



**STATE OF NEW JERSEY**  
**NEW JERSEY LAW REVISION COMMISSION**  
**REVISED FINAL REPORT**

Relating to

**General Durable Power of Attorney Act**

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NEW JERSEY LAW REVISION COMMISSION  
153 Halsey Street, 7th Fl., Box 47016  
Newark, New Jersey 07101  
973-648-4575  
(Fax) 973-648-3123  
Email: [njlrc@njlrc.org](mailto:njlrc@njlrc.org)  
Web site: <http://www.njlrc.org>

## Introduction

Title 46:2B-8.1 through 46:2B-8.14, known as the *Revised Durable Power of Attorney Act*, (RDPAA) was enacted in 2000, replacing Title 46:2B-8 and 46:2B-9, which had been enacted in 1971 as an Act concerning the effect of death, disability or incapacity of a principal upon a power of attorney<sup>1</sup>. The RDPAA was not intended to and did not supersede the provisions of Title 46:2B-10 *et seq.* relating to banking transactions under a power of attorney. Instead, it expressly complemented these provisions. Since its enactment, the RDPAA has not been modified except for the addition of section 46:2B-8.13a.pertaining to gratuitous transfers and gifts.<sup>2</sup>

In 2006, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved and recommended for enactment in all states, the *Uniform Power of Attorney Act* (UPOAA)<sup>3</sup>, in response to a national review of state power of attorney legislation. As stated in the Prefatory Note, NCCUSL’s review “revealed growing divergence among states’ statutory treatment of powers of attorney” on such topics as the authority of multiple agents and of a later-appointed fiduciary or guardian; the impact on the power of attorney of the dissolution or annulment of the principal’s marriage to the agent; the activation of contingent powers; the authority of the agent to make gifts; and the standards of conduct and liability for the agent. NCCUSL also discovered that more than seventy percent of the states surveyed agreed that a power of attorney statute should include provisions not in the then current uniform law. These provisions included, among other things: a requirement that gift-making authority be expressly stated in the grant of authority; a default standard for fiduciary duties; protection of the reliance of other persons on a power of attorney; and provision for revoking a spouse-agent’s authority upon the dissolution or annulment of the marriage to the principal. The UPOAA addresses these concerns.

The enactment of the UPOAA, and the recent amendment to the New York durable power of attorney law<sup>4</sup>, prompted this Commission to evaluate the need for

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<sup>1</sup> This earlier act is noted as being similar to §5-501 of the *Uniform Probate Code* which provision is part of a series of provisions that were amended by NCCUSL in 1979 and enacted as part of the *Uniform Durable Power of Attorney Act*.

<sup>2</sup> That section provides that a power shall not be construed to authorize gratuitous transfers of the principal’s property by an agent to that agent or others except to the extent expressly authorized by the principal, and that an authorization to perform all acts generally (or similar words) is not an express or specific authorization to make gifts.

<sup>3</sup> The UPOAA replaced the original *Uniform Durable Power of Attorney Act*, which had been amended last in 1987, and had at one time been followed, according to NCCUSL, by all but a few jurisdictions. The UPOAA also superseded the *Uniform Statutory Form Power of Attorney Act*, and sections of the *Uniform Probate Code*.

<sup>4</sup> New York’s Chapter 644, signed into law at the beginning of 2009 and effective September 1, 2009, was the result of eight years of study by the New York State Law Revision Commission. Chapter 644 amends New York’s General Obligations Law to provide significant reforms to the use of powers of attorney in New York. New York’s power of attorney law was further amended, effective September 13, 2010 (retroactive to September 1, 2009). The New York State Bar Association characterized these most recent amendments as a “measure that corrects unintended problems created by New York’s Power of Attorney (POA) Statute that went into effect on September 1, 2009.”

revision to the current New Jersey power of attorney statutes. Attorneys proficient in trusts and estate law and elder and disability law were consulted for comment. The chairs of the New Jersey State Bar Association, Real Property, Trust and Estate Law Section, and the State Bar Elder and Disability Law Section, the legislative co-coordinators of the State Bar Elder and Disability Law Section, the President of the New Jersey Chapter of the National Academy of Elder Law Attorneys (NAELA), and individuals in the title and banking industries were solicited for their comment and review. The consensus was that certain aspects of the UPOAA would be useful in New Jersey although a statutory form of power of attorney similar to that provided in the New York statute would not be helpful.

The proposed revision focuses on several areas. Consistent with the UPOAA, a power of attorney is now durable unless otherwise expressly stated. Consistent with New York's law, the UPOAA, and current 46:2B-10, a Definitions section has been added, defining key terms, including but not limited to "agent", "financial institution", "incapacity" and "principal." The term "attorney in fact" has been replaced with the term "agent", as used in the banking power of attorney provisions and consistent with the UPOAA. A majority of commenters agreed with the conclusion of NCCUSL, that use of the term "agent" helped eliminate any confusion in the lay public about the meaning of "attorney in fact."

Unlike New York's law and the UPOAA, no form of power of attorney is provided in the New Jersey statute. However, the proposed revision does set forth drafting guidelines for the contents of a form of power of attorney (46:2B-20.7) as well as a form of affidavit to be signed by an agent in support of the assertion that the power of attorney has not been revoked or terminated (46:2B-20.12). The standards for determining the validity of a power of attorney are expressly set forth at section 46:2B-20.6. The revised statute further clarifies that the provisions regarding the recordability of a power of attorney, as set forth in N.J.S. 46:15-1.1 are not altered by the revision.

