REVISED DURABLE POWER OF ATTORNEY ACT WITH PROPOSED CHANGES

46:2B-20.1. Short title

This act shall be known and may be cited as the “General Durable Power of Attorney Act”.


COMMENT

The sole reason for a change in name of the act is to distinguish the current law from the proposed revised law. This new act combines elements of the current Revised Durable Power of Attorney Act with elements of the statutes pertaining to banking power of attorneys and adds new elements adopted from other sources as noted.

46:2B-20.2. Definitions

As used in this act:

“Account” means an agreement between a financial institution and its customer pursuant to which the institution accepts funds or property of the customer and agrees to repay or return the funds or property upon the terms and conditions specified in the agreement. The term “account” includes, but is not limited to, checking accounts, savings accounts, certificate of deposit and other types of time and demand accounts as institutions are authorized to enter into pursuant to applicable federal or State law. The term “account” does not include an agreement pursuant to which a banking institution agrees to act as a fiduciary within the meaning of the Uniform Fiduciaries Law, N.J.S. 3B:14-52 et seq.

“Agent” means the person, at least 18 years of age, or a qualified bank within the meaning of N.J.S. 17:9A-28, authorized to act for a principal pursuant to a power of attorney. An agent may be referred to as an “attorney-in-fact” in the power of attorney. For purposes of this act, an agent includes the original agent, any co-agent or successor agent, and any person to whom an agent delegates authority. An agent acting under a power of attorney has a fiduciary relationship with the principal.

“Benefits from governmental programs or civil or military service” means any benefit, program or assistance provided under a statute or governmental regulation, including social security, Medicare and Medicaid.

“Durable”, with respect to a power of attorney, means that the authority conferred is exercisable notwithstanding the principal’s subsequent incapacity.

“Execution” means the signing of the instrument by the principal, and acknowledgment of the principal’s signature in accordance with this act.
“Financial institution” means a financial entity, including, but not limited to a bank, credit union, federal credit union, federal mutual savings bank, federal mutual savings and loan association, federal savings and loan association, branch of a foreign banking corporation, insurance company, national bank, public pension fund, retirement system, savings bank, savings and loan association, securities broker, securities dealer, securities firm, trust company, whether chartered by the United States, this State or any other state or territory of the United States or a foreign country.

“General power of attorney” means a power of attorney that is intended for general use and not for a limited purpose.

“In good faith” means done honestly, regardless of whether it is done negligently.

“Incapacity of the agent” means the inability of the agent to exercise the authority conferred by the power of attorney.

“Incapacity of the principal” means impairment of the principal by reason of mental or physical illness, deficiency or disability, or the chronic use of drugs or chronic alcoholism or other cause (except minority) to the extent the principal lacks the ability to govern and manage the principal’s property and personal affairs.


“Limited power of attorney” means a power of attorney intended for a limited purpose and not for general use.

“Power of attorney” means a written instrument, signed and acknowledged by the principal, by which a principal with capacity authorizes an agent to act on the principal’s behalf.

“Principal” means an individual, at least 18 years of age, who authorizes an agent to act in a power of attorney.

“Safe deposit company” means a company operating pursuant to N.J.S. 17:14A-1 et seq.

“Sign” means to bear a mark or symbol intending to authenticate or adopt the written document signed.

“Third party” includes a financial institution.


COMMENT
The definitions section is new. Some of the definitions are adopted from current section 46:2B-10; some are extrapolated from current section 46:2B-8.2; some from New York’s new durable power of
attorney law, Chapter 644 of the Laws of 2008, signed into law as Chapter 4 of the Laws of 2009, amending the General Obligations Law (Chapter 644) and some from the Uniform Power of Attorney Act (UPOAA) promulgated by NCCUSL in 2006. The definition of “durable” is derived in part from source section 46:2B-8.2, and the definition of “incapacity of the principal” is adopted from the definition of “incapacitated individual” in Title 3B. The term “incapacity” is no longer coupled with the term “disability” as in the current act because disability does not necessarily render someone incapable of property and business management.

The term “agent”, which is used in the current statute governing banking powers of attorney, is now used here to replace the term “attorney-in-fact” to avoid confusion by the public about the meaning of the term and the differences between an attorney-in-fact and an attorney-at-law. The term “account” is used in the current statute governing banking powers but has been modified to include financial institutions as well as banking institutions. The term “safety deposit company” is used in the current statute governing banking powers.

46:2B-20.3. Existing powers of attorney not invalidated by this act
A power of attorney executed in this State before the effective date of this act:
   a. is valid if at the time of its execution the power of attorney complied with the law of this State;
   b. is not durable unless, at the time of its execution, the power of attorney complied with the requirements in effect for making it a durable power of attorney; and
   c. does not revoke any prior power of attorney unless, at the time of its execution, the revocation complied with the requirements in effect for revoking a power of attorney.
Source: New.

COMMENT
This new provision recognizes the validity, enforceability and revocation of durable powers of attorney created prior to enactment of the proposed new law.

46:2B-20.4. Powers of attorney; durable unless otherwise stated
   a. Every power of attorney is “durable” as defined in this act unless the power expressly provides that it terminates upon the incapacity of the principal. Notwithstanding the presumption of durability conferred by this section, a power intended by the principal to be durable may state that it is durable.
   b. Unless the power of attorney expressly provides that it terminates upon the incapacity of the principal, all acts by an agent pursuant to the power, during any period of the principal’s incapacity, shall have the same effect and inure to the benefit of and bind the principal and the principal’s heirs, devisees, successors and personal representatives as if the principal were not incapacitated.
   c. A power of attorney is exercisable notwithstanding the lapse of time since its execution, unless it states a time of termination.

COMMENT
The source sections are merged and modified in this new section. The term “durable”, and the term “incapacity” as that term is applied to both the principal and the agent, are now defined in proposed section 46:2B-20.2. Subsection a. is modeled on Section 104 of the UPOAA. Subsection b. is modeled on source provision N.J.S. 46:2B-8.3 and 46:2B-16 pertaining to banking institutions. The terms “heirs”, “devisees”, “successors” and “personal representatives” are used here as those terms are understood under Title 3B of the New Jersey statutes.

Unlike the current act -- which provides that in order to be durable, the power of attorney must recite certain language showing the principal’s intent to make it so -- the new act now presumes that a power of attorney is durable unless otherwise stated. This presumption is based on the belief -- as
articulated in the comments to the UPOAA -- that most principals prefer that a power be durable to hedge against the need for guardianship. The second sentence of subsection a. is added because third parties, especially those unfamiliar with New Jersey law or those without access to our statutes, may not be aware of the presumption conferred by the revised provision.

46:2B-20.5. Creation of a valid power of attorney; when effective

a. To be valid, a power of attorney shall be:

(1) typed, or printed using letters which are legible and easy to read;
(2) in compliance with section 46:2B-20.6a; and
(3) executed by a principal, with the capacity to do so, in the following manner:
(a) the principal, appearing before two witnesses (neither of whom is an agent) and a notary public or any other officer authorized to take acknowledgements as provided in N.J.S. 46:14-6.1, signs and dates the power and acknowledges that the power was executed as the principal’s own act;
(b) the witnesses swear before the notary public or other qualifying officer that they witnessed the principal execute the power of attorney as the principal’s own act; and
(c) the officer taking the acknowledgment and proof does so in the manner prescribed for the acknowledgement and proof of a conveyance of real property in accordance with N.J.S. 46:14-2.1c.

b. A power of attorney shall not be invalid solely because of (i) a lapse of time between the dates of acknowledgement of the signature of the principal and the date of its use; or (ii) the subsequent incapacity of the principal during any such lapse of time.

c. Unless a power of attorney states otherwise, the date on which the principal’s signature is acknowledged is the effective date of the power of attorney. A power of attorney may state that it takes effect upon the occurrence of a date or contingency specified in the instrument, in which case, once acknowledged by the principal, the power of attorney takes effect upon the date or occurrence of the contingency in the manner specified.

d. A signature on a power of attorney is presumed to be genuine if acknowledged in accordance with subsection a.(3).


