authority without gifting authority, which cannot be modified,[35] and a limited grant of authority with optional gifting authority, which can be modified.[36] Maryland's new law also requires two witnesses for each of the two statutory forms.[37]

New Jersey's Law Revision Commission recently issued a report on proposed amendments to the state's power of attorney law.[38] It recommends that if the principal intends to authorize the agent to make gifts, gratuitous transfers, and self-gifts, that the power of attorney expressly list those gifting powers.[39] The New Jersey proposal incorporates elements of New York's 2009 law as well as the Uniform Power of Attorney Act.[40]

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[30] UPOAA, Prefatory Note, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm.

[31] *Id*.

[32] Chapter 689 Maryland 2010 Regular Session, available at LEXSEE 2010 MD ALS 689.

[33] Chapter 455 §26-72.01Virginia Acts of Assembly –2010 Session, available at http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+CHAP0455+pdf.

[34] The UPOAA has also been adopted by Delaware (LEXSEE 2010 Del. ALS 467), Wisconsin (LEXSEE 2009 Wsc. ALS 319), and the US Virgin Islands (15 V.I.C. §1-201).

[35] Chapter 689 §17-202 Maryland 2010 Regular Session, available at LEXSEE 2010 MD ALS 689.

[36] Chapter 689 §17-203 Maryland 2010 Regular Session, available at LEXSEE 2010 MD ALS 689.

[37] Chapter 689 §§17-202, 17-203 Maryland 2010 Regular Session, available at LEXSEE 2010 MD ALS 689.

[38] New Jersey Law Revision Commission, Final Report Relating to General Durable Power of Attorney Act (May 13, 2010) (NJLRC Final Report).

[39] NJLRC Final Report at 21.

[40] NJLRC Final Report at 21, Comment to proposed section 46:2B-20.22. New Jersey does not have a statutory form power of attorney and it did not adopt the concept of a Gifts Rider. It opted to "permit authority to make gifts and other gratuitous transfers by express and specific provision in the power of attorney itself . . ." *Id*.

B. The Formalities of Execution

The requirement of two witnesses to the Gifts Rider accompanying the statutory form power of attorney, or a non-statutory power of attorney with gifting authority, is designed to draw the principal's attention to the importance of the document and its potential effect on his or her estate.

This level of formality is consistent with similar requirements under New York law for wills, trusts and health care proxies. Thus, section 3-2.1 of the Estates, Powers and Trusts law requires that a will be signed by the testator in the presence of at least two witnesses. In 1977, section 7-1.17(a) of the Estates, Powers and Trusts law changed the execution rules for a trust to be more consistent with those for a will, requiring the signatures of the settlor and the trustee, and either their notarization or the signatures of two witnesses. As the Sponsor's Memorandum to section 7-1.17(a) noted, "[s]ome degree of formality helps the parties involved realize the serious nature of the instrument being executed and reduces substantially the potential for foul play."[41] Similarly, health care proxies require the principal's signature as well as the signatures of two witnesses.[42] An attempt to reduce the number of witnesses to one was vetoed by the Governor on August 30, 2010.[43] The veto message concludes that in light of "the relative ease of finding a second person to witness the execution of a health care proxy in most cases," two witnesses should be required because of "the potential for significant and irreparable harm resulting from a person wrongfully exercising control over another's personal health care decisions."[44]

A formal execution requirement for a power of attorney is not unique to New York. As noted earlier, Maryland is the latest state to adopt heightened execution requirements.[45] Other states that have heightened execution requirements include Oklahoma (two witnesses and a notary),[46] Florida (two witnesses),[47] South Carolina (two witnesses),[48] Arizona (one witness and a

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41 Memorandum in Support, 1997 S.B. 4223.

42 *See* N.Y. Pub. Health Law §2981(5)(d).

43 Veto No. 6788 of 2010.

44 *Id*.

