

To: New Jersey Law Revision Commission
From: Staff
Re: Revised sections – General Durable Power of Attorney Act
Date: May 3, 2010

MEMORANDUM

Attached to this memorandum are three sections of the General Durable Power of Attorney Act that were revised in accordance with the Commission's direction at the April meeting. They are:

- a. section 46:2B:20.7, pertaining to the guidelines for the content of the form;
- b. section 46:2B:20.13, pertaining to the action to compel the third party to accept the power; and
- c. section 46:2B:20.24, pertaining to the resignation of the agent.

Also attached is a revised definition of "third party" in response to a commenter's concern upon review of proposed 20.13.

46:2B-20.7. Power of attorney; guidelines for contents of form

a. A specific form of power of attorney is not required by the act. However, every power of attorney shall contain provisions ~~that address to~~ to:

(1) ~~designation of an agent including the agent's~~ by name, and if more than one agent, a statement of whether the agents must act together or may act independently;

(2) ~~grant of~~ authority which the principal intends to give the agent;

(3) ~~require that~~ the agent ~~must~~ to follow the principal's instructions as set forth in the power of attorney, or if there are no instructions, act in the principal's best interest;

(4) indicate that the power of attorney does not authorize the agent to make health care decisions for the principal; ~~and that~~ an agent is authorized to make medical or health care decisions for the principal only if the principal signs an advanced directive for health care in accordance with N.J.S. 26:2H-53 *et seq.* or N.J.S. 26:2H-103, *et seq.*, as applicable; and

(5) indicate that the power of attorney does not authorize the agent to do any of the following acts unless the principal gives express specific authority in the power of attorney for the act:

(a) ~~to~~ make any ~~major~~ gifts or gratuitous transfers, including but not limited to gifts or gratuitous transfers of the principal's property to the agent or to a co-agent or successor agent; or

~~(b) to make, amend, alter or revoke the principal's wills or codicils; or~~

~~(c) to designate, change, or revoke the beneficiary designations in any life insurance, annuity, or similar contract, or account, employee benefit or plan or retirement benefit or plan, payable on death or transfer on death beneficiary designations account, or any other account or benefit; or~~

~~(d) to make, amend, alter, or revoke or terminate any inter vivos trust, registration of the principal's securities in beneficiary form, or any provisions for nonprobate transfer at death or to open, modify or terminate a transfer on death account; or~~

~~(e) to make transfers of property, money or other assets to any trust; or~~

~~(f) to disclaim property or disclaim a power of appointment or discretion held by the principal as executor or trustee or in a similar fiduciary capacity; or~~

~~(g) to open or close any account of the principal including an account naming the agent and the principal as joint owners unless the change in account status is solely ministerial in nature; or~~

~~(h) to create or change rights of survivorship; or~~

~~(i) to renounce a principal's designation as a fiduciary for a third party; or~~

~~(i)~~ (i) 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

~~(j)~~ (j) delegate to others any one, more or all of the specific powers that have been conferred on the agent; or .

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) (2) 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;~~

~~(3) that the principal may contact an attorney of the principal's own choosing before signing the power of attorney 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 of attorney 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) the name and title of the person who prepared the power of attorney;

(6) specific delineation of each one or more grant kinds of authority ~~the principal wishes to give to the agent, which may include, but is not limited to,~~ as those subjects are ~~defined~~ described in this act, including but not limited to the authority to conduct real estate transactions; 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 an advanced directive for health care); 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;

(7) ~~the~~ designation of a successor agent, ~~including~~ by 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 may act independently;

(8) the telephone number, mailing address and e-mail address of each agent;

(9) that the agent may be compensated from the principal's assets for reasonable expenses incurred on the principal's behalf and services rendered on the principal's behalf, as provided in section 46:2B-20.19;

(10) that the power of attorney continues until the principal revokes it or it is terminated by the principal's death or other event, as provided in section 46:2B-20.17;.