COMMENT

The proposed new section is substantially derived from the UPOAA and Chapter 644 and suggestions of commenters. The source statute is also incorporated into this new section. However, the revised section now requires acknowledgement and proof of the principal’s signature before two witnesses, neither of which is the agent, and a notary public or other officer in accordance with N.J.S. 46:14-6.1. A signature in compliance with this provision is presumed to be genuine (as is the case in the UPOAA, Section 104.)

46:2B-20.6. Power of attorney; guidelines for contents of form

a. Every power of attorney shall provide:

(1) designation of an agent including the agent’s name and mailing address, and if more than one agent, a statement of whether the agents must act together or independently;
(2) the grant of authority which the principal intends to give the agent;

(3) that the agent must follow the principal’s instructions, or if there are no instructions, act in the principal’s best interest;

(4) a statement which makes clear that the power of attorney does not authorize the agent to make health care decisions for the principal, but that the principal may sign a separate document that authorizes an agent to make health care decisions for the principal, in accordance with N.J.S. 26:2H-53 et seq. or N.J.S. 26:2H-103, et seq., as applicable if the principal so chooses;

(5) the name and title of the person who prepared the power of attorney;

(6) if the principal intends to make major gifts or transfers, including gifts of the principal’s property to the agent, or to make, amend, alter or revoke the principal’s wills or codicils, or to designate, change or revoke the beneficiary designations in any life insurance, annuity, or similar contract, employee benefit or plan or retirement benefit or plan, payable on death or transfer on death beneficiary designations, or to make, amend alter or revoke any inter vivos trust, registration of the principal’s securities in beneficiary form, or any provisions for nonprobate transfer at death; or to make transfers of property to any trust, or to disclaim property, that the principal may not do so unless the power of attorney includes express specific authority to make such gifts or transfers, in accordance with section 46:2B-20.21; and

(7) if the power is not intended to be durable, express language indicating that the power shall terminate upon the incapacity of the principal.

b. A power of attorney may also provide the following, for purposes of illustration and not limitation:

(1). that the principal does not lose authority to act even though similar authority has been given to the agent;

(2). that the principal may select more than one agent to act together or independently and one or more successor agents to act together or independently;

(3). that the law governing powers of attorney appears at N.J.S. 46:2B-20.1 et seq, and is available at a law library or online through the New Jersey Legislative website, www.njleg.state.nj.us/, along with the instruction that if there is anything about the power that the principal does not understand, the principal should contact an attorney of the principal’s own choosing before signing the power of attorney;

(4) that the power is effective upon execution in accordance with this act and shall not be affected by the principal’s incapacity, or by lapse of time, unless the principal has stated otherwise;

(5). specific delineation of each grant of authority the principal wishes to give to the agent, which may include, but is not limited to, as those subjects are defined in this act, the authority to conduct real estate transactions; goods and chattels or tangible personal property transactions; bond, share and commodity transactions; banking transactions; business operating transactions; insurance transactions; estate transactions; litigation and other legal proceedings; personal and family maintenance; health care billing, recordkeeping and payments (which shall be distinguished from a health care power of attorney); retirement benefit transactions; tax matters; the collection and
disbursement of benefits from governmental programs or civil or military service; or any or all of the above;

(6) designation of a successor agent, including the agent’s name and mailing address, and if more than one successor agent, a statement of whether the successor agents must act together or independently;

(7) the telephone number and e-mail address of each agent;

(8) that the agent may be compensated from the principal’s assets for reasonable expenses incurred on the principal’s behalf or services rendered on the principal’s behalf, or both. “Reasonable compensation” may be defined in the power of attorney;

(9) that the power of attorney continues until the principal revokes it in accordance with section 46:2B-20.15a. or it is terminated by the principal’s death or other event described in section 46:2B-20.15b.;

(10) special instructions or additional provisions, including but not limited to language to limit or supplement authority granted to the agent, which may be set forth on an addendum attached to the power of attorney that shall also be initialed by the principal;

(11) that the agent, in the exercise of reasonable care, skill and caution, may delegate to others any one, more, or all of the specific powers which have been conferred on the agent by the power of attorney;

(12) authorization to make major gifts and transactions in accordance with the requirements of section 46:2B-20-21; and

(13) any other provisions requested by the principal that are permitted by law.

Source: New.

COMMENT

The current act does not provide or suggest a form of power of attorney. Commenters have strongly suggested that guidelines would be useful. This section sets forth guidelines for the contents of a power of attorney. Subsection a. establishes required guidelines. Subsection b. sets forth illustrative guidelines. Both sets of guidelines are derived substantially from current practice, portions of the forms provided in Chapter 644 and the UPOAA that are deemed workable by commenters, and general commenters’ suggestions.

46:2B-20.7. Fiduciary status and duties of agent

a. An agent acting under a power of attorney has a fiduciary duty to the principal, and if the principal is adjudicated an incapacitated person after the power is executed, to a guardian of the property of the principal, to act within the powers delegated by the power and solely for the benefit of the principal;

b. An agent shall also:

(1) act in accordance with instructions from the principal, or where no instructions have been given, in the best interest of the principal;

(2) act in good faith;
(3) keep the principal’s property separate and distinct from any other property owned or controlled by the agent, except for any property jointly owned by the principal and agent at the time of execution of the power of attorney, except where the agent is the principal’s spouse and keeping the principal’s property separate and distinct from the agent’s is not reasonable under the circumstances; and

(4) keep an accurate record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and make the record and the power of attorney available, or render an accounting, at the request of:

(i) the principal;

(ii) a co-agent or successor agent acting under the power of attorney;

(iii) a guardian or conservator appointed for the principal;

(iv) the personal representative of the principal’s estate;

(v) a governmental agency or entity having regulatory authority to protect the welfare of the principal; or

(vi) the Superior Court upon application of any heir or other next friend of the principal, where the court is satisfied that the principal is incapacitated and there is concern whether the agent is either acting within the powers granted by the power or acting solely for the benefit of the principal.

c. An agent who fails to make the record and power of attorney available or to render an accounting under subsection b.(4) within a reasonable time period after a written request, not to exceed 15 days, may be compelled to do so by an order to show cause in accordance with the Rules Governing the Courts of the State of New Jersey.


COMMENT

The source statute is incorporated into this new section. Subsections b. and c. are derived, in part, from Section 114 of the UPOAA and commenters’ suggestions.

46:2B-20.8. Relation of agent to court-appointed fiduciary

a. A conservator, guardian of the estate, or other fiduciary appointed by a court to manage some or all of the principal’s property, after execution of a power of attorney, shall be accountable to the fiduciary as well as to the principal.

b. In a power of attorney, a principal may nominate a conservator, guardian of the principal’s estate, or guardian of the principal’s person, for consideration by the court if protective proceedings for the principal’s person or estate are commenced after the principal executes the power of attorney.