New section 46:2B-20.8 sets forth the scope of the fiduciary duty and responsibility of the agent, incorporating current section 46:2B-8.4 and concepts from the UPOAA, as well as commenters' suggestions. Guidelines for co-agents and successor agents are clarified in section 46:2B-20.14 and an agent is now required to disclose the agent's relationship with the principal in any transaction where the agent acts pursuant to a power of attorney and the handwritten signature of the agent or principal is required (46:2B-20.18).

Proposed section 46:2B-20.11 incorporates current section 46:2B-13 of the banking power of attorney provisions. Proposed section 46:2B-20.10 pertains to the acceptance of powers of attorney by third parties generally and specifically provides that no third party 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 refuse to accept or rely on a power of attorney solely because of a lapse of time since the execution of the power. Original powers of attorney presented to third parties must be returned promptly. Third parties are defined as including financial institutions.

New proposed section 46:2B-20.13 provides for a summary action to compel a third party to accept a power of attorney and is modeled, in part, on a similar provision in the New York power of attorney law.

The mechanisms for revoking and terminating a power of attorney are set forth at section 46:2B-20.17. Liability of a third party acting in reliance on a power of attorney is now set forth in section 46:2B-20.23. Notably, the liability of an agent is not addressed in the current statute. Such liability is not proposed in the revision because the proposed revised statute expressly articulates the fiduciary obligation of the agent to the principal. As a result, commenters believe a liability provision for the agent is unnecessary. The resignation of an agent is addressed in section 46:2B-20.24.

The proposed revision sets forth the requirements for authorizing the agent to make gifts on behalf of the principal at section 46:2B-20.22. In addition, descriptions of each specific grant of authority that may be (and is customarily) given to the agent are set forth at sections 46:2B-20.27 through 46:2B-20.39. Finally, the proposed revision attempts to merge general durable power of attorney law with the provisions pertaining to power of attorneys for banking purposes, while also broadening the scope of the latter to apply to financial institutions generally.

The proposed revised statute commences at section 46:2B-20.1, to follow in sequence the most current existing provisions. Modifications to section descriptors are also recommended throughout the statute as needed. Enactment of the proposed revised statute would supersede current sections 46:2B-8.1 through 46:2B-8.14 and 46:2B-10 through 46:2B-19.

#### **46:2B-20.1. Short title**

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

Source: 46:2B-8.1.

#### 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, certificates of deposit and other types of time and demand accounts as institutions are authorized to enter into pursuant to applicable federal or State law, and

brokerage and mutual fund accounts. 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, subject to any limitations or requirements imposed by the statute or governmental regulation.

“Capacity of the principal to execute the power of attorney” means the capacity required to enter into a contract.

“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, mutual fund, 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 an act or failure to act that is done honestly, regardless of whether it is done negligently and in the absence of knowledge of facts, which, if known to an agent, would obligate the agent to take certain actions or refrain from taking certain actions on behalf of a principal.

“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 to the extent the principal lacks the ability to govern and manage the principal’s property and personal affairs. “Incapacity of the principal” also means a disability or physical or mental impairment of the principal which is expected to give rise to a need for specialized health, social, and other services, or which makes the principal dependent upon others for assistance to secure these services.

“Internal Revenue Code” means the United States Internal Revenue Code of 1986, as amended, or any subsequent federal tax code.

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

“Notice” means written notification delivered by any means.

“Power of attorney” means a written instrument 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, in a power of attorney, authorizes an agent to act.

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

“Signature” includes any mark made on a document with the intent by the signer to give legal effect to that document. A “signature” also includes any mark made on a document on behalf of a person, with that person’s authority and to effectuate that person’s intent.

“Third party” means a person or entity other than a principal or agent, including a financial institution, presented with a power of attorney, or intended, by an agent or a principal, to accept, honor or rely upon a power of attorney.

Source: New; 46:2B-8.2; 46:2B-10; 46:2B-19.

#### 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 “disability”, however, is included within the definition of incapacity of the principal and its meaning is consistent with Title 3B. The definition of “capacity of the principal to execute a power of attorney” has been added to clarify that a principal who may be incapacitated for purposes of durability of the power nonetheless may have had the capacity to make the power of attorney.

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. The term “signature” is adopted from current N.J.S. 46:14-4.2.

### **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 then 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 then 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. Applicability**

a. This act applies to all powers of attorney except:

(1) a power to make medical or health care decisions or an advanced health care directive;

(2) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; however, this act permits the grant of authority from a principal to an agent to act in connection with a proxy or other delegation to exercise voting or management rights;

(3) a power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose;

(4) a power created for a limited purpose in accordance with a state or federal statute other than this act;

(5) a power to the extent it is coupled with an interest in the subject of the power;

(6). a power made by an entity other than a natural person;

(7) a grant of limited authority that does not involve any exercise of discretion by the agent;

(8) a power that is contained within an agreement or instrument which governs the internal affairs of an entity;

(9) a power given to or for the benefit of a creditor in connection with a loan or other credit transaction; and

(10) any other power or grant of authority which, either expressly, or by implication under all of the applicable circumstances, is so limited and specific in its purpose that the principal could not have intended the power or grant of authority to be governed by this act.

b. Unless doing so is prohibited by other law, nothing in this act bars a principal from expressly providing in a power of attorney, regardless of whether the act is applicable to the power under this section, that this act shall govern the power of attorney.

Source: New.

#### COMMENT

The proposed new section is substantially derived from the UPOAA and suggestions raised as a result of recent amendments to the New York statute.

