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VOL. 16 NO. 1 JANUARY 2010

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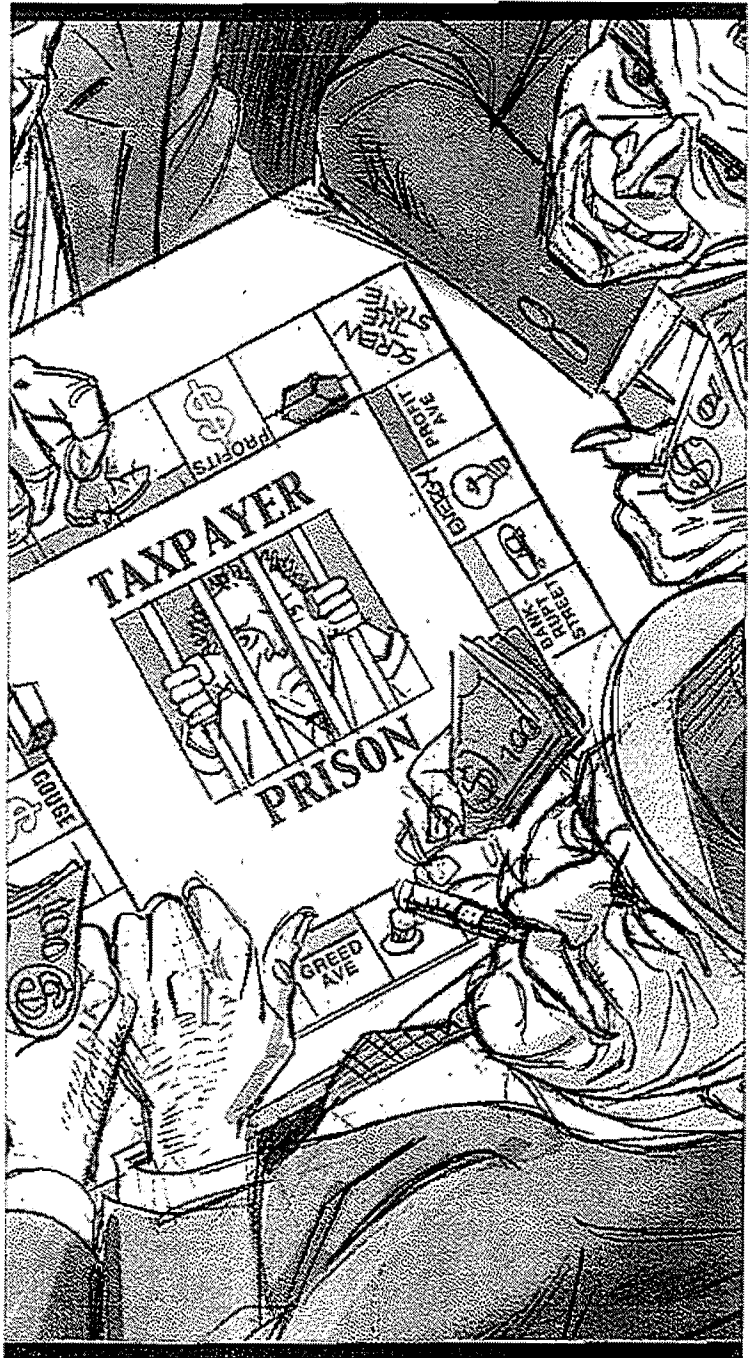
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IMPACT OF NEW POWER OF ATTORNEY FORM IN NEW YORK STATE

by Sylvia E. Di Pietro, Esq.

On September 1, 2009, a new statutory power of attorney form became effective in New York State under provisions of Title 15 of the General Obligations Law. A power of attorney is a document that permits one person to act on behalf of another as agent or "attorney-in-fact." Powers of attorney can be quite specific, such as those which are executed to allow a person to sign a document to transfer property on behalf of the owner. Or they can be general, permitting one person to stand in for another who is incapacitated in regard to all necessary transactions. One can empower an agent to do one or more things. The document can be said to be "durable" by surviving the incapacity of the maker, "springing," by becoming effective only upon and during the incapacity of the maker; or it can be non-durable, and valid only as long as the principal owns the capacity to make business decisions.

