

## Memorandum in Support

NYSBA #18-B

July 13, 2020

A. 5630-A  
S. 3923-A

By: M. of A. Weinstein

By: Senator Hoylman

Assembly Committee: Rules

Senate Committee: Judiciary

Effective Date: 180<sup>th</sup> day after it shall have become a law

**AN ACT** to amend the general obligations law, in relation to reforming the statutory short form and other powers of attorney for purposes of financial and estate planning; and to repeal certain provisions of such law relating to statutory gift riders.

Consumers often suffer major problems because of the complexity and rigid “exact-wording” standard required of the current power of attorney form. The complexity of the form, including the required Statutory Gifts Rider, has frequently resulted in problems with the execution of the form, even frustrating the ability of the agent to carry out the intent of the principal. In addition, third parties, such as banks and other financial institutions have often refused to accept valid powers of attorney, instead requiring that the consumer utilize the third party’s own form. This problem is exacerbated because these institutions face no penalties for refusing to honor the document. When a consumer loses capacity and cannot execute a new document, this can result in a major problem for an agent under a power of attorney who needs to pay rent, make mortgage and utility payments, arrange for other essential services or do planning for the incapacitated person.

Under current law, a power of attorney form is too complex, too costly, and unreasonably difficult for individuals to use.

In order to address the current problems with the form, this bill would:

- Simplify the current power of attorney form;
- Prevent third parties from improperly refusing to accept a consumer’s valid power of attorney;
- Provide protection for third parties who follow the process for accepting a power of attorney; and,
- Authorize language in the power of attorney form that substantially conforms with the statutory language, in order to prevent the harsh consequence of the form being invalidated because of harmless error in the form.

In short, this bill would ease the burden on families, especially at a time when they need simple and effective solutions. Good public policy should ensure that individuals are able to create and use an effective power of attorney when they need it.

Reform of the power of attorney law is even more urgent considering the COVID-19 Pandemic and its potential aftermath. The situation in nursing homes and assisted living facilities has illustrated the difficulty our most vulnerable have in executing documents.

While remote notarization utilizing audio-video technology is possible by Executive Order 202.7, the current complex power of attorney form, requiring initialing in multiple places, has proven difficult when the attorney/notary is remote. In addition, the requirement of two witnesses for the Statutory Gifts Rider makes remote audio-video execution requiring the principal and three other people even more difficult because of the requirements of Executive Order 202.14 regarding audio-video witnessing and the subsequent electronic exchange of documents. The reforms in this legislation simplifying the form, eliminating two additional witnesses for the Gifts Rider, and allowing substantial conformity rather than exact wording will greatly improve the situation.

Even after the pandemic there will be lingering issues of access by visitors to nursing homes and assisted living facilities. Once the Executive Order on remote notarization expires, trying to execute the current power of attorney using a notary at a facility who may not be familiar with the form will almost certainly result in many improper executions.

Many elderly and disabled persons will have past due bills, back rent and mortgage payments to deal with. Enabling them to execute the simplified power of attorney authorized under this bill and have an agent deal with creditors, utilities, banks and landlords will be of utmost importance. This new law would essentially make accepting (rather than rejecting) the power of attorney the default which would substantially alleviate the frustrating burdens of the current law in many situations.

Based on the foregoing, the New York State Bar Association **SUPPORTS** this legislation, which is based on a proposal by the Association.