Subsection (2) excludes from the act a proxy or other delegation to exercise voting rights or management rights with respect to an entity. It is adopted from the UPOAA and addressed in a recent White Paper, endorsed by approximately 50 New York law firms, which raised concerns about the application of Chapter 644.

Subsection a. (5) is adopted from the UPOAA and as the comment there notes, addresses situations where, “due to the agent’s interest in the subject matter of the power, the agent is not intended to act as the principal’s fiduciary. . . . Common examples of powers coupled with an interest include powers granted to a creditor to perfect or protect title in, or to sell, pledged collateral” and a “power held by an insurer to settle or confess judgment.”

Section a. (6) clarifies that the act applies only to powers of attorney made by natural persons.

Subsection a. (7) excludes from the act a grant of limited authority that does not require the authorized person to use any discretion. Such limited authority, includes, but is not limited to, the power to accept service of pleadings or other documents on the principal’s behalf, or the authority to sign a document, such as a deed or contract, on behalf of the principal in connection with a transaction, or a stock power which by its terms appoints an attorney in fact solely to effect the transfer on the books of the issuer.

Subsection a. (8) excludes from the act any power contained within an agreement governing the internal affairs of a corporation, limited liability company, partnership or cooperative or condominium association, including, but not limited to, a shareholder agreement, partnership agreement, limited liability company operating agreement, or an offering plan, bylaws or declaration of condominium.

Subsection a. (10) is a “catchall” provision to cover a myriad of other documents, or provisions in documents, designated as “powers of attorney” though not contemplated or intended to be governed by this act. An example would be a discretionary brokerage account agreement or a trading authorization agreement.

Subsection b. permits a principal to expressly provide in a power of attorney that the power of attorney is governed by this act regardless of whether this act would apply to the power of attorney.

#### **46:2B-20.5. 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 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 or event of termination.

Source: 46:2B-8.2; 46:2B-8.3; 46:2B-16.

#### COMMENT

The source sections are merged and modified in this new section. The terms “durable” and “incapacity of the principal” 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 provides that a power of attorney is durable unless otherwise stated. This 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 durability (unless otherwise stated) conferred by the revised provision.

#### **46:2B-20.6. 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 substantial compliance with subsection a. of 46:2B-20.7; 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 acknowledgment and proof of a conveyance of real property in accordance with N.J.S. 46:14-2.1c. The signatures of the principal and the witnesses may be acknowledged in a single certificate by the notary public or other qualifying officer.

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) above;

e. If a power of attorney made pursuant to this act includes the power to “conduct real estate transactions” as described in N.J.S. 46:2B-20.28, the power of attorney shall be recorded prior to or simultaneously with the deed, mortgage or other document executed by the agent in connection with the real estate transaction. A power of attorney is in recordable form if it complies with N.J.S. 46:15-1.1.

Source: New.

#### COMMENT

The proposed new section is substantially derived from the UPOAA and Chapter 644 and suggestions of commenters. New subsection a. (3) replaces current section 46:2B-8.9, which required that the power of attorney be in writing and duly signed and acknowledged as a deed. The new provision, supported by a majority of commenters, requires acknowledgement and proof of the principal's signature before two witnesses, neither of which is the agent, as well as 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).

A provision has been added to clarify that powers of attorney that grant the authority to "conduct real estate transactions" must be recorded prior to or simultaneously with the document executed by the agent in connection with the real estate transaction. It is important to note that the standards for validity under this section and recordability under N.J.S. 46:15-1.1, are not the same, and so although a power of attorney which meets the requirements of N.J.S. 46:15-1.1 is recordable, recording does not in and of itself mean the power of attorney is otherwise valid within the meaning of the section.

#### **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 to:

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

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

(3) require the agent 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; 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, which names the agent as the principal's health care representative, as defined in N.J.S. 26:2H-55, or as the principal's mental health care representative, as defined in N.J.S. 26:2H-104; 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) make 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) 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 account, or any other account or benefit; or

(c) make, amend, alter, 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

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

(e) 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

(f) 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

(g) create or change rights of survivorship; or

(h) renounce a principal's designation as fiduciary for another person; or

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

b. A power of attorney may also provide, 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 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/](http://www.njleg.state.nj.us/);

(3) that the principal may 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 one or more kinds of authority as described in this act, 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) designation of a successor agent, 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, although if the power of attorney is to be recorded, the preparer may choose not to include the telephone number or e-mail address;

(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.

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-20.28, 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;

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-20.36, 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

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.

#### 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 those issues that should be addressed in a power of attorney in some manner although no form of power of attorney is mandated. 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. Clarification is added regarding the requirement of preparing in recordable form those powers of attorney that grant the authority to conduct real estate transactions. Powers of attorney that grant an agent the authority to conduct health care billing, recordkeeping and payment also may authorize the agent to act as the personal representative of the principal for purposes of HIPAA.

#### **46:2B-20.8. 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 and the power of attorney is not terminated, to a guardian of the property of the principal, to act within the powers delegated by the power of attorney and solely for the benefit of the principal;

b. An agent shall also:

(1) act in accordance with the instructions from the principal set forth in the power of attorney, 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, other than 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, domestic partner, or partner in civil union and keeping the principal's property separate and distinct from the agent's is not reasonable under the circumstances;

(4) cooperate with a person that has authority to make medical and health care decisions for the principal; and

(5) 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 of attorney or acting solely for the benefit of the principal.

c. An agent who fails to make the records and power of attorney available or to render an accounting under subsection b.(5) within a reasonable time period after a written request thereunder, not to exceed 15 days in the case of making the record and power of attorney available, and not to exceed 45 days in the case of rendering an accounting, 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.

d. If an agent renounces the principal's designation as a fiduciary for another person, the agent shall serve the principal with written notice of the renunciation in the same manner as service on a party in accordance with Rule 1:5-2 of the Rules Governing the Courts of the State of New Jersey.