45 Chapter 689 Maryland 2010 Regular Session.

46 Ok. Stat. Ann. §58-1072.2.

47 Fla. Stat. Ann §§709.08(1); 689.01.

48 S. C. Code Ann.§§62-5-501(c); 62-2-502.

notary),[49] and Illinois (one witness and a notary).[50] Pennsylvania is considering a statutory amendment requiring two witnesses.[51]

A formal execution requirement is seen as providing a number of protections: 1) alerting the principal to the significance of the instrument he or she is executing; 2) lessening the chance that a dishonest agent will obtain a durable power of attorney from a vulnerable principal without the knowledge of third persons;[52] 3) identifying that it is the principal who is executing the document and that he or she is competent and free from undue influence;[53] and 4) making the document acceptable in states such as Florida, which have, as noted earlier, a requirement that one or more witnesses attest to the principal's signing of the power of attorney.

C. Initial Reaction to the Gifts Rider

The goal of the 2009 statute – to better inform individuals about the power of attorney and the gifting authority of the agent – seems to be universally acknowledged as laudable.

Service providers see the Gifts Rider as an important and necessary change that will provide additional protections for principals, particularly older adults. Counselors in various facilities, such as hospitals and nursing homes, regard the power of attorney as a powerful document that should be executed by a principal only after careful consideration. These same advocates urge an educational campaign that promotes the importance of pre-crisis planning to avoid situations where execution of a power of attorney is made difficult if not impossible by an individual's diminished mental capacity. Certainly no one can disagree that both clients and their lawyers would be better served if planning were done in advance of a crisis. Such a public relations effort could be similar to the educational campaign undertaken after the enactment of the health care proxy law. Indeed, a residential care facility in New York City and a service provider for older adults in upstate New York have already expressed interest in collaborating on such a campaign.

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[49] Ariz. Rev. Stat. Ann. §14-5501.

[50] 755 ILCS §45/3-3.

[51] *Powers of Attorney: Proposed Amendments to the Probate, Estates and Fiduciaries Code* 16-17 (Report of the Advisory Committee on Decedents' Estates March 2010), available at http://jsg.legis.state.pa.us/POWERS%20OF%20ATTORNEY%20March%2023%202010.pdf.

[52] Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 Elder L.J. 165, 195-96 (2009).

[53] *Id. See also* Kelly Dedel Johnson, *Financial Crimes Against the Elderly* 24 (U.S. Department of Justice Office of Community Oriented Policing Services (2004)(noting the lack of oversight of legal documents granting such enormous decision-making authority over financial matters, and criticizing the lack of two key requirements: the involvement of a lawyer in drafting the document, and the presence of witnesses to assure that the Principal's signature is voluntary.); Margaret Z. Reed and Jonathan Federman, *Abuse and the Durable Power of Attorney: Options for Reform* 48-49 (Albany Law School Government Law Center 1994).

Social workers and prosecutors recognize that the Gifts Rider alerts the principal to proceed cautiously in executing such a document and may deter would-be exploiters, and that the 2009 law provides useful tools for dealing with financial exploitation, such as requiring the agent to acknowledge his or her responsibilities to the principal and sign the power of attorney, expressly identifying the agent as a fiduciary, and establishing the agent's accountability.

The majority of lawyers with whom we have spoken believe that requiring a Gifts Rider enhances the integrity of financial and estate planning. They view the Gifts Rider as the cornerstone of the law because it requires the principal to make focused decisions on a critical component of planning.[54] These attorneys view their role as one of educating clients, assisting clients in understanding that the Gifts Rider is to protect them, allowing clients to make their wishes clear, and providing clients with the ability to retain control over their assets, if that is their intention.[55] These attorneys recognize the importance of the heightened execution requirements and regard the formality as a useful way to emphasize the importance of the document. They also appreciate that the Gifts Rider highlights the importance of the choice of agent. Indeed, one learned treatise notes "[i]t cannot be emphasized enough that the power to make gifts of the principal's property in amounts greater than the present interest exclusion amount should be granted only after the most careful consideration [by the principal] with particular attention to the selection of the agent."[56] Additionally, because the principal can choose to compensate the agent, many attorneys have been having more detailed discussions with clients about the choice of agent, the structure of the agent's compensation, and the effect on other family members if the agent is compensated.

Some lawyers have expressed concern that the Gifts Rider requires more time and does not achieve its goal of education, is not consumer friendly, is more burdensome, and adds an unnecessary layer of complexity for a client of diminished capacity. A preliminary examination of these complaints follows. We will look at them in more depth over the next year.