~~(11) special further instructions or set forth additional provisions, including but not limited to language to limit or supplement authority granted to the agent, which may be set forth on either in the power of attorney itself or in an addendum attached to the power of attorney that shall also be initialed by the principal;~~

~~(12) the authorization to agent may make major gifts and or gratuitous transactions transfers, or other acts addressed in section 46:2B-20.22, provided that the authorization from the principal to do so is in accordance with the requirements of section 46:2B-20.22;~~

~~(13) the authorization to agent may delegate to others any one, more or all of the specific powers that have been conferred on the agent, provided that the authorization from the principal to do so is in accordance with the requirements of section 46:2B-20.15;~~

~~(14) that c. If the principal intends to grant any authority for which an express and specific grant is required under this act, as provided in section 46:2B:20.22 or section 46:2B:20.15 and as described in subsection a.(5) of this section, the grant of authority shall be made in accordance with section 46:2B:20.22 or 46:2B:20.15, as applicable.~~

~~d. If the power of attorney includes the power to “conduct real estate transactions” as described in N.J.S. 46:2B-20.2827, in which case the power of attorney shall be in a recordable form that complies with N.J.S. 46:15-1.1 and shall be recorded prior to or simultaneously with the deed, mortgage or other document executed by the agent in connection with the real estate;~~

~~(15) that e. If the power of attorney includes the power to “conduct health care billing, recordkeeping and payment” as described in N.J.S. 46:2B-20.3635, in which case the power of attorney shall be construed to mean that the principal authorizes the agent to act as the principal’s representative pursuant to the *Health Insurance Portability and Accountability Act* (HIPAA), sections 1171 through 1179 of the *Social Security Act*, 42 U.S.C. Section 1320d, and applicable regulations, in order to obtain access to the principal’s health-care information and communicate with the principal’s health-care provider; and~~

~~(16) any other provisions requested by the principal that are permitted by law.~~

~~f. Any special instructions or additional provisions, including but not limited to language to limit or supplement authority granted to the agent, shall be set forth in the power of attorney itself or in an addendum attached to the power of attorney that is initialed by the principal.~~

Source: New.

46:2B-20.13. Action to compel third party to accept power

a. If a third party refuses to honor or accept a power of attorney, An action may be commenced by a principal; agent, co-agent, or successor agent acting under the power of attorney; guardian or conservator appointed for the principal; spouse, domestic partner or partner in civil union, child or parent of the principal; a governmental agency or entity

having regulatory authority to protect the welfare of the principal; or the principal's successor in interest, to compel a third party to honor or accept a power of attorney pursuant to sections 46:2B-20.10 or 46:2B-20.11.

b. An action under this section shall be a summary proceeding commenced in accordance with Rule 4:67 of the Rules Governing the Courts of the State of New Jersey, in the Superior Court, Chancery Division, Probate Part, at which time the only issue to be determined is whether the third party who is refusing to honor or accept a power of attorney in accordance with sections 46:2B-20.10 or 46:2B-20.11 shall be ordered to do so.

c. If the form of power of attorney is valid and effective in accordance with section 46:2B-20.6, and there is no credible issue of fact regarding the capacity of the principal to have executed the power of attorney, or the ability of the agent to exercise the authority conferred by the power of attorney, or whether the power of attorney has been revoked or terminated, the court shall issue an order compelling the third party to honor or accept the power of attorney. The court shall award costs and may award reasonable attorneys' fees to the successful petitioner under this section.

Source: New.

46:2B-20.24. Resignation of agent

Unless the power of attorney provides otherwise, an agent shall resign by written notice delivered by regular and certified mail, return receipt requested, to the principal. A copy of the written notice shall also be delivered by regular and certified mail, return receipt requested, to any co-agent or successor agent, or to a conservator or guardian appointed for the principal, as appropriate, or if there is no co-agent, successor agent, conservator or guardian, to a governmental agency having regulatory authority to protect the welfare of the principal, such as Adult Protective Services, the Division of Developmental Disabilities, the Bureau of Guardianship Services, or the Ombudsman for the Institutionalized Elderly, or their successor agencies.

Source: New.

46:2B-20.2. Definitions

As used in this act:

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“Third party” means a person or entity, including a financial institution, other than a principal or agent, that is presented with a power of attorney.