Source: 46:2B-8.13.

#### 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-20.9. Relation of agent to court-appointed fiduciary**

a. If , after execution of a power of attorney, a conservator, guardian of the estate, or other fiduciary is appointed by a court to manage some or all of the principal's property, the agent shall be accountable to the fiduciary as well as to the principal, unless the power of attorney is revoked or terminated by court order appointing the fiduciary.

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.

Source: 46:2B-8.4.

#### **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-20.17c.

#### **46:2B-20.10. Acceptance and good faith reliance by third party**

a. A third party shall accept a power of attorney that is valid in accordance with section 46:2B-20.6 or properly executed in accordance with the laws in effect at the time of execution. However, a third party that is a financial institution may also require compliance with the conditions set forth in section 46:2B-20.11 before accepting the power of attorney.

b. A third party may rely upon the authority granted in a power of attorney until the third party has received notice or has knowledge of:

(1) the revocation or termination 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) the incapacity of the principal, if the power of attorney expressly provides that it terminates upon the incapacity of the principal.

c. A third party who has not received notice or does not have knowledge as provided under subsection b. may require that the agent execute an affidavit stating that at the time of initial exercise of the power of attorney the agent did not have knowledge or notice as provided in subsections (b)(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.

d. No third party 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 refuse to accept and rely on a power of attorney solely because of a lapse of time since the execution of the power.

e. A third party shall have a reasonable time under the circumstances to decide whether to accept a power of attorney presented to it.

f. Subject to subsection a.(4) of 46:2B-20.11, any third party to whom the power of attorney is presented may retain and rely upon (1) a photocopy or electronically transmitted copy of the original signed document or (2) a copy of the original signed document certified to be a true copy of the original by (i) the attorney who prepared the original and holds either the original or an executed copy; (ii) a financial institution; or (iii) the county recording office of the county in which the original was recorded. If presented with an original signed power of attorney, the third party may not retain the original. Any original shall be copied and promptly returned to the presenter. The third party may rely upon the copy or original power of attorney until the third party receives knowledge or information that requires or permits it not to honor the power of attorney in accordance with this act.

Source: 46:2B-8.6; 46:2B-8.11; 46:2B-18; new.

#### COMMENT

This section is derived substantially from its source sections with some modifications in language. Subsection d. is new and derived from Chapter 644 and commenters' suggestions.

Subsection b. deviates from its source provision by the deletion of the word "actual" before the word "notice. Subsection f. 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.). Subsection f. also provides a third method of certifying true copies of original powers of attorney and requires prompt return of the original power to the presenter.

### **46:2B-20.11. Requirements of financial institutions**

a. Although subject to the requirements of section 46:2B-20.10, 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 (i) the signature is not genuine as provided by subsection d. of 46:2B-20.6., or (ii) the employee of the institution who receives or is required to act on the power receives notice or has knowledge 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 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) the institution may require a power of attorney that contains an actual original signature of the principal. However, if the institution receives an affidavit that such an original is not available to be presented, the institution shall accept a copy of the power of attorney certified to be a true copy of the original by (i) the attorney who prepared the original and holds either the original or an executed copy; (ii) a financial institution; or (iii) 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 that the principal is then incapacitated as provided in the power of attorney.

b. 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.

Source: 46:2B-13; new.

#### COMMENT

This section is derived substantially from its source and merges the banking provisions with the current act, with some modifications in language.

### **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, made in accordance with subsection c. of 46:2B-20.10, shall state that the agent, at the time of exercise of the power, had no knowledge or notice 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, no knowledge or notice of the principal’s incapacity, or if the power expressly states that it terminates upon the appointment by a court of a guardian, conservator or other fiduciary, no knowledge or notice of the appointment by a court of a guardian, conservator or other fiduciary.

b. The 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 “the Principal”, by virtue of a Power of Attorney dated [*date of power of attorney*], and [*if recorded, use following language: 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 vests me with the authority to act for the Principal for the purposes set forth in the Power of Attorney, including the execution and delivery of the document to which this Affidavit is attached.

2. To the best of my knowledge and belief, this Power of Attorney is in full force and effect. I have no knowledge or notice of revocation of the Power of Attorney by an act of the Principal nor do I have knowledge or notice of the termination of the Power of Attorney by the death or incapacity of the Principal or by my act or any act of any other agent or by the order of a court or by the terms of the Power of Attorney itself. The Principal either has not been judicially declared to be incapacitated or has been judicially declared to be incapacitated and the court has maintained the power of attorney for certain stated purposes.

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

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[*Signature of Agent*]



Sworn and subscribed before me this \_\_\_\_  
day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
[Signature of Notary]

c. If the transaction for which the affidavit is executed involves real estate or an interest therein, the affidavit shall be recorded as part of the deed, mortgage or other instrument executed by the agent.

Source: New.

#### COMMENT

This new section is derived from a form provided by Fidelity National Title Group that has been modified as a result of comments received. 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. 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; an agent, co-agent, or successor agent acting under the power of attorney; a guardian or conservator appointed for the principal; the spouse, domestic partner or partner in civil union, or a 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.

