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Changes to New York Power of Attorney Law Should Simplify Form and Streamline Acceptance by Financial Institutions

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"Don't make the process harder than it is."

— Jack Welch

Virtually everyone who has prepared or signed a New York Durable Power of Attorney statutory "short form" over the past ten or so years has the same reaction when first trying to navigate the form: "Huh?" While the law enacted in 2009 was an attempt by the legislature to address concerns regarding potential abuses of powers of attorney, particularly with respect to the elderly, the resulting "short form" and its companion, the statutory gifts rider, made for a confusing, cumbersome and inflexible document. For years, practitioners and bar associations proposed changes to the existing law and statutory form. In 2020, to the delight of many, the Assembly and Senate passed a new power of attorney law which was signed by Governor Andrew Cuomo on December 15, 2020.

We note that the new law actually becomes effective on June 13, 2021; until then, powers of attorney may be established using the current law.

By way of background, a power of attorney is an essential component of a comprehensive estate plan. It allows an individual (the "principal") to name and empower an agent to engage in financial transactions on the principal's behalf. For example, in the event the principal is hospitalized or otherwise incapacitated, under an appropriately crafted power of attorney, the principal's agent could step in and write checks to pay rent, medical bills and the principal's other expenses.

ANALYSIS

The new power of attorney law addresses several issues that are problematic under the current law.

1. Substantial Conformance. Under the current law, the form of power of attorney must be identical to the wording used in the statutory short form – any mistake in the form could render the power of attorney invalid. Under the new law, the form of power of attorney need only "substantially conform" with the wording of the statute, which means that it is much less likely that a power of attorney will be invalidated due to insignificant mistakes in the form. In fact, the new law creates a presumption in favor of validity of a power of attorney.

2. No Gifts Rider. The new law makes two significant changes with respect to making gifts. Under the current law, an agent is limited to making aggregate gifts of $500 on behalf of the principal each year; any gifts in excess of $500 per year must be authorized by executing a gifts rider (that must be notarized and witnessed by two witnesses). Under the new law, the $500 limitation is increased to aggregate gifts of $5,000 each year and the gifts rider is eliminated. Gifts in excess of the $5,000 maximum can be accomplished through an optional modifications section in the form itself.

3. Signature at Direction of Principal. The new law permits a principal to direct someone (other than an agent or successor agent), while in the presence of the principal, to sign the power of attorney on his or her behalf. The current law does not permit anyone other than the principal to sign the power of attorney.

4. Sanctions for Bank Refusal to Honor Power of Attorney. The new law affords protections (i) for principals, from a third party (such as a bank) unreasonably refusing to accept their power of attorney,

and (ii) for third parties, when they rely upon a power of attorney being valid.

Specifically, the new law provides for a period of ten business days within which a third party who is presented with a power of attorney must either honor or reject the form (and, in the case of a rejection, the new law describes what must be included in the required written notification of any such rejection). If the third party refuses to accept the power of attorney, the principal may bring a special proceeding to compel a third party to honor the form. In the event that the court finds that the third party acted unreasonably in refusing to honor the power of attorney, the court is authorized to award damages, including reasonable attorney's fees and costs, to the principal.

This provision was included because, under the current law, banks and financial institutions often require that their own forms (rather than the New York statutory form) be used, and they are able to do so without being penalized for refusing to honor a validly executed statutory form. In addition, the new provision attempts to address the fact that, even within a financial institution, there is generally no consistent policy regarding whether and when a statutory form will be accepted.

The corollary to the protections for the principal is a safe harbor which protects a third party who in good faith accepts a power of attorney as valid. Specifically, if a third party accepts a power of attorney that appears to be validly executed, the third party will not be held liable for relying on the presumption that the power of attorney was, in fact, validly executed.

The above protections were adopted from the Uniform Power of Attorney Law, used in many states.

5. Maintenance of Records. The new law clarifies that the agent is required to maintain records and receipts of all payments and transactions conducted on behalf of the principal.

TAKEAWAYS

The changes to the law as summarized above should eliminate much of the complexity and confusion surrounding the current New York statutory short form power of attorney. The 2009 law had complicated the power of attorney form to such an extent, some attorneys reported that it took more time to go over the power of attorney form with clients than it took to go over their Will. In particular, the elimination of the need for a separate "statutory gifts rider" to authorize large gifts will substantially reduce the complexity and length of the form, and consequently, the time it takes to review and execute the form. Clients who wish to empower their agent to make gifts in excess of $5,000 may do so by inserting a simple modification to that effect. In addition, it has been a recurring source of frustration that agents, even though equipped with perfectly valid statutory short form powers of attorney, are rebuffed by banks and other third parties who insist on the use of their own form of power of attorney. The new law makes an effort to reduce that frustration by providing a remedy (and potential sanctions) for an unreasonable refusal to honor a valid power of attorney, while offering protection from liability to third parties when they do honor a valid power of attorney.

Time will tell whether these changes will improve the situation. Although the form has been simplified by the new law, because having a valid power of attorney in effect is an essential part of an individual's estate plan, it is advisable to consult with experienced estate planning counsel regarding the creation and execution of a power of attorney consistent with one's overall estate plan.

As stated above, the new law becomes effective on June 13, 2021. It is important to note, however, that the change in law will not impact the validity of an existing power of attorney executed in accordance with the provisions of the current law. ◆

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