COMMENT

The source statute is incorporated into this new section with some modification in language based on the UPOAA. Subsection c. of the source statute has been moved to new provision 46:2B-20.15d.

46:2B-20.9. Good faith reliance by third party

a. Any third party may rely upon the authority granted in a power of attorney until the third party has received actual notice of:

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(1) the revocation of the power of attorney;
(2) the termination or the suspension of the authority of the agent;
(3) the death of the principal; or
(4) if the power expressly provides that it terminates upon the incapacity of the principal, the incapacity of the principal.

b. A third party who has not received actual notice as provided under subsection a. may require that the agent execute an affidavit stating that the agent did not have at the time of exercise of the power actual knowledge as provided in subsections (a)(1), (2), (3), or (4), which affidavit is conclusive proof of the power not having been revoked or terminated at that time. A form of affidavit is set forth at section 46:2B-20.12. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for recording is likewise recordable.

c. Any third party to whom the power of attorney is presented may retain and rely upon a photocopy or a certified copy or electronically transmitted copy of the original signed document.

d. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal’s capacity.


COMMENT

This new section is derived substantially from source section 46:2B-8.6 with some modifications in language. Subsection c. is derived from source section 46:2B-8.11 but adds the option of electronic transmission of an original power, as provided in the UPOAA (Section 106 d.).

46:2B-20.10. Agent’s act without notice of death or incapacity of principal

a. Any agent who acts in good faith under a valid and enforceable power of attorney, without knowledge of the principal’s death, binds the principal’s successors in interest, or, in the case of a power of attorney that terminates upon the incapacity of the principal, without knowledge of the principal’s incapacity, binds the principal and the principal’s successors in interest.

b. If the agent executes an affidavit, in accordance with section 46:2B-20.12., stating that the agent’s act in accordance with the power was done without actual knowledge of the revocation or termination of the power by death or incapacity, such act shall be presumed valid, subject to challenge only by a clear and convincing showing of fraud or gross neglect.

Source: 46:2B-8.5.

COMMENT

This new section is derived substantially from source section 46:2B-8.5 with some modifications in language.
46:2B-20.11. Third party to accept power of attorney; financial institutions

a. A third party shall accept a power of attorney, presented to the third party, that is valid in accordance with section 46:2B-20.5 or properly executed in accordance with the laws in effect at the time of execution. The third party shall rely upon the power subject to the requirements of section 46:2B-20.9. However, a third party that is a financial institution may also require compliance with the conditions set forth in subsection b. before accepting and relying on the power.

b. With respect to financial transactions, a third party financial institution may further condition acceptance of and reliance upon a power of attorney as follows:

(1) the institution may refuse to rely on or act pursuant to a power of attorney if the signature is not genuine, subject to section 46:2B-20.5d., or the employee of the institution who receives or is required to act on the power receives actual notice of the death of the principal, or the principal’s incapacity at the time of execution of the power or that the power has been revoked;

(2) the institution is not obligated to rely on or act pursuant to a power of attorney and shall have a reasonable time under the circumstances within which to decide whether to do so, if it believes in good faith that the power does not appear to be genuine or that the principal is dead, or that the principal was incapacitated at the time of the execution of the power or that the power has been revoked;

(3) if an agent seeks, in accordance with a power of attorney, to withdraw or pay funds from a principal’s account at a financial institution, the institution may require the agent to provide evidence satisfactory to the institution of the agent’s identity and to execute a signature card in a form as required by that institution;

(4) if the institution has viewed a form of power of attorney which does not contain an actual original signature of the principal, and the institution requires that an actual original signature be provided, the institution may require the agent to provide an affidavit that such an original is not available to be presented. If such an affidavit is provided, the institution shall accept a photocopy of the power of attorney certified to be a true copy of the original by either (i) another financial institution or (ii) the county recording office of the county in which the original was recorded;

(5) if a power of attorney expressly provides that “it shall become effective upon the incapacity of the principal” or similar words, the institution is not obligated to rely on or act pursuant to the power of attorney unless the institution is provided by the agent with proof to the institution’s satisfaction that the principal is then incapacitated as provided in the power of attorney.

c. No third party, including a financial institution, may refuse to accept or rely on a power of attorney solely because it is not on a form prescribed by the third party to whom the power is presented. Nor may a third party, including a financial institution, refuse to accept and rely on a power of attorney solely because of a lapse of time since the execution of the power, except that a third party may refuse to honor a power of attorney first presented to the third party more than 10 years after its effective date unless the agent is the spouse, domestic partner, civil union partner, parent or a descendant of a parent of the principal.
d. A financial institution that refuses to rely on or act pursuant to a power of attorney, for any reason, shall notify the agent in writing that the power of attorney has been rejected and the reason for the rejection provided that the agent or principal has given the mailing address of the agent to the institution in writing. Written notice of refusal to honor the power shall be sent by certified mail, return receipt requested, or registered mail to the mailing address given to the institution.


COMMENT

This section is derived substantially from its sources and merges the banking provisions with the current act, with some modifications in language. Subsection c. is derived from Chapter 644. 46:2B-20.12.

46:2B-20.12. Affidavit of non-revocation or non-termination of power of attorney; language and model form

a. An affidavit of non-revocation or non-termination of a power of attorney, as required in accordance with sections 46:2B-20.9b. or 46:2B-20.10, shall state that the agent, at the time of exercise of the power, had no actual knowledge of revocation or termination of the power of attorney, or of the principal’s death, or, if the power expressly states that it terminates upon the principal’s incapacity, actual knowledge of the principal’s incapacity.

b. Such affidavit shall be prepared in substantially the following form:

State of New Jersey, County of [name of county], ss.:

[Name of agent], being of full age, and duly sworn according to law, deposes and says:

1. I am the Agent for [name of principal], hereinafter referred to as PRINCIPAL, by virtue of a certain Power of Attorney date [date of power of attorney], and recorded [date of recordation of power of attorney, if applicable] in the Office of the Clerk/Register of [name of county where recorded] County, in Deed Book [book number], page [page number], which Power of Attorney and vests me with the authority to act for PRINCIPAL for all purposes set forth therein, including, without limitation, the execution and delivery of the document to which this Affidavit is attached.

2. To the best of my knowledge and belief, the said Power of Attorney has not been revoked or terminated by an act of PRINCIPAL or by the death or incapacity of PRINCIPAL. PRINCIPAL has not been judicially declared to be incompetent.

3. This Affidavit is made pursuant to the provisions of the statute [citation].

_____________________
[Signature of Agent]
Sworn and subscribed before me this ___
day of __________, 20___

_____________________
[Signature of Notary]

Source: New.