#### COMMENT

The current statute does not provide for a summary method to compel third party acceptance of a power of attorney, the form and execution of which complies with the statute. Commenters have noted that failure to accept such a power of attorney can be financially devastating to a principal. The proposed new section is derived from Chapter 644 (section 5-1510) and commenters' suggestions.

#### **46:2B-20.14. 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 otherwise, the co-agents shall act jointly.

(2) joint action by co-agents requires the concurrence of all agents to exercise any power granted.

(3) if joint action by co-agents is required, and an agent dies, resigns or, is unable to exercise the authority conferred by the power of attorney, unless otherwise provided, the remaining co-agent, or, if there is more than one, the remaining co-agents by joint action, may act for the principal and exercise all powers granted.

(4) if the power of attorney provides separate action by co-agents, then any one agent may 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, is unable to exercise the authority conferred by the power of attorney, is not qualified to serve or declines to serve; and

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

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 who 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.

#### **46:2B-20.15. Delegation by agent**

If the principal intends to authorize the agent to delegate to other agents one or more or all of the powers granted under the power of attorney, the principal shall expressly and specifically grant that authority in the power of attorney or the agent may not so delegate.

Source: 46:2B-8.8.

COMMENT

This section is derived substantially from its source with some modifications in language.

**46:2B-20.16. Agent's act without notice or knowledge of principal's death, or of termination or revocation of power**

a. Any agent who acts in good faith under a valid and enforceable power of attorney, without knowledge or notice of the principal's death, or of the principal's revocation of the power of attorney, binds the principal's successors in interest.

b. Any agent who acts in good faith under a valid and enforceable power of attorney that terminates upon the incapacity of the principal, or upon the appointment by a court of a guardian, conservator or other fiduciary, or for any other reason, without knowledge or notice of the principal's incapacity, or without knowledge or notice of the appointment by a court of a guardian, conservator or other fiduciary, or without knowledge or notice that the power of attorney has terminated for any other reason, binds the principal and the principal's successors in interest.

c. If the agent executes an affidavit, in accordance with section 46:2B-20.12., the agent's act in accordance with the power shall be presumed valid, subject to challenge only by a clear and convincing showing of fraud, intentional misconduct, or gross neglect. Nevertheless, a subsequent determination of fraud, intentional misconduct or gross neglect shall not affect the interest of a party who dealt with the agent in good faith and in reliance upon the power of attorney and the affidavit.

Source: 46:2B-8.5; 46:2B-8.6.

COMMENT

This new section is derived substantially from source section 46:2B-8.5 with some modifications in language. Reference to "actual" before the word "knowledge" has been deleted. Notice, as defined in this act, or constructive knowledge, is now sufficient.

**46:2B-20.17. 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 or states that all other powers of attorney are revoked;

(2) causes all executed originals of the power of attorney to be physically destroyed, including any originals that have been filed with financial institutions; or

(3) executes a written instrument of revocation which is acknowledged in the same manner as the power of attorney in accordance with subsection a.(3) of 46:2B-20.6; or

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

b. If a power of attorney that has been recorded is revoked, but the revocation is not recorded in the recording office where the original power of attorney was recorded, the revocation shall be ineffective as to a third party or an agent who acts in reliance on the recorded power of attorney without knowledge or notice of the revocation.

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

d. 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 knowledge or notice 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 knowledge or notice 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 power of attorney in accordance with subsection a. of this section;

(5) the agent dies, is unable to exercise the authority conferred by the power of attorney, or resigns, and there is no co-agent or successor agent or none who is willing or able to serve;

(6) the agent's authority terminates because the marriage, domestic partnership or partnership in civil union of the agent who is the spouse or domestic partner of or partner in civil union with the principal is terminated by divorce, annulment, dissolution or other proceeding, unless the power of attorney otherwise provides;

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

(8) the power of attorney terminates by its terms.

e. Despite the revocation or termination of a power of attorney under this section, an agent's good faith act may bind the principal and the principal's successors in interest in accordance with section 46:2B-20.16.

Source: 46:2B-8.10; 46:2B-8.5; 46:2B-8.4c.

#### 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. Subsection e. refers to new section 46:2B-20.16 and reliance upon the concept (as adopted from source section 46:2B-8.5) that an agent's actions may bind a principal or principal's successors in interest, despite the revocation or termination of the power of attorney, if the agent acts in good faith and without knowledge of the principal's death or incapacity.

#### **46:2B-20.18. 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 knowledge or 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 knowledge or notice of the principal's incapacity, or knowledge or notice of any facts indicating the principal's incapacity; and
- (4) the agent does not have knowledge or 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 knowledge or 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.

### **46:2B-20.19. Compensation of the agent**

A principal may, in the power of attorney, direct that an agent be compensated from the principal's assets for services rendered as agent, which may include reimbursement for reasonable expenses incurred on the principal's behalf, 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.

#### COMMENT

The proposed section is substantially derived from the source statute with the modification that the direction regarding compensation be provided, if at all, in the power of attorney itself and not in a separate written document. Possible reimbursement for reasonable expenses incurred, permitted in the UPOAA (section 112), is also included here.

**46:2B-20.20. 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 institution with respect to any transaction permitted by this act, whether conducted in this or any other state or jurisdiction.

Source: 46:2B-12.