Excessive Time Required

It is not clear why an undue amount of time is needed to counsel a client about the contents of a Gifts Rider. If anything, laying out all the gifting powers in a Gifts Rider would seem to make explaining the agent's gifting authority easier and simpler than it would have been under prior law when much of the gifting authority was not evident on the statutory short form. In any event, as more than one practitioner has noted, financial and estate planning requires attorneys to spend time with clients, to ask the right questions, understand their needs,

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54 *See* Mark B. Edwards, *Through the Looking Glass: the Future of Estate and Financial Planning*, SM003 ALI-ABA 1289 (July 19-21, 2006) noting that "[t]he durable power of attorney is like the hub of a wheel, the piece around which everything else turns. We must treat this document with the care it deserves, taking the extra time (and charging the extra fees) to do the job well." *See also* Stephen C. F. Diamond, *With a Name Like SmuGeR It Has to be Good,* 42 NYSBA Trusts and Estates Law Section Newsletter 4 (Winter 2009).

55 Edwards, *supra* n. 54.

56 2-17 Klipstein, Drafting New York Wills § 17.03 (3rd ed. Lexis Nexis Matthew Bender).

personalize their plans, and offer sound and practical advice that assists them in achieving their goals.[57]

User Friendly

Some attorneys have opined that the Gifts Rider is not "principal friendly." A power of attorney under the 2009 law is no more or less "principal friendly" than a power of attorney under the old law. If anything, it could be said that the old statutory form was less "principal friendly" because the form's apparent simplicity masked the default gifting provisions, making it a trap for an unwary principal, as noted at page 5 of this Report. Indeed, many lawyers acknowledge that they have advised their clients that the Gifts Rider is for their protection. Moreover, the educational role of the Gifts Rider extends beyond that of simply informing the principal. It also clearly informs others about the scope of the agent's authority, such as the agent who accepts the responsibility for acting, and third parties, such as banks and financial institutions.

It has been claimed that the Gifts Rider is too long and that clients are often anxious to "get it over with." The Gifts Rider is no more lengthy than many powers of attorney under the prior law which contained detailed custom-drafted modifications which expanded gifting and other authority granted the agent. In any event, it would seem that the explanation to the client about the contents of the Gifts Rider is more important than the length of the document. Still, we will continue to monitor the issue before reaching any final conclusion.

Two Witnesses

The need for two witnesses has been called burdensome. In light of the legal requirement for two witnesses for a will and a health care proxy,[58] two other major staples of a basic estate plan, a persuasive argument has not been offered as of yet for abandoning this requirement for a Gifts Rider. Nonetheless, we will study the matter further to clarify why the requirement is burdensome, particularly since many practitioners apparently encourage their clients to execute wills, health care proxies and powers of attorney all at the same time, using the same witnesses for each document as a matter of convenience.

Clients with Diminished Capacity

Concerns have been raised that the Gifts Rider is too complex for a client with diminished capacity. Under the 2009 statute, "capacity" is defined as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any

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[57] *See, e.g.,* Laurie Menzies, *What's Wrong with Most Estate Plans?* NYSBA Elder Law Attorney, Summer 2008, at 8.

[58] As noted earlier, the requirement of two witnesses for a health care was recently affirmed by the Governor's veto of a bill which sought to reduce the requirement to one witness. *See* discussion *supra* at p. 12.

person to act as agent under a power of attorney."[59] Whether the principal has this capacity, described by one leading treatise as " functional,"[60] is likely to emerge during the discussions between the attorney and the principal regarding what can be done with the power of attorney and his or her intentions for the agent. If the attorney concludes, or has reason to believe, that the principal does not have the statutory standard of capacity, the situation raises fundamental ethical and other concerns that we will consider in the coming months.

V. Conclusion

The Commission has been studying powers of attorney for approximately 10 years. This study has led to the 2009 statute and the 2010 technical amendments. As demonstrated above, a number of issues raised in this preliminary examination of the Gifts Rider require further thought, analysis and empirical research, all of which will be undertaken in preparation of our Final Report. To consider the issues raised herein and any other power of attorney related matters, we plan to host over the coming months a roundtable meeting as well as small meetings for those interested and concerned about the law relating to powers of attorney.

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[59] Section 5-1501(2)(c).

[60] 2-17 Klipstein, Drafting New York Wills § 17.03 (3rd ed. Lexis Nexis Matthew Bender).