COMMENT

This new section is derived from a form provided by Fidelity National Title Group. It has been suggested that such an affidavit is helpful to title companies and if incorporated into the text, might be better utilized.
**46:2B-20.13. Co-agents and successor agents**

a. A principal may designate two or more persons to act as co-agents, either jointly or separately; provided that:

   (1) if the power of attorney does not expressly provide, the co-agents shall act jointly, unless a co-agent is unavailable because of absence, illness or other temporary incapacity, and prompt action is required to accomplish a purpose of the power or to avoid irreparable injury to the principal in which case any remaining agent may act for the principal; or

   (2) if the power provides that an agent may act separately, or if the power provides joint action by co-agents, and an agent dies, resigns or becomes incapacitated, the agent who may act separately, or any remaining co-agent, may act for the principal and exercise all powers granted.

b. A principal may designate one or more successor agents to serve. Unless the principal expressly provides otherwise in the power of attorney:

   (1) a successor agent may act only if every initial or predecessor agent resigns in writing, dies, becomes incapacitated, is not qualified to serve or declines to serve;

   (2) a successor has the same authority as that granted to an initial or predecessor agent; and

   (3) a successor agent may appoint another successor if the successor agent must resign and no other agents are able to serve for the reasons set forth in subsection b.(1).

c. A co-agent or a successor agent acting under a power of attorney shall have the authority to request, receive and seek to compel a co-agent or predecessor agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal.

d. Except as otherwise provided by this section or by the power of attorney, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent is not liable for the actions of the other agent.

Source: 46:2B-8.7.

**COMMENT**

The proposed new section is substantially derived from a combination of Chapter 644, and the UPOAA. Unlike the current statute and the UPOAA, but in keeping with New York’s statute, this proposed revised section presumes that the principal intends the co-agents to act jointly unless otherwise provided. Subsection d. is adopted from the UPOAA.


If the power of attorney expressly provides, the agent, in the exercise of reasonable care, skill and caution, may delegate to other agents one or more or all of the powers which have been conferred on the agent in the power.


**COMMENT**

This section is derived substantially from its source with some modifications in language.
46:2B-20.15. Revocation and termination of power of attorney

a. A power of attorney is revoked when the principal:

(1) executes a subsequent power of attorney that expressly revokes the prior power of attorney;

(2) either causes all executed originals of the power of attorney to be physically destroyed, or executes a written instrument of revocation which is acknowledged in the same manner as the power of attorney in accordance with section 46:2B-20.5a.(3); or

(3) otherwise revokes the power of attorney in accordance with its terms.

b. A power of attorney terminates when:

(1) if the power is a limited power of attorney, the purpose of the power of attorney is accomplished;

(2) the principal dies, provided that if the agent, who without actual knowledge of the principal’s death, acts in good faith under the power, any action so taken by the agent, unless otherwise invalid or unenforceable, binds the principal’s successors in interest;

(3) the principal becomes incapacitated and the power of attorney expressly provides that it terminates upon the incapacity of the principal, provided that if the agent, who without actual knowledge of the principal’s incapacity, acts in good faith under the power, any action so taken by the agent, unless otherwise invalid or unenforceable, binds the principal and the principal’s successors in interest;

(4) the principal revokes the agent’s authority, in writing, and there is no co-agent or successor agent, or none who is willing or able to serve;

(5) the principal revokes the power of attorney in accordance with subsection a.;

(6) the agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent or none who is willing or able to serve;

(7) a court order terminates the power of attorney; or

(8) the authority of the agent terminates and there is no co-agent or successor agent or none who is willing or able to serve. An agent’s authority terminates, unless the power of attorney expressly provides otherwise, when (i) the principal revokes the agent’s authority; (ii) the agent dies, becomes incapacitated or resigns; or (iii) the marriage, domestic partnership or civil union of an agent who is the spouse or domestic or civil union partner of the principal is terminated by divorce, annulment, dissolution or other proceeding.

c. Except upon a court order for good cause, no person other than the principal may revoke a durable power of attorney.

d. If a power of attorney that has been revoked was recorded, the principal shall also record a written revocation in the same manner.

COMMENT
The proposed new section incorporates elements of the source statutes and section 3B:3-13 pertaining to the revocation of wills, and adopts some language from a combination of Chapter 644 and the UPOAA.

46:2B-20.16. Agent to disclose relationship with principal

a. In any transaction where the agent is acting pursuant to a power of attorney and the handwritten signature of the agent or principal is required, the agent shall disclose the principal and agent relationship by
   (1) signing (name of agent) as agent for (name of principal); or
   (2) signing (name of principal) by (name of agent) as agent; or
   (3) any similar written disclosure of the principal and agent relationship.

b. When the agent engages in a transaction on behalf of the principal, the agent is attesting that at the time of the transaction:
   (1) the agent has actual authority to engage in the transaction;
   (2) the agent does not have actual notice of the termination or revocation of the power of attorney, or knowledge or notice of any facts indicating that the power has been terminated or revoked;
   (3) if the power of attorney does not expressly provide that it terminates upon the incapacity of the principal, that the agent does not have actual notice of the principal’s incapacity, or knowledge or notice of any facts indicating the principal’s incapacity; or
   (4) the agent does not have actual notice that the power of attorney has been modified in any way that would affect the ability of the agent to engage in the transaction, or knowledge or notice of any facts indicating that the power has been so modified.

c. The attestation of the agent pursuant to subsection b. is not effective as to any third party with actual notice that the power has terminated or been revoked prior to the transaction.

Source: New.

COMMENT
The proposed new section is substantially derived from Chapter 644 (section 5-1507) and the suggestions of commenters that the relationship of agent and principal be expressly stated when the agent signs on the principal’s behalf.


a. A principal may, in the power of attorney direct that an agent be compensated and provide for the method by which compensation shall be calculated and when compensation shall be paid. In the absence of any such direction, upon appropriate application, a court may award reasonable compensation to the agent.

Source: 46:2B-8.12; new.
COMMENT
The proposed new section is substantially derived from the source statute with the modification that the direction regarding compensation, if any, be provided in the power of attorney itself and not in the power or a separate written document.

46:2B-20.18. Resignation of agent

Unless otherwise provided for by the principal in the power of attorney, an agent who has signed a power of attorney may resign only by

(1) giving written notice to the principal and, if applicable, a co-agent, successor agent, or the principal’s guardian; or,

(2) if no co-agent, successor agent, or guardian is known to the agent and the principal is incapacitated, or the agent has knowledge or constructive knowledge of any facts indicating the principal’s incapacity, by petitioning the court to approve the resignation.

Source: New.

COMMENT
The proposed new section is substantially derived from a combination of Chapter 644 and the UPOAA.

46:2B-20.19. Agent authorized to act with respect to transactions in this or any other state

An agent may exercise all powers described in this act that are exercisable by the principal upon and after presentation of the power of attorney to the necessary person or financial institution with respect to any transaction permitted by this act, whether conducted in this or any other state or jurisdiction.

Source: 46:2B-12; new.

COMMENT
This new section is derived substantially from its source with some modifications.

46:2B-20.20. Powers of attorney executed in other jurisdictions; choice of law.

a. A power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction, or the law of this State, is valid in this State regardless of whether the principal is a domiciliary of this State.

b. The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power, and if no governing jurisdiction is indicated in the power, by the law of the jurisdiction in which the power was executed.

Source: New.