COMMENT

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

**46:2B-20.21. 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:20.22. Gifts and other gratuitous transfers; self-dealing; other acts requiring express and specific authority**

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 to that effect, is not an express or specific authorization to make gifts. If the principal intends to authorize the agent to make any gifts or to gratuitously transfer property of the principal to the agent, or to a co-agent or successor agent, or to any others, the principal shall expressly and specifically grant that authority in the power of attorney. A power of attorney shall not be construed to authorize the agent to make any gifts or to gratuitously transfer property of the principal to the agent or to a co-agent or successor agent, or to any others unless the power of attorney expressly and specifically so authorizes.

b. 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 shall expressly and specifically grant such authority in the power of attorney.

c. If the principal intends to authorize the agent to make, amend, alter, revoke or terminate an inter vivos trust, the principal shall expressly and specifically grant such authority in the power of attorney.

d. 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 to make, amend, alter or revoke any provisions for nonprobate transfer at death, the principal shall expressly and specifically grant such authority in the power of attorney.

e. If the principal intends to authorize the agent to make transfers of money, property or other assets to any trust, or 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, the principal shall expressly and specifically grant such authority in the power of attorney.

f. If the principal intends to authorize the agent to open or close any accounts of the principal, including a joint account naming the agent and the principal as the joint owners, unless the change in account is solely ministerial in nature, the principal shall expressly and specifically grant such authority in the power of attorney.

g. If the principal intends to authorize the agent to create or change rights of survivorship, the principal shall expressly and specifically grant such authority in the power of attorney.

h. If the principal intends to authorize the agent to renounce a principal's designation as a fiduciary for another person, the principal shall expressly and specifically grant such authority in the power of attorney.

i. If the principal intends to authorize the agent 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, the principal shall expressly and specifically grant such authority in the power of attorney.

j. Unless the power of attorney expressly and specifically provides otherwise, if after naming the spouse or domestic partner or partner in civil union 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 partnership in civil union is dissolved, the divorce, annulment, declaration of nullity or dissolution terminates the authority to gift or make other transfers to the former spouse or domestic partner or partner in civil union. Remarriage or a new ceremony for a domestic partnership or partnership in civil union to the prior spouse or prior domestic partner or partner in civil union shall revive the power.

Source: 46:2B-8.13a; new.

#### COMMENT

The proposed 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 gifts and other gratuitous transfers by express and specific provision in the power of attorney itself and sets out guidelines for doing so. This section also permits certain other acts only by express and specific provision in the power of attorney.

**46:2B-20.23. Liability of person or institution acting in reliance on power of attorney**

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 person or institution, unless the act or omission constitutes a crime, actual fraud, actual malice or willful misconduct or the person or institution acting in reliance on the power of attorney has knowledge or notice that the principal lacked capacity to execute the power of attorney.

Source: 46:2B-14.

COMMENT

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

**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.

COMMENT

The proposed new section is substantially derived from the UPOAA with some modifications.

**46:2B-20.25. 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-20.26. 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.

Source: 46:2B-15.

COMMENT

This new section is derived substantially from its source.



#### **46:2B-20.27. Financial transactions; acts authorized**

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, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

a. continue, modify or terminate any account or other financial arrangement made by or on behalf of the principal prior to creation of the agency;

b. open, either in the name of the agent alone, the principal alone or in both their names jointly, or otherwise, only if the change in account status is solely ministerial in nature, an account of any type in any financial institution selected by the agent; hire, remove the contents of or surrender a safe deposit box or vault space; and make other contracts for the procuring of other services made available by any financial institution or safe deposit company as the agent shall deem desirable;

c. draw, sign and deliver checks or drafts for any purpose, 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 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, or existing bank credit card accounts of the principal;

d. 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;

e. receive statements, vouchers, notices or other documents from any financial institution and to act with respect to them;

f. have free access during normal business hours to any safe deposit box or vault to which the principal would have access;

g. 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; give any security out of the assets of the principal as the agent shall deem desirable or necessary for any borrowing; 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 procure for the principal a loan from any financial institution by any other procedure made available by the financial institution;

h. 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; receive the cash or other proceeds of these transactions; and accept any draft drawn by any person upon the principal and pay it when due;

i. 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;

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

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

l. 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 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; conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and 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;

m. execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful to accomplish any purpose enumerated in this section;

n. prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or 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 financial transaction or intervene in any action or proceeding relating to the transaction;

o. 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

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

Source: 46:2B-11.

#### COMMENT

The proposed new section is substantially derived from the source provision with some modifications to language and to expand the section's application to financial institutions that may not be banking institutions.

#### **46:2B-20.28. Real estate transactions; acts authorized**

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 authority under the power of attorney to:

a. 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;

b. 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;

c. 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;

d. 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;

e. 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;

f. 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;

g. 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;

h. change the form of title of an interest in or right incident to real property;

i. execute, acknowledge, seal and deliver any deed, affidavit of title and other closing documents, and to do any and all other acts and things reasonably necessary to consummate the sale of premises or land generally, or specifically;

j. execute, acknowledge, seal and deliver any revocation, declaration, mortgage, lease, notice, check or other instrument which the agent deems useful to accomplish any purpose enumerated in this section;

k. dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest;

l. 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; conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and 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;

m. prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or 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 intervene in any action or proceeding relating to the transaction;

n. 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

o. in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent concerning any real property that affects the interests of the principal.