New Form Is Complex

Under the new law, all powers of attorney are deemed to be "durable" unless expressly stated otherwise, and are assumed to continue to operate after the incapacity of the principal until the moment of their death.

The new law abolishes the old single sheet statutory power in favor of an extremely complex document whose sophistication and complexity is sure to result in an onslaught of new forms of litigation. The new power of attorney replaces the older one created in 1948, and advises the principal within the body of the document of the powers being granted to the agent and cautions the agent to consult an attorney for clarification because liability could result if the powers are abused. The new document also creates a new species of lawsuit to compel institutions, such as banks, which frequently refuse to recognize such powers, to honor the document.

The new document contains two sections and can be viewed as a bilateral contract: 1) the statutory powers, which must be signed by the principal and the agent or multiple agents and a notary, and requires acknowledgment in the same manner as the conveyance of real property, (although the agent may delay signing, and therefore the commencement of his obligations to a later date) and 2) the statutory major gift rider which must be signed by the principal and witnessed in the same manner as a will by two disinterested individuals.

While the changes to the power of attorney are numerous and prospective in nature, and do not affect existing powers of attorney, there are five changes that do apply to the actions of all agents regardless of the date of the document: 1) the powers of attorney extend to benefits from governmental programs or civil or military service; 2) the power of agents to gain access to a principal's medical records for billing purposes; 3) the requirement that institutions not act unreasonably and honor a power of attorney; 4) the fiduciary duties of the agent to include that of record-keeping; and 5) a new

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special proceeding to decide issues relating to powers of attorney.

New Law Adds Major Gifts Rider

Under the new rules, two documents are now required to accomplish what a single document did in the past. If a person wishes to permit an agent to make any gift in excess of \$500 in a year, a "major gifts rider" must be executed and attached to the power of attorney. Since gifting under the general powers is limited to \$500 and must be in conformity with the principal's former habit of gifting, the new statutory major gift rider permits the agent to make gifts on behalf of the principal, including real property transactions, in amounts over \$500. Accordingly, the provisions relating to funding of trusts have been removed from the statutory short form power of attorney (General Obligations Law Section 5-1513) and have been placed in the statutory major gifts rider (General Obligations Law Section 5-1514.)

There is also a separate section which, if authorized by the principal, permits the agent to gift to himself. The powers granted to the agent are vast unless the document is modified by the principal, opening up numerous opportunities for abuse.

The new documents also allow for multiple agents, who must act together, unless the contrary is specified, and also

allow for a monitor or monitors to oversee the activities of the agent or agents. The power requires the agent to maintain records and permits the monitors to request an accounting of all activities taken on behalf of the principal. Both the agent(s), successor agent(s) and monitor(s) can be compensated for their actions if specifically authorized by the principal. Here, to be on the safe side, the principal must specify the reasonable amount permissible.

Many Twists and Turns with New Document

Previously executed powers of attorney can remain in effect, but if the principal executes a new power of attorney after September 1, 2009, the principal must specifically modify the new document to reaffirm that the earlier document remains effective. Other requirements take the form of an insistence that the document be drafted in 12-point type, including the sections advising the principal and agent. With such a mass of verbiage assaulting the parties, it is unlikely that the principal and agent, as well as successor agents and monitors, will even want to take responsibility for granting and accepting such authority, whether or not for remuneration.

There are so many twists and turns and possibilities for mistake, misuse and confusion associated with this new document that practitioners are certain that the document will create problems and litigation in the areas of Elder Law, Trusts and Estates and Real Property. For the ordinary

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citizen who was once familiar with the purchase of a power of attorney form at the local stationery store, such access is not now readily possible. Further, there are so many pitfalls to the form that execution without the advice of an attorney, especially for the elderly, is sure to create a flood of new lawsuits. At the time of this writing, a bill is before the New York State Legislature which proposes technical amendments in order to make the document more understandable and user-friendly.

POWER OF ATTORNEY NEW YORK STATUTORY SHORT FORM

(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your "agent") authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. "Important Information for the Agent" at the end of this document describes your agent's responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney by executing this Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) DESIGNATION OF AGENT(S):

I, _____ hereby appoint:
[name and address of principal]

_____ as my agent(s)
[name(s) and address(es) of agent(s)]

If you designate more than one agent above, they must act together unless you initial the statement below.