COMMENT
The current statute does not address powers of attorney executed in other jurisdictions. Proposed new subsection a. is substantially derived from Chapter 644. Proposed new subsection b. is substantially derived from the UPOAA.
46:2B:20.21, Major gifts and other transfers; self-dealing

a. An authorization in a power of attorney to perform all acts which the principal could perform if personally present and capable of acting, or words of like effect or meaning, is not an express or specific authorization to make gifts.

b. If the principal intends to authorize the agent to make any gifts and transfers, the principal must expressly grant such authority in the power of attorney. A power of attorney shall not be construed to authorize the agent to gratuitously transfer property of the principal to the agent or to a co-agent or successor agent, or to any others except to the extent the power of attorney expressly and specifically so authorizes.

c. If the principal intends to authorize the agent to designate, change, or revoke any beneficiary of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal, or any type of employment or retirement benefit or plan for the principal, or any other account or benefit, the principal must expressly grant such authority in the power of attorney.

d. If the principal intends to authorize the agent to create, amend, revoke or terminate an inter vivos trust, the principal must expressly grant such authority in the power of attorney.

e. If the principal intends to authorize the agent to open, modify or terminate a transfer on death account as described in N.J.S. 3B:30-6 through 3B:30-8 and designate or change any beneficiary of such account, or make, amend, alter or revoke and provisions for nonprobate transfer at death, the principal must expressly grant such authority in the power of attorney.

f. If the principal intends to authorize the agent to make, amend, alter or revoke the principal’s wills or codicils, or to make transfers of property to any trust, or to disclaim property, the principal must expressly grant such authority in the power of attorney.

g. Unless the power of attorney expressly provides otherwise, if after naming the spouse or domestic or civil union partner as a permissible recipient of gifting or other transfers, the principal is divorced, or the principal’s marriage is annulled or its nullity declared, or the marriage or domestic partnership or civil union is dissolved, the divorce, annulment, declaration of nullity or dissolution revokes the authority to gift to the former spouse or domestic or civil union partner. Remarriage or a new ceremony for a domestic partnership or civil union to the prior spouse or prior domestic or civil union partner shall revive the power.


COMMENT

The proposed new section is substantially derived from the source statute but also adds elements from Chapter 644 and the UPOAA. Rather than create a form of major gift rider under our statute, as the revised New York statute provides, this section permits authority to make major gifts and other transfers by express provision in the power of attorney itself and sets out guidelines for doing so.
46:2B-20.22. Liability of person or institution acting in reliance on power of attorney

VERSION A. – THIS IS ADOPTED VIRTUALLY VERBATIM FROM THE BANKING PROVISION (46:2B-14) BUT BROADENED TO APPLY TO ALL THIRD PARTIES

No person or institution acting in reliance on a power of attorney as set forth in this act, shall be held liable for injury for any act or omission if the act or omission is performed in good faith and within the scope of the duties of the institution or person, unless the act or omission constitutes a crime, actual fraud, actual malice or willful misconduct.

OR

VERSION B – DERIVED FROM BANKING PROVISION IN PART.

In the absence of actual knowledge that the principal lacked capacity to execute a power of attorney or that such power of attorney was procured through fraud, duress or undue influence, no third party receiving and retaining an original, photocopy, certified copy or electronically transmitted copy of such original power of attorney, nor any of the third party’s officers, agents or employees, shall incur any liability by reason of acting upon the authority of the power unless the third party receives actual notice of the revocation or termination of the power. A financial institution where the principal maintains an account is deemed to have actual notice of the revocation or termination of the power if, upon receipt of such written notice of revocation or termination at the office where the account is located, the institution has a reasonable opportunity to act in response.

Source: 46:2B-14; new.

COMMENT

This new section is derived substantially from its source with some modifications to expand its application beyond banking institutions.

COMMENT- REFERENCE TO THIS SECTION AND COMMENT SHALL APPEAR IN THE INTRODUCTION

The liability of an agent is not addressed in the current statute. A proposed new section pertaining to the liability of an agent is not included in this revision because the statute establishes a fiduciary obligation on the part of the agent and therefore commenters believe a liability provision is unnecessary.

46:2B-20.23. Remedies not exclusive

The remedies set forth in this act are not exclusive and do not abrogate any right or remedy under any other law of this State.

Source: New.

COMMENT

This section is new and is self-explanatory. It is derived from the UPOAA.
46:2B-20.24. Authority of agent not to exceed principal

Nothing in this act shall be deemed to give an agent any greater authority or rights than the principal could exercise on the principal’s own behalf.


COMMENT

This new section is derived substantially from its source.

46:2B-20. 25. Financial transactions; acts authorized

a. If any power of attorney contains language which confers authority on the agent to "conduct banking transactions as set forth in section 2 of P.L.1991, c.95 (C.46:2B-11)", or “conduct financial transactions” or words to that effect, the agent shall have the following authority under the power of attorney:

(1) To continue, modify or terminate any account or other banking financial arrangement made by or on behalf of the principal prior to creation of the agency;

(2) To open, either in the name of the agent alone, the principal alone or in both their names jointly, or otherwise, an account of any type in any banking institution selected by the agent; to hire, remove the contents of or surrender a safe deposit box or vault space; and to make other contracts for the procuring of other services made available by any banking institution or safe deposit company as the agent shall deem desirable;

(3) To draw, sign and deliver checks or drafts for any purpose, to withdraw by check, order, draft, wire transfer, electronic funds transfer or otherwise, any funds or property of the principal deposited with, or left in the custody of, any banking financial institution, wherever located, either prior or subsequent to the creation of the agency, and use any line of credit connected with any such accounts, apply for any automatic teller machine card or debit card or use any automatic teller machine card or debit card, including already existing cards, in connection with any such accounts and apply for and use any bank credit card issued in the name of the agent as an alternate user, but shall not use existing credit cards issued in the name of the principal, on existing bank credit card accounts of the principal;

(4) To prepare periodic financial statements concerning the assets and liabilities or income and expenses of the principal, and to deliver statements so prepared to the financial institution or other person whom the agent believes to be reasonably entitled;

(5) To receive statements, vouchers, notices or other documents from any banking financial institution and to act with respect to them;

(6) To have free access during normal business hours to any safe deposit box or vault to which the principal would have access if personally present;

(7) To borrow money by bank overdraft, loan agreement or promissory note of the principal given for a period or on demand and at an interest rate as the agent shall select; to give any security out of the assets of the principal as the agent shall deem desirable or necessary for any borrowing; to pay, renew or extend the time of payment of any agreement or note so given or given by or on behalf of the principal; and to procure for the principal a loan from any banking financial institution by any other procedure made available by a the financial institution;

(8) To make, assign, endorse, discount, guaranty and negotiate for any purpose all promissory notes, checks, drafts or other negotiable or non-negotiable paper instruments...
of the principal or payable to the principal or to the principal's order; to receive the cash or other proceeds of these transactions; and to accept any draft drawn by any person upon the principal and pay it when due;

(9) To receive for the principal and deal in or with any trust receipt, warehouse receipt or other negotiable or non-negotiable instrument in which the principal has or claims to have interest;

(10) To apply for and receive letters of credit or traveler's checks from any banking institution selected by the agent, giving any related indemnity or other agreements as the agent shall deem appropriate;

(11) To consent to an extension in the time of payment for any commercial paper or banking financial transaction in which the principal has an interest or by which the principal is, or might be, affected in any way;

(12) To demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any banking transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; to conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and to reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to the provisions of this section;

(13) To execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(14) To prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any banking financial transaction or to intervene in any action or proceeding relating to the banking transaction;

(15) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(16) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent concerning any transaction with a banking financial institution which affects the financial or other interests of the principal.

b. All powers described in subsection a. shall be exercisable equally with respect to any financial transaction which affects the financial or other interests of the principal, regardless of whether the transaction is (i) specifically identified at the time of the execution of the power of attorney or (ii) conducted in this State or elsewhere.