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-20.29. Tangible personal property transactions; acts authorized**

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

a. demand, buy, receive, reject, accept as a gift or as security for an extension of credit, or otherwise acquire ownership or possession of tangible personal property or an interest in tangible personal property;

b. 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 tangible personal property or an interest in tangible personal property;

c. grant a security interest in tangible personal property, or an interest in tangible personal 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;

d. release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property;

e. manage or conserve tangible personal property or an interest in tangible personal property;

f. 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 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; conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and 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;

g. execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful to accomplish any purpose enumerated in this section;

h. prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or 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 tangible personal property transaction or intervene in any action or proceeding relating to the transaction;

i. 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

j. in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent concerning any tangible personal property or interest in any tangible personal property that affects the interests of the principal.

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-20.30. Bond, share and commodity transactions; acts authorized**

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 authority under the power of attorney to:

a. 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;

b. 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;

c. 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;

d. manage or conserve any bond, share, instrument of similar character, commodity interest or any instrument with respect to a commodity;

e. 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;

f. 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; conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and 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;

g. execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful to accomplish any purpose enumerated in this section;

h. prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or 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 intervene in any action or proceeding relating to the transaction;

i. 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

j. in addition to the specific acts set forth in this section, 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.

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. Business operating transactions; acts authorized**

Subject to the terms of a document or agreement governing an entity or an entity ownership interest, 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 authority under the power of attorney to:

- a. operate, buy, sell, enlarge, reduce, or terminate an ownership interest;
- b. 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;
- c. enforce the terms of an ownership agreement;
- d. with respect to an entity or business owned solely by the principal regardless of the form of organization of the business, provided that proof of the principal's sole ownership is demonstrated:
  - (1) continue, modify, renegotiate, extend and 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;
  - (2) 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;
  - (3) change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and
  - (4) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;
- e. 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 in which the principal has an interest; join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business; sell or liquidate all or part of the entity or business; 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 with respect to the entity or business 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 with respect to the entity or business;
- f. 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; engage in banking transactions the agent deems desirable for effectuating the execution of the powers described in this section; 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;

g. execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful to accomplish any purpose enumerated in this section;

h. prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or 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 intervene in any action or proceeding relating to the transaction;

i. 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

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

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-20.32. Insurance transactions; acts authorized**

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 authority under the power of attorney to:

a. continue, pay the premium or assessment or make a contribution 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 and specifically conveyed in a power of attorney that is executed pursuant to this act;

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

c. collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;



d. 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; surrender and thereupon receive the cash surrender value; 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 and specifically conveyed in a power of attorney executed pursuant to this act;

e. 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 insurance 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 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;

f. execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful to accomplish any purpose enumerated in this section;

g. prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or 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 insurance transaction or intervene in any action or proceeding relating to the transaction;

h. 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

i. in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent concerning the procuring, supervising, managing, modifying, enforcing, or terminating a contract of insurance or otherwise involving any insurance transaction in which the principal is insured or that affects the interests of the principal.

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. Estate transactions; acts authorized**

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 authority under the power of attorney to:

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

b. 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;

c. exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

d. conserve, invest, disburse or use anything received for an authorized purpose;

e. 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 settlor;

f. 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;

g. 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 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; 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; initiate, participate in and oppose any proceeding for the removal, substitution or surcharge of a fiduciary; conserve, invest disburse or use anything so received for purposes enumerated in this section; and 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;

h. execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful to accomplish any purpose enumerated in this section;

i. prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or settle and propose or accept a compromise with respect to any claim which affects the estate of a decedent, absentee, minor or intellectually incapacitated person, or the administration of a trust or other fund, in any one of which the principal has, or claims to have, an interest or with respect to which the principal is a fiduciary, or intervene in any action or proceeding related to the estate, trust or fund;

j. 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

k. in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent concerning the estate or the administration of a trust or other fund, in any one of 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 and specifically conveyed in a power of attorney executed pursuant to this act. A power of attorney may be used to renounce the principal's designation as a fiduciary for another person in accordance with this act only if expressly and specifically conveyed in a power of attorney executed pursuant to this act.

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. Litigation and other legal proceedings; acts authorized**

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 authority under the power of attorney to:

a. assert and maintain before a court, administrative agency, or other tribunal a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or 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;

b. bring an action of interpleader or to determine adverse claims or intervene or interplead in any action or proceeding, and act in any litigation as amicus curiae;

c. seek attachment, garnishment, order of arrest, replevin, distraint, or any other preliminary, provisional, or intermediate relief or effect or satisfy a judgment, lien, order or decree;

d. 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 bind the principal in the conduct of any litigation or controversy as the agent deems desirable;

e. submit to alternative dispute resolution, mediation, arbitration, or settle and propose or 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;

f. waive the issuance and service of process, accept service of process, appear for the principal, designate persons upon whom process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, appeal to appellate tribunals, procure and give surety and indemnity bonds at such times and to such extent as the agent deems desirable or necessary, contract and pay for the preparation and printing of records and briefs, 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;

g. 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;

h. 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;

i. 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

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

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. Personal and family maintenance; acts authorized**

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 authority under the power of attorney to:

a. 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, usual vacations and travel expenses, domestic help, healthcare, and custodial care, of the principal, the principal's spouse or domestic partner or partner in civil union, 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;

b. 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;

c. 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 a.;

d. maintain credit and debit accounts, and open new accounts, as appropriate, for the individuals described in paragraph a.;

e. continue payments incidental to membership or affiliation of the principal in a religious institution, club, society, order or other organization or continue contributions to those organizations;

f. 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;

g. act as the principal's personal 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

h. 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 endorse, collect or otherwise realize upon any instrument for the payment so received;

i. use 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, tangible personal property, 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;

j. execute, acknowledge, verify, seal, file and deliver any application, consent, petition, notice, release, waiver, agreement or other instrument that the agent deems desirable to accomplish any purpose enumerated in this section;

k. prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or 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;

l. 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

m. in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent for the welfare of the spouse, domestic partner or partner in civil union, 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.

