

Making Gifts and Property Transfers Under New Power of Attorney Law

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The power of attorney is an integral component of estate planning and elder law. Article 5, Title 15 of the New York General Obligations Law (GOL) has been the source of the statutory short form power of attorney (POA), both durable and nondurable, and the formal requirements that define a valid POA. Given the importance of the POA and its widespread use, a new bill was introduced to significantly amend the POA statute. This bill was signed into law by Governor David A. Paterson on Jan. 27, 2009, and the effective date was recently extended to Sept. 1, 2009.

A POA executed prior to the new law's effective date is still valid, but some of the amendments apply retroactively. The objectives of the amendments are to curb financial abuse, clarify ambiguities identified in practice, provide more concrete direction and guidance where the statute was otherwise silent and adapt to recent changes in the Internal Revenue Code and the HIPAA (Health Insurance Portability and Accountability Act) Privacy Rule. In order to effectively counsel clients in estate planning and elder law, attorneys must comply with the new statutory requirements. This article seeks to take the first step toward that goal by focusing on one area of significant change, the authority to make gifts and other property transfers.

Key Changes

Attorneys have been using the same statutory short form POA for over a decade. From approximately 2000 to 2008, the New York State Law Revision Commission engaged in a study to understand the use and effectiveness of New York's POA. According to the sponsors' memorandum in support of the new law,¹ the commission solicited input from trusts and estates and elder law attorneys, the judiciary, prosecutors, adult protective service investigators, state agencies, the Legislature, the banking community and the title insurance community. Other information considered was New York case law, statutes from other jurisdictions and various studies and surveys.

The new law makes several significant changes to the prior POA statute. Authority to make substantial gifts and other property transfers has been removed from the statutory short form POA and must now be expressly granted in a supplemental rider. The commission addressed the prior law's silence as to the agent's responsibilities by including a statutory explanation informing the agent of his or her fiduciary duties and requiring the duly acknowledged signature of the agent.² Next, the powers within the prior statutory short form POA were amended to provide the agent with the authority to obtain medical records, under HIPAA Privacy Rule, for billing and payment purposes.

Other substantial changes include new procedures for terminating or revoking the POA, the ability of the principal to appoint a third party "monitor" to hold the agent accountable in the event the principal becomes incapacitated and the requirement that a third party cannot unreasonably refuse to accept the POA. While these changes are vast and significant, we concentrate on the portion of the law that amends the content and procedures for delegating authority to make gifts and other property transfers.

Gifts and Property Transfers

To understand the amendments affecting gifts and other property transfers it is helpful to first review the issues sought to be remedied. The commission's study concluded that the following deficiencies existed: (1) the statutory form was ambiguous and did not capture the principal's informed decision-making with respect to gifts and other property transfers, (2) case law

and the POA statute were inconsistent with respect to the type of authority required to allow the agent to make certain property transfers and, most notably, (3) the procedure for granting authority to make substantial gifts or transfer property was not commensurate with such an important delegation and thus, was subject to inadvertent actions by the principal.

Given the gravity of the issues, the commission deemed it appropriate to completely restructure the procedures for granting authority to make substantial gifts and other property transfers. Thus, if the principal intends to delegate to his or her agent

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authority to make gifts, other than gifts customarily made to individuals and charities which are cumulatively less than \$500 per recipient (hereinafter referred to as a “Major Gift”), or the authority to transfer property as described in subdivision 3 of GOL §5-1514, the new law requires the principal to expressly grant such authority in a separate rider called a statutory major gifts rider (SMGR).³

The new statutory short form POA does not contain an embedded power, among the list of enumerated powers, to make gifts within the federal gift tax annual exclusion amount. Rather, the only reference to making Major Gifts on the statutory short form POA is an optional statement which, when initialed by the principal, merely authorizes such transfers in accordance with the provisions of a validly executed SMGR. This new procedural step highlights the importance of making Major Gifts and other property transfers and is designed to ensure that the principal delegates this authority in a knowing and willing manner. Moving forward, the statutory short form POA is limited to those powers relating to the management of the principal’s everyday financial affairs, while the authority to redistribute the principal’s assets shifts to the SMGR. Section 5-1514 of the New York General Obligations Law sets forth the type of transfers delegated through the SMGR and the formal requirements in drafting and executing the SMGR.