COMMENT

The proposed new section is substantially derived from the source provisions with some modifications to language and to expand the section’s application to financial institutions that may not be banking institutions. Changes from source provision 46:2B-11 are noted by underscores of new language and strikethroughs of current language. Subsection b. is adopted from Chapter 644.

a. If a power of attorney contains language that confers authority on the agent to “conduct real estate transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:

(1) To demand, buy, lease, receive, reject, accept as a gift or as security for an extension of credit, or otherwise acquire an interest in real property or a right incident to real property;

(2) To sell, exchange, convey with or without covenants, representations or warranties, quitclaim, release, surrender, retain title for security, encumber, mortgage, partition, consent to partitioning, subject to an easement or covenant, subdivide, apply for zoning or other governmental permits; plat or consent to platting, develop, grant an option concerning, lease, sublease, contribute to an entity in exchange for an interest in that entity, or otherwise grant or dispose of an interest in real property or a right incident to real property;

(3) To pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) To release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property which exists or is asserted;

(5) To manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including insuring against liability or casualty or other loss; obtaining or regaining possession of or protecting the interest or right by litigation or otherwise; paying, assessing, compromising or contesting taxes or assessments or applying for and receiving refunds in connection with them; and purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

(6) To use, develop, alter, replace, remove, erect, or install structures or improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(7) To participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to bonds and shares or other property received in a plan of reorganization, including selling or otherwise disposing of them; exercising or selling an option, right of conversion, or similar right with respect to them; and exercising any voting rights in person or by proxy;

(8) To change the form of title of an interest in or right incident to real property;

(9) To execute, acknowledge, seal and deliver any deed, affidavit of title and other closing documents, and to do any and all other act and things reasonably necessary to consummate the sale of premises or land generally, or specifically;
(10.) To execute, acknowledge, seal and deliver any revocation, declaration, mortgage, lease, notice, check or other instrument which the agent deems useful to accomplish any of the purposes enumerated in this section;

(11) To dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest;

(12) To demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any real estate transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; to conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and to reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;

(13) To execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(14) To prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any real estate transaction or to intervene in any action or proceeding relating to the transaction;

(15) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(16) In addition to the specific acts set forth in this section, to do any other act which the principal can do through an agent concerning any real property that affects the financial or other interests of the principal.

b. All powers described in subsection a. shall be exercisable equally with respect to any real property in which the principal has an interest, regardless of whether the interest in real property is (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.27. Goods and chattels transactions; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct goods and chattels transactions” or “conduct tangible personal property transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:
(1) To demand, buy, receive, reject, accept as a gift or as security for an extension of credit, or otherwise acquire ownership or possession of the goods and chattels or the tangible personal property or an interest in them;

(2) To sell, exchange, convey with or without covenants, representations, or warranties, quitclaim, release, surrender, create a security interest in, encumber, grant options concerning, lease, sublease, or, otherwise dispose of goods and chattels or tangible personal property or an interest in them;

(3) To grant a security interest in goods and chattels or tangible personal property, or an interest in them as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) To release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien or other claim on behalf of the principal, with respect to goods and chattels or tangible personal property or an interest in them;

(5) To manage or conserve goods and chattel or tangible personal property or an interest in them;

(6) To demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any chattel or goods or tangible personal property transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting: to conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and to reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;

(7) To execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(8) To prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any goods or chattel or tangible personal property transaction or to intervene in any action or proceeding relating to the transaction; 

(9) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(10) In addition to the specific acts set forth in this section, to do any other act which the principal can do through an agent concerning any chattel or goods or tangible personal property or interest in any chattel or goods or tangible personal property that affects the financial or other interests of the principal.

b. All powers described in subsection a, shall be exercisable equally with respect to any goods and chattel or tangible personal property owned by the principal, regardless
of whether the goods and chattels or tangible personal property is (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.28. Bond, share and commodity transactions; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct bond, share and commodity transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:

(1) To sell, exchange, transfer either with or without a guaranty, release, surrender, hypothecate, pledge, grant options concerning, loan, trade in, or otherwise dispose of any bond, share, other instrument of similar character, commodity interest, or any instrument with respect to a commodity interest, together with the interest, dividends, proceeds or other distributions connected with them;

(2) To receive certificates and other evidences of ownership with respect to a bond, share, other instrument of similar character, commodity interest, or any instrument with respect to a commodity interest;

(3) To exercise voting rights with respect to a bond or share in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote;

(4) To manage or conserve any bond, share, instrument of similar character, commodity interest or any instrument with respect to a commodity;

(5) To carry in the name of a nominee selected by the agent any evidence of the ownership of any bond, share, other instrument of similar character, commodity interest or instrument with respect to a commodity, belonging to the principal;

(6) To demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any bond, share or commodity transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; to conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and to reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;

(7) To execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(8) To prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based
on or involving any bond, share or commodity transaction or to intervene in any action or proceeding relating to the transaction;

(9) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(10) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent concerning any transaction with respect to any interest in any bond, share or commodity interest that affects the financial or other interests of the principal.

b. All powers described in subsection a. shall be exercisable equally with respect to any interest in any bond, share or other instrument of similar character, commodity or instrument with respect to a commodity owned by the principal, regardless of whether the interest is (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.29. Business operating transactions; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct business operating transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:

(1) To operate, buy, sell, enlarge, reduce, or terminate an ownership interest;
(2) To perform a duty, discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;
(3) To enforce the terms of an ownership agreement;
(4) With respect to an entity or business owned solely by the principal:
   (a) to continue, to modify, to renegotiate, to extend and to terminate any contractual arrangements made with any person, firm, association, corporation or other entity, by or on behalf of the principal prior to the creation of the agency; to determine: the location of the operation; nature and extent of the business; methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in operations; amounts and types of insurance carried; mode of engaging, compensating and dealing with employees, accountants, attorneys, or other advisors; and the name or form of organization; and
   (b) to collect and disburse accounts receivable; continue, modify, renegotiate, extend and terminate a contract made by or on behalf of the principal before execution of the power of attorney; inject additional capital; join in a plan of reorganization, consolidation, conversion, domestication, or merger of the business or entity; sell or liquidate all or part of the business or entity; establish the value under a buy-out agreement to which the principal is a party; and prepare, sign, file and deliver reports,
compilations, returns, or other documents and make related payments; pay, compromise, or contest taxes, assessments, fines or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines or penalties;

(5) To demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any business operating transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; to engage in banking transactions the agent deems desirable for effectuating the execution of the powers described in this section; to conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and to reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;

(6) To execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(7) To prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any business operating transaction or to intervene in any action or proceeding relating to the transaction;

(8) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(9) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent concerning any business operating transaction that affects the financial or other interests of the principal.

b. All powers described in subsection a. shall be exercisable equally with respect to any business operating transaction in which the principal has an interest, regardless of whether the business operating transaction is (i) specifically identified at the time of the execution of the power of attorney or (ii) conducted in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.30. Insurance transactions; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct insurance transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:

