

## **IV. Powers of Attorney**

### **A. Summary**

A power of attorney is a written instrument whereby one person (the “principal”) designates another person (the “agent”) to act on the principal’s behalf regarding, personal, financial and other similar matters. In colloquial terms, the principal “clones” himself or the agent “steps into the shoes of the principal”. The agent and principal are bound by the laws of agency.

Although the agent must act in good faith and with undivided loyalty to the principal, the agent’s standard of conduct has not been clearly provided for in the statute. The definition of a fiduciary is found in Article 11 of the Estates, Powers and Trust Law and does not include an attorney-in-fact.

The power of attorney is an extremely powerful instrument which unfortunately is widely abused. When used properly, it can promote positive financial and estate planning goals such as the management of one’s assets and the avoidance of guardianship proceedings. When left unattended, it can be devastating. A power of attorney is a simple document to obtain with few safeguards to curtail its misuse. Thus, when placed in the wrong hands, assets have been misappropriated or depleted, and principals have been left with mismanaged affairs. The elderly are usually the target of such abuse. Long awaited legislation is currently pending which attempts to cure some of the mishaps of a power of attorney.

### **B. Formalities**

#### **1. Capacity**

- The principal must also have the valid capacity to execute a power of attorney.

The exact standard has not been established but most likely is greater than testamentary capacity and closer to contractual capacity.

## 2. Execution

- Every statutory short form durable power of attorney, to be valid, must be (i) written, typed or printed using letters which are in legible writing of or clear type of no less than twelve-point in size or if in writing a reasonable equivalent thereof, (ii) must contain, in bold face upper case or upper and lower case type or a reasonable equivalent thereof (a) the "CAUTION" which is printed in bold face type at the beginning of the statutory form printed above and (b) the "DIRECTIONS" which are printed in bold face type immediately before subdivisions (A) through (Q) of the statutory form and (iii) duly acknowledged by the principal in the manner prescribed for the acknowledgement of a conveyance of real property. If the principal cannot sign the document, he can make a mark (usually an "X") and the attorney draftsman can prepare an affirmation affirming the principal's capacity.

## 3. Revocation

- The current statute does not provide a mechanism for revocation. Presumably, the attorney can prepare a written instrument revoking the agent's authority and deliver such paper writing to the agent and any person or financial institution that may have a copy of the power of attorney being revoked.

## 4. Designation of Multiple Agents

- A principal can designate one or multiple agents. If multiple agents are designated, the statutory form requires the principal to designate whether each agent may

act separately or if they must act jointly. The principal should always consider appointing a successor agent. If multiple agents are initially appointed and required to act jointly, the attorney should address if the whether the successor agent needs to act jointly with one of the initial agents if an initial agent dies, becomes incompetent, resigns, or ceases to act as agent for any other reason.

### **C. Variations**

The statutory framework for a short form power of attorney is found in Title 15, Article 5 of the General Obligations Law.

#### **1. Durable Power of Attorney**

- A durable power of attorney is effective immediately upon execution and continues to be effective even after the principal becomes incapacitated.

- Most frequently used form of a power of attorney in New York State.

#### **2. Non-Durable Power of Attorney**

- A non-durable power of attorney is effectively immediately upon execution but ceases to be effective once the principal loses capacity.

#### **3. Springing Power of Attorney**

- A springing power of attorney only becomes effective upon the happening of a specified event (e.g. incapacity).

- The springing power of attorney is not preferred among practitioners due to the inherent difficulties involved with determining if and when the specified event has occurred. For instance, if the specified event is the incapacity of the principal, it may be difficult to determine if and when the principal becomes incapacitated, even with the assistance of physicians. Moreover, under HIPAA, it may be difficult for the agent to

obtain confidential medical records prior to his appointment in order to determine the principal's capacity so that the principal's appointment can take effect.

- Clients may sometimes feel uncomfortable executing a durable power of attorney effective immediately, yet also recognize the drawbacks of a nondurable and springing power of attorney. A solution may be for the principal to execute a durable power of attorney but not deliver the original to the agent. The agent should be provided with instructions on where to find the original if the principal becomes incapacitated. In essence, the principal has created a springing power of attorney.

- It is not advisable for the attorney to hold the original in escrow since it raises a myriad of issues when its release is requested.

#### **D. Enumerated Statutory Powers**

There are sixteen enumerated powers in the statute:

1. real estate transactions;
2. chattel and goods transactions;
3. bond, share and commodity transactions;
4. banking transactions;
5. business operating transactions;
6. insurance transactions;
7. estate transactions;
8. claims and litigation;
9. personal relationships and affairs;
10. benefits from military service;
11. records, reports and statements;

12. retirement benefit transactions;

13. gift transactions;

- limited to \$10,000.00 and only to the principal's spouse, children, parents and other descendants.