Three Transfer Types

The SMGR segregates the type of transfers authorized by the principal into three separate sections as follows: (a) transfers consisting of Major Gifts with limited authority,⁴ (b) transfers consisting of Major Gifts with unlimited authority as to amount and/or beneficiaries (excluding the agent) and other property transfers listed in the statute⁵ and (c) transfers to the agent.⁶

Under all three sections, the agent’s authority must be exercised in a manner that is consistent with the principal’s instructions or, if none, in the principal’s best interest with an emphasis on “financial, estate, or tax planning, including minimization of income, estate, inheritance, generation-skipping transfer or gift taxes.”⁷

Major Gifts With Limited Authority. If the principal elects to grant limited authority to make Major Gifts under Section (a) of the rider, the principal may do so by initialing alongside the narrow SMGR language that grants the agent authority to make Major Gifts solely to the principal’s descendants, spouses and parents, up to the federal gift tax annual exclusion amount or, double that amount for beneficiaries other than the spouse, if the spouse agrees to split gift treatment. No other transfers are authorized under this section and the statutory language on the form cannot be modified in the course of drafting the SMGR.

Unlimited Major Gifts and Other Property Transfers. If the principal does not want to be constrained by the language of the limited authority above, the principal can delegate broader authority under Section (b) of the rider, also known as the

“MODIFICATIONS” section. Here, the SMGR may be altered by including provisions to authorize Major Gifts in excess of the above limitations and/or to other beneficiaries except the agent. For example, to delegate authority to make Major Gifts to a charity, the SMGR would be modified to include such a provision and the principal must affirmatively initial alongside a statement granting this specific authority to the agent.

Additionally, if the principal seeks to delegate authority over property transfers other than Major Gifts, subdivision 3(c) of GOL §5-1514 provides a list of specific transactions that can be delegated to the agent by modifying this section in the same manner as described above for a gift to charity. These transactions deal with property interests that are an essential part of estate planning and elder law, and must be carefully considered when drafting an SMGR.

The transactions identified in the new law allow the agent to: (1) open, modify or terminate a deposit account or a joint account in the name of the principal and other joint tenants, (2) open, modify or terminate a bank account in trust form or a transfer on death account, and designate or change the beneficiaries of such accounts, (3) procure life insurance contracts on the life of the principal or annuity contracts for the benefit of the principal, (4) designate or change the beneficiaries of any life insurance contract on the life of the principal or annuity contract for the benefit of the principal as well as for any retirement benefit or plan, (5) create, amend, revoke or terminate inter vivos trusts and (6) create, change or terminate other property interests or rights of survivorship, and designate or change the beneficiaries therein.⁹

Upon a careful review of the transactions listed above, it is noteworthy that not all transactions with respect to the principal’s property interests are delegated in the SMGR. For example, an SMGR is not required for an agent to terminate a life insurance contract¹⁰ or make withdrawals from a joint account or totten trust,¹¹ if these property interests were in existence prior to the creation of the agency.

Finally, the new law provides that Major Gifts and other property transfers authorized under Section (b) of the SMGR may be made outright, to a trust for the benefit of such individual, to a Uniform Transfers to Minors Act account or to a §529 account or plan for the benefit of such individual.¹²

Agent Transfers. Gifts or transfers authorized in Sections (a) and (b) of the SMGR cannot be made to the agent. The emphasis of the new law on clarity and its attempt to avoid financial abuse by the agent require that the principal expressly provides for gifts or other property transfers to the agent in a separate section of the SMGR, Section (c). Here, the principal must initial alongside a statement granting such authority and the SMGR must be modified to set forth the type of transfers that can be made to the agent. As with the prior POA, attorneys must continue to recognize the risk of inadvertently creating a general power of appointment within the agent when modifying this section.

SMGR Execution

Like the new statutory short form POA and its predecessor, similar type and print requirements exist so that the rider is legible and clear.¹³ Quite different, however, is the heightened requirement that the principal's signature be acknowledged and witnessed by two disinterested witnesses in the same manner required for a will execution.¹⁴ Additionally, the SMGR must be "executed simultaneously" with the POA and the principal must initial the required SMGR provision on the POA.¹⁵ An SMGR form containing the requirements discussed above is included under subdivision 10 of GOL §5-1514.

Conclusion

The new law will