() My agents may act SEPARATELY.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)

If every agent designated above is unable or unwilling to serve, I appoint as my successor agent(s):

[name(s) and address(es) of successor agent(s)]

Successor agents designated above must act together unless you initial the statement below.

() My successor agents may act SEPARATELY.

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications."

**Hop on
Hop off**

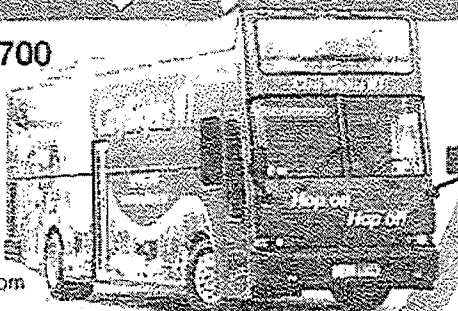
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(e) This POWER OF ATTORNEY REVOKES any and all prior Powers of Attorney executed by me unless I have stated otherwise below, under "Modifications."

If you are NOT revoking your prior Powers of Attorney, and if you are granting the same authority in two or more Powers of Attorney, you must also indicate under "Modifications" whether the agents given these powers are to act together or separately.

(f) GRANT OF AUTHORITY:

To grant your agent some or all of the authority below, either

- (1) Initial the bracket at each authority you grant, or
- (2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.


I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

- (A) real estate transactions;
- (B) chattel and goods transactions;

- (C) bond, share, and commodity transactions;
- (D) banking transactions;
- (E) business operating transactions;
- (F) insurance transactions;
- (G) estate transactions;
- (H) claims and litigation;
- (I) personal and family maintenance;
- (J) benefits from governmental programs or civil or military service;
- (K) health care billing and payment matters; records, reports, and statements;
- (L) retirement benefit transactions;
- (M) tax matters;
- (N) all other matters;
- (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;
- (P) EACH of the matters identified by the following letters

You need not initial the other lines if you initial line (P).

(g) MODIFICATIONS: (OPTIONAL) In this section, you may make additional provisions, including language to



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limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make major gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Major Gifts Rider.

(h) MAJOR GIFTS AND OTHER TRANSFERS: STATUTORY MAJOR GIFTS RIDER: (OPTIONAL) In order to authorize your agent to make major gifts and other transfers of your property, you must initial the statement below and execute a Statutory Major Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make major gifts and other transfers. The preparation of the Statutory Major Gifts Rider should be supervised by a lawyer.

(____) (SMGR) I grant my agent authority to make major gifts and other transfers of my property, in accordance with the terms and conditions of the Statutory Major Gifts Rider that supplements this Power of Attorney.

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

I wish to designate _____, whose address(es) is (are) _____ as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) COMPENSATION OF AGENT(S): (OPTIONAL) Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define "reasonable compensation,"

you may do so above, under "Modifications." (____) My agent(s) shall be entitled to reasonable compensation for services rendered.

(k) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) TERMINATION: This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law. Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on _____, 20__.

PRINCIPAL signs here:

= > _____

State of _____)
County of _____) ss.:

On the _____ day of _____ in the year 20____, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her their

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signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

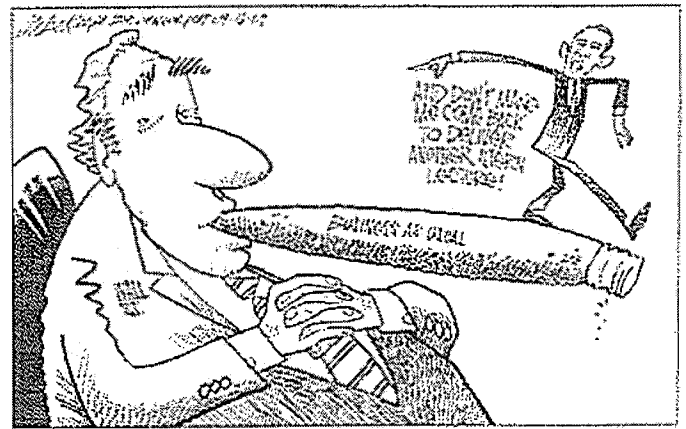
Signature and Office of individual taking acknowledgment

(n) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

- (1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;
- (2) avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;
- (4) keep a record of all receipts, payments, and transactions conducted for the principal; and
- (5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manner: (Principal's Name) by (Your Signature) as Agent, or (Your Signature) as Agent for (Principal's Name).