(1) To continue, pay the premium or assessment on any contract of life, accident, health, disability or liability or any combination of such insurance procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract; provided that with respect to life insurance contracts existing at the time the power of attorney is executed, the authority granted by the power shall not include the authority to add, delete
or otherwise change the beneficiary designation in effect for the contract, or modify, rescind, exchange, release or terminate such contract unless the specific authority to add, delete or otherwise change the beneficiary designation or to modify, rescind, exchange, release or terminate such contract is expressly conveyed in a power of attorney that is executed pursuant to this act;

(2) To procure new, different or additional contracts of insurance or annuities protecting the principal; to select the amount, type of insurance contract and the mode of payment under each policy; and to pay the premium or assessment on, modify, rescind, exchange, release or terminate any contract procured by the agent;

(3) To collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

(4) To apply for and receive any available loan on the security of the contract of insurance, whether for the payment of a premium or for the procuring of cash; to surrender and thereupon receive the cash surrender value; to exercise an election as to the beneficiary or mode of payment, change the manner of premium payments; and change or convert the type of insurance contract with respect to any contract to which the principal has, or claims to have, any one or more of the powers described in this section; provided that the authority granted by the power shall not include the authority to add, delete or otherwise change the beneficiary designation in effect for the contract, unless the power to add, delete or change the beneficiary designation is expressly conveyed in a power of attorney executed pursuant to this act;

(5) To demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any business operating transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; to conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and to reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;

(6) To execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(7) To prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any business operating transaction or to intervene in any action or proceeding relating to the transaction;

(8) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(9) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent concerning the procuring, supervising, managing, modifying, enforcing, or termination a contract of insurance or otherwise
involving any insurance transaction in which the principal is insured or in any way interested.

b. All powers described in subsection a. shall be exercisable equally with respect to any contract of insurance in which the principal has an interest, regardless of whether the contract of insurance is (i) specifically identified at the time of the execution of the power of attorney or (ii) conducted in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.31, Estate transactions; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct estate transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:

(1) To accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust or other beneficial interest;

(2) To demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(3) To exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

(4) To conserve, invest, disburse or use anything received for an authorized purpose;

(5) To transfer an interest of the principal in real property, bonds and shares, accounts with financial institutions or securities, intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settler; and

(6) To apply for and to procure, in the name of the principal, letters of administration, letters testamentary, letters of trusteeship, or any other type of judicial or administrative authority to act as a fiduciary;

(7) To demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled by reason of the death testate or intestate of any person or of any testamentary disposition or of any trust, or by reason of the administration of the estate of a decedent or absentee, or of the guardianship of a minor or intellectually incapacitated person, or the administration of any trust or other fund, to initiate; participate in and oppose any proceeding for the ascertainment of the meaning, validity or effect of any deed, will, declaration of trust, or other transaction affecting the interest of the principal; to initiate, participate in and oppose any proceeding for the removal, substitution or surcharge of a fiduciary; to conserve, invest disburse or use anything so received for purposes enumerated in this section; and to reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;
(8) To execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(9) To prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim which affects the estate of a decedent, absentee, minor or intellectually incapacitated, or the administration of a trust or other fund, in any one if which the principal has, or claims to have, an interest, and to do any and all acts that the agent deems desirable or necessary in effectuating such compromise;

(10) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(11) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent concerning the estate of a decedent, absentee, minor or intellectually incapacitated person, or the administration of a trust or other fund, in any one if which the principal has, or claims to have, an interest or with respect to which the principal is a fiduciary; provided that with respect to beneficiary designations existing at the time the power of attorney is executed, or the power to reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust or other beneficial interest, or the establishment of a trust or the transfer of property, money or other assets to a trust already established for the benefit of the principal or such people as the principal shall designate, the authority granted by the power shall not include the authority to change the designation of a beneficiary, or reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust or other beneficial interest, or the establishment of a trust or the transfer of property, money or other assets to a trust already established for the benefit of the principal or such people as the principal shall designate, unless the authority to make such change is expressly conveyed in a power of attorney executed pursuant to this act.

b. All powers described in subsection a. shall be exercisable equally with respect to any estate of a decedent, absentee, minor or intellectually incapacitated individual, or the administration of any trust or other fund, in which the principal has an interest, regardless of whether the estate, trust or other fund is (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA. Consistent with another recent Law Revision project, the term “intellectually incapacitated person” refers to a person who under current law is deemed mentally deficient or incompetent.

46:2B-20.32. Litigation and other legal proceedings; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct litigation and other legal proceedings”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:
(1) To assert and maintain before a court, administrative agency, or other tribunal a claim, claim for relief, cause of action, counterclaim, offset, recoupment, defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance or other relief;

(2) To bring an action of interpleader or to determine adverse claims or intervene or to interplead in any action or proceeding, and to act in any litigation as amicus curiae;

(3) To seek attachment, garnishment, order of arrest, replevin, distraint, or any other preliminary, provisional, or intermediate relief or to effect or satisfy a judgment, lien, order or decree;

(4) To submit to or propose and accept a compromise, offer of judgment, admission of any facts, submission of any controversy on an agreed statement of facts, consent to examination before trial, and generally to bind the principal in the conduct of any litigation or controversy as the agent deems desirable;

(5) To submit to alternative dispute resolution, mediation; arbitration; settlement; or propose and accept a compromise with respect to any claim existing in favor of or against the principal, or any litigation to which the principal is or may become designated a party;

(6) To waive the issuance and service of process, to accept service of process; to appear for the principal; to designate persons upon whom process directed to the principal may be served; to execute and file or deliver stipulations on the principal’s behalf; to verify pleadings; to appeal to appellate tribunals; to procure and give surety and indemnity bonds at such times and to such extent as the agent deems desirable or necessary; to contract and pay for the preparation and printing of records and briefs; to receive and execute, file or deliver any consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument which the agent deems desirable or necessary in connection with the prosecution or defense of any litigation to which the principal is or may become or be designated a party;

(7) To act for the principal with respect to bankruptcy or insolvency proceedings, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in any chattel, bond, share, commodity interest, chose in action or other thing of value;

(8) To pay from funds in the agent’s control or for the account of the principal, any judgment, award, or order against the principal or to receive and conserve any money or other things of value paid in a settlement made in connection with a claim or litigation and to receive and endorse checks and to deposit them;

(9) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(10) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent in connection with any claim by or against
the principal or with litigation or proceeding to which the principal is or may become or be designated a party.

b. All powers described in subsection a. shall be exercisable equally with respect to any litigation or proceeding, regardless of whether the litigation or proceeding is (i) specifically identified at the time of the execution of the power of attorney or (ii) arising in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.33. Personal and family maintenance; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct personal and family maintenance”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:

(1) To perform the acts necessary to maintain the customary standard of living, including but not limited to the costs of food, shelter, clothing, appropriate education (which may mean postgraduate or vocational education, or both), incidentals, healthcare, and custodial care, of the principal, the principal’s spouse or domestic or civil union partner, the principal’s children, other individuals legally entitled to be supported by the principal, and any other individuals whom the principal has customarily supported or indicated an intent to support, regardless of whether living when the power of attorney is executed or later born;

(2) To make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(3) To continue any provision made by the principal for automobiles or other means of transportation, including but not limited to registering, licensing, insuring, and replacement, for the individuals described in paragraph (1);

(4) To maintain credit and debit accounts, and open new accounts, as appropriate, for the individuals described in paragraph (1);

(5) To continue payments incidental to membership or affiliation of the principal in an religious institution, club, society, order or other organization or to continue contributions to those organizations;