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. 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 authority under the power of attorney to:

(1) access records relating to the provision of health care and 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) 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) 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; and 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) 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) prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or 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 healthcare billing, recordkeeping and payment that affects the interests of the principal;

(6) 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

(7) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent concerning any healthcare billing, recordkeeping and payment that affects the interests of the principal.

b. The authority granted under this section 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.

c. 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 may be authorized only by 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.*, or both, as applicable.

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-20.37. Retirement benefit transactions; acts authorized**

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 governed by the Internal Revenue Code, as appropriate. 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 attorney otherwise provides, the agent shall have the authority under the power of attorney to:

a. select the form and timing of payments under a retirement plan, and contribute to and withdraw benefits from the plan;

b. make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another, or make investment directions;

c. establish a retirement plan in the principal's name;

d. exercise investment powers available under a retirement plan;

e. borrow from, sell assets to, or purchase assets from a retirement plan;

f. 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 and specifically conveyed in a power of attorney executed pursuant to this act;

g. convert to or from a Roth IRA;

h. execute, acknowledge, verify, seal, file and deliver any application, consent, petition, notice, release, waiver, agreement or other instrument that the agent deems desirable to accomplish any purpose enumerated in this section;

i. prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or 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 intervene in any action or proceeding relating to the transaction;

j. 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

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

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-20.38. 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 authority under the power of attorney to:

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

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

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

(5) act for the principal in all tax matters in connection with any authority enumerated in sections 46:2B-20.27 through 46:2B-20.39 of this act;



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

(7) prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or 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 intervene in any action or proceeding relating to the transaction;

(8) 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, do any other act which the principal may do through an agent concerning any tax matters involving the principal or in which the principal has an interest or may thereafter have an interest regardless of whether any specific act is authorized by the principal's execution of an IRS Form 2848, "Power of Attorney and Declaration of Representative" or similar document.

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.

#### 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-20.39. Collect and disburse benefits from governmental programs or civil or military service; acts authorized**

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 authority under the power of attorney to:

a. 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 subsection a. of 46:2B-20.35, and for shipment of their household effects;

b. 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;

c. enroll in, apply for, select, reject, change, amend, or discontinue a benefit or program on the principal's behalf;

d. prepare, file and prosecute a claim of the principal to any benefit or assistance, financial or otherwise, to which the principal 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 to the principal by blood or by marriage, domestic partnership or as partners in civil union, to execute any receipt or other instrument which the agent deems desirable or necessary for the enforcement or the collection of the claim;

e. 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;

f. communicate with any representative or employee of a government, governmental subdivision, agency, or instrumentality on behalf of the principal;

g. prosecute, defend, submit to alternative dispute resolution, mediation or arbitration, or settle and propose to accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any benefit from governmental programs or from civil or military service or intervene in any action or proceeding relating to the benefit;

h. 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

i. in addition to the specific acts set forth in this section, 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.

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.

**TABLE OF DISPOSITIONS**

<b>CURRENT</b>	<b>PROPOSED</b>	<b>COMMENT</b>
46:2B-8.1	Section 46:2 B-20.1	
46:2B-8.2	Section 46:2B-20.2; Section 46:2B-20.5.	
46:2B-8.3	Section 46:2B-20.5	
46:2B-8.4	Section 46:2B-20.9; Section 46:2B-20.17.	
46:2B-8.5	Section 46:2B-20.16; Section 46:2B-20.17.	
46:2B-8.6	Section 46:2B-20.10; Section 46:2B:20.16.	
46:2B-8.7	Section 46:2B-20.14	
46:2B-8.8	Section 46:2B-20.15	

46:2B-8.9	Deleted	Replaced by section 46:2B-20.6
46:2B-8.10	Section 46:2B-20.17	
46:2B-8.11	Section 46:2B-20.10	
46:2B-8.12	Section 46:2B-20.19	
46:2B-8.13	Section 46:2B-20.8	
46:2B-8.13a	Section 46:2B-20.22	
46:2B-8.14	Deleted	Unnecessary
46:2B-10	Section 46:2B-20.2	
46:2B-11	Section 46:2B-20.27	
46:2B-12	Section 46:2B-20.20	
46:2B-13	Section 46:2B-20.11	
46:2B-14	Section 46:2B-20.23	
46:2B-15	Section 46:2B-20.26	
46:2B-16	Section 46:2B-20.5	
46:2B-17	Deleted	Unnecessary
46:2B-18	46:2B-20.10	
46:2B-19	46:2B-20.2	
None	46:2B-20.3	new
None	46:2B-20.4	new
None	46:2B-20.6	new
None	46:2B-20.7	new
None	46:2B-20.12	new
None	46:2B-20.13	new
None	46:2B-20.18	new
None	46:2B-20.21	new
None	46:2B-20.24	new
None	46:2B-20.25	new
None	46:2B-20.28	new
None	46:2B-20.29	new
None	46:2B-20.30	new
None	46:2B-20.31	new
None	46:2B-20.32	new
None	46:2B-30.33	new
None	46:2B-30.34	new
None	46:2B-30.35	new
None	46:2B-30.36	new
None	46:2B-30.37	new
None	46:2B-30.38	new
None	46:2B-30.39	new