## **E. Additional Powers**

Section 5-1501 of the General Obligations Law allows for the modification of the statutory form by adding or deleting powers.

### *1. Expanded gift giving provisions*

- "Absent a specific provision in the power of attorney document authorizing gifts, an attorney-in-fact, in exercising his or her fiduciary responsibilities to the principal, 'may not make a gift to himself'. *Anderson Marszal v. Anderson*, 9 A.D.3d 711, 780 N.Y.S.2d 432 (3<sup>rd</sup> Dep't 2004), quoting *Semmler v. Naples*, 166 A.D.2d 751, 752, 563 N.Y.S.2d 116 (1990), *appeal dismissed* 77 N.Y.2d 936, 569 N.Y.S.2d 607 (1991).

- Gifts made by the agent to himself must be in the best interests of the principal. *In re Ferrara*, 6 N.Y.3d 861, 850 N.E.2d 12, 817 N.Y.S.2d 198). The best interests of the principal includes "minimization of income, estate, inheritance, generation skipping or gift taxes".

### *2. Government Benefits*

- Consideration should be given to including language specifically authorizing the agent to apply for government benefits (e.g. Medicaid) on behalf of the principal. Medicaid will accept direction from an agent.

### *3. Power to Renounce*

- Disclaimers are becoming increasingly popular with the amorphous estate tax system in effect. Consider the case where an incapacitated surviving spouse would be well advised to disclaim property passing to him or her upon the death of the first spouse in order to avoid adverse estate tax consequences. Under Section 2-1.11(c)(6) of the Estate, Powers and Trusts Law, an agent can only renounce on behalf of a principal if so authorized in a valid power of attorney. Moreover, if the agent seeks to renounce property of a principal who is not disabled in favor of the agent or the spouse of the agent, the power of attorney must expressly authorize such renunciation, otherwise a court order must be obtained.

#### *4. HIPAA Privacy Language*

- The Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, is designed to protect an individual's right to privacy and the use of the individual's protected health information. Unintentionally, HIPAA runs against the powers delineated to an agent to obtain records, reports and statements. Moreover, if an agent derives his power under a Springing Power of Attorney, he will not be able to gain access to the principal's medical records to determine if his authority has vested. Practitioners should consider drafting language specifically authorizing their agent to access confidential medical records.

#### *5. Enrolling the Principal in a NYSARC Trust*

#### *6. Making Pre-Need Burial Arrangements*

Although the elder law practitioner typically prepares a power of attorney with broad powers, there may be instances where a power of attorney is only needed for limited purposes, such as a real estate transaction.

**F. Other Matters**

**G. Proposed Legislation**

*1. S753/A8500*

Adds Sections 9u and 9v to the Banking Law (a) making it unlawful for any banking institution (defined therein) to refuse a statutory short form power of attorney and (b) holds banks harmless for such acceptance unless they have written notice of revocation or termination.

*2. S5042*

Amends Section 5-1503 of the General Obligations Law to automatically revoke a power of attorney in the event of a divorce, annulment, or dissolution of marriage.

*3. S1479*

Amends Sections 5-1501, 5-1502M, 5-1504 and 5-1506 of the General Obligations Law to change the statutory short form to (a) permit annual gifts equal to the maximum federal exclusion rather than the current \$10,000.00, and (b) specify the manner by which additional powers may be added.

*4. S4996-B/A6421-B*

Completely revamps Title 15, Article 5 of the General Obligations Law to clear existing ambiguities and provide mechanisms to curtail the abuse of powers of attorney. Some of the more significant changes are summarized below:

*a. Major Gifts and Other Property Transfers*

The grant of authority to make major gifts and other asset transfers must be set out in a “Major Gifts Rider” which must be witnessed in the same manner as a Will.

*b. HIPAA Privacy Rule*

Section 5-1502K is amended to include “health care billing and payment matters” to the term “records, reports and statements”.

*c. Agent*

Includes a statutory explanation of the agent’s fiduciary duties. A notice to the agent is added to the statutory form explaining the agent’s (i) role, (ii) fiduciary obligations and (iii) limitations on the agent’s authority. The agent is required to sign the power of attorney. Absent an affirmative statement by the principal, the agent is not entitled to reasonable compensation.

*d. Principal*

The bill provides guidance on revoking a power of attorney. It also attempts to further convey the seriousness of the power of attorney by expanding the cautionary language at the beginning of the form.

*e. Other Major Provisions*

- i. makes it unlawful for any third party (expanded from financial institutions) to refuse to accept a power of attorney without reasonable cause;
- ii. incorporates provisions of S1479 regarding annual exclusion;
- iii. adds a provision allowing contributions to a “Section 529” plan;