(6) To continue the discharge of any services or duties assumed by the principal, prior to the creation of the agency or thereafter, to any parent, relative or friend of the principal;

(7) To demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is or may become or may claim to be entitled as a salary, wages, commission or other remuneration for services performed, or as a dividend or distribution upon any stock, or as interest or principal upon any indebtedness or periodic distribution of profits from any partnership or business in which the principal
has or claims an interest, and to endorse, collect or otherwise realize upon any instrument for the payment so received;

(8) To utilize any asset of the principal for the performance of the powers enumerated in this section, including but not limited to the power to draw money by check or otherwise from any bank deposit of the principal, to sell any land, real property, chattel, bond, share, commodity interest, chose in action or other asset of the principal, to borrow money and to pledge as security for such loan, any asset, including insurance, which belongs to the principal;

(9) To execute, acknowledge, verify, seal, file and deliver any application, consent, petition, notice, release, waiver, agreement or other instrument that the agent deems desirable for the accomplishment of any of the purposes enumerated in this section;

(10) To prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any transaction enumerated in this section or to intervene in any action or proceeding relating to the transaction;

(11) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(12) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent for the welfare of the spouse, domestic or civil union partner, children or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents, relatives, friends and organizations.

b. All powers described in subsection a. shall be exercisable equally with respect to the welfare of the spouse, domestic or civil union partner, children or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents, relatives, friends and organizations, regardless of whether the acts required for their execution are (i) specifically identified at the time of the execution of the power of attorney or (ii) conducted in this State or elsewhere.

Source: New.

COMMENT
The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.34. Health care billing, recordkeeping and payment; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct health care billing, recordkeeping and payment”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:

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(1) To access records relating to the provision of health care and to make decisions relating to the past, present or future payment for the provision of health care consented to by or on behalf of the principal or the principal’s health care agent authorized under State law;

(2) To keep records of all cash received and disbursed for or on account of the principal, of all credits and debits to the account of the principal, and of all transactions affecting in any way the assets and liabilities of the principal;

(3) To prepare, execute and file all tax, social security, unemployment insurance and information returns, required by the laws of the United States, of any state or of any subdivision thereof or of any foreign government; to prepare, execute and file all other papers and instruments which the agent deems desirable for the safeguarding of the principal against excess or illegal taxation or against penalties imposed for a claimed violation of any law or other governmental regulation;

(4) To prepare, execute and file any record, report, statement or other document to safeguard or promote the principal’s interest, under a statute or governmental regulation;

(5) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(6) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent in connection with the preparation, execution, filing, storage or other utilization of any record, report, or statement of or concerning the principal’s affairs.

b. The authority granted under this section shall not include authorization for the agent to make other medical or health care decisions for the principal which only can be authorized by a separate advanced directive for health care, otherwise known as a living will, along with a health care proxy, otherwise known as a durable power of attorney for health care, in accordance with N.J.S. 26:2H-53 et seq. or N.J.S. 26:2H-103, et seq., or both, as applicable.

c. All powers described in subsection a. shall be exercisable equally with respect to any health care billing and payment matters, and records, reports or statements of or concerning the affairs of the principal regardless of whether (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.35. Retirement benefit transactions; acts authorized.

a. If a power of attorney contains language that confers authority on the agent to “conduct retirement benefit transactions”, or words to that effect, unless the power of

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attorney otherwise provides, the agent shall have the following authority under the power of attorney. For purposes of this section “retirement benefits” means a plan or account created by an employer, the principal or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary or owner, including a plan or account under the Internal Revenue Code, as appropriate:

(1) To select the form and timing of payments under a retirement plan; contribute to and withdraw benefits from the plan;

(2) To make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another, or make investment directions;

(3) To establish a retirement plan in the principal’s name;

(4) To exercise investment powers available under a retirement plan;

(5) To borrow from, sell assets to, or purchase assets from a retirement plan;

(6) To make investment directions, select and change payment options, and exercise any other election for the principal with regard to any retirement benefit or plan in which the principal has an interest, provided that the authority granted hereby shall not include the authority to add, delete or otherwise change the designation of the beneficiaries in effect for any such retirement benefit or plan, unless the authority to add, delete or otherwise change the designation of the beneficiaries is expressly provided in a power of attorney executed pursuant to this act.

(7) To execute, acknowledge, verify, seal, file and deliver any application, consent, petition, notice, release, waiver, agreement or other instrument that the agent deems desirable for the accomplishment of any of the purposes enumerated in this section;

(8) To prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any retirement benefit or plan or to intervene in any action or proceeding relating to the transaction;

(9) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(10) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent with respect to any retirement benefit or plan maintained by the principal or in which the principal has an interest or may thereafter have an interest.

b. All powers described in subsection a. shall be exercisable equally with respect to any retirement benefits or plan, regardless of whether (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.
COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.36. Tax matters; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct tax matters”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:

(1) To prepare, sign, and file federal, state, local and foreign income, gift, payroll, property, and any other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents;

(2) To pay taxes due, collect refunds, post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

(3) To exercise any election available to the principal under federal, state, local or foreign tax law; and

(4) To act for the principal in all tax matters for all periods before the Internal Revenue Service, or other taxing authority;

(5) To act for the principal in all tax matters in connection with any authority enumerated in sections 46:2B-20.25 through 46:2B-20.37 of this act.

(6) To execute, acknowledge, verify, seal, file and deliver any application, consent, petition, notice, release, waiver, agreement or other instrument that the agent deems desirable for the accomplishment of any of the purposes enumerated in this section;

(7) To prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any tax matters or to intervene in any action or proceeding relating to the transaction;

(8) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(9) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent with respect to any tax matters involving the principal or in which the principal has an interest or may thereafter have an interest.

b. The powers explicitly authorized in this section shall not be construed to diminish any like powers authorized in any other section of this act.

Source: New.
The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.37. Collect and disburse benefits from governmental programs or civil or military service; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “collect and disburse benefits from governmental programs or civil or military service”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the following authority under the power of attorney:

(1) To execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state, or by another jurisdiction, to the principal, including allowances and reimbursements for transportation of the individuals described in section 46:2B-20.33a.(1), and for shipment of their household effects;

(2) To take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage and safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

(3) To enroll in, apply for, select, reject, change, amend, or discontinue a benefit or program on the principal’s behalf;

(4) To prepare, file and prosecute a claim of the principal to any benefit or assistance, financial or otherwise, to which the principal is, or claims to be, entitled under a statute or governmental regulation, including but not limited to any benefit or assistance arising from or based upon military service performed prior or subsequent to creation of the agency by the principal or by any person related by blood or by marriage to the principal, to execute any receipt or other instrument which the agent deems desirable or necessary for the enforcement or the collection of the claim;

(5) To receive the financial proceeds of any claim of the type described in this section, converse, invest, disburse or use anything so received for a lawful purpose;

(6) To communicate with any representative or employee of a government, governmental subdivision, agency, or instrumentality on behalf of the principal;

(7) To hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(8) In addition to the specific acts set forth in this section, to do any other act which the principal may do through an agent to assure the maximum possible benefit from governmental programs or from civil or military service performed prior to or after the creation of the agency.

b. All powers described in subsection a. shall be exercisable equally with respect to any benefits from governmental programs or civil or military service, regardless of
whether (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT
The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

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