You may not use the principal's assets to benefit yourself or give major gifts to yourself or anyone else unless the principal has specifically granted you that authority in this Power of Attorney or in a Statutory Major Gifts Rider attached to this Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest. You may resign by giving



Mike Keefe/Denver Post

written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent:

The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

(o) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT: It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I/we, _____, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as agent(s) for the principal named therein. I/we acknowledge my/our legal responsibilities.

Agent(s) sign(s) here:==> _____

==> _____

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State of)
County of) ss.:

On the day of in the year 20, before me, the undersigned, personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Signature and Office of individual taking acknowledgment

State of)
County of) ss.:

On the day of in the year 20, before me, the undersigned, personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Signature and Office of individual taking acknowledgment

New York Statutory Power of Attorney
Affidavit As To Power of Attorney

STATE OF)
COUNTY OF) ss.:

, being duly sworn,
deposes and says as follows:

1. This affidavit is made in connection with the (transfer)(mortgage) of property known as _____, in _____, New York to _____.
2. I am (the)(an) agent named in the Power of Attorney (hereafter "Power of Attorney") made by _____ as principal (the "Principal"), dated _____.
3. I do not have actual notice that the Power of Attorney has been modified in any way that would affect my ability to authorize or engage in the present transaction for which the Power of Attorney is being used, or notice of any facts indicating that the Power of Attorney has been so modified.
4. I do not have actual notice of the termination or revocation of the Power of Attorney, or notice of any facts indicating that the Power of Attorney has been terminated or revoked, and the Power of Attorney remains in full force and effect.
5. If the Principal has been my spouse, we are not divorced and our marriage has not been annulled.
6. If I am a successor agent, the prior agent is no longer able or willing to serve.

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and Yesterday Isn't Fast Enough*



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Sworn to before me this _____ day
of _____, 20____.

Notary Public

NOTE: If multiple agents are appointed, an affidavit is to be executed by each agent.

**POWER OF ATTORNEY
NEW YORK STATUTORY MAJOR GIFTS RIDER
AUTHORIZATION TO MAKE MAJOR GIFTS OR
OTHER TRANSFERS**

Attached to a New York Statutory Short Form Power
of Attorney
dated _____ made by _____

CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make major gifts or other transfers of your money or other property during your lifetime. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. Major gifts or other transfers are described in section 5-1514 of the General Obligations Law. This Major Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.

This Major Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make major gifts and other transfers, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS:

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property. If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.



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() I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code. This authority will be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) MODIFICATIONS:

Use this section if you wish to authorize gifts in excess of the above amount, gifts to other beneficiaries or other types of transfers.

Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. If you wish to authorize your agent to make gifts or transfers to himself or herself, you must separately grant that authority in subdivision (c) below.

() I grant the following authority to my agent to make gifts or transfers pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE MAJOR GIFTS OR OTHER TRANSFERS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts or transfers to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

() I grant specific authority for the following agent(s) to make the following major gifts or other transfers to himself or herself:

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(d) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Major Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on 20 .

PRINCIPAL signs here ==>

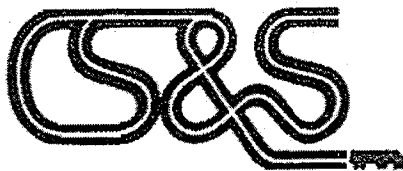
State of)
County of) ss.:

On the day of in the year 20 , before me, the undersigned, personally appeared personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/ their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Signature and Office of individual taking acknowledgment

(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Major Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature



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was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Major Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of major gifts.

Signature of witness 1

Date

Print Name

Address

City, State, Zip code

Signature of witness 2

Date

Print Name

Address

City, State, Zip code

(g) This document prepared by: _____

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Work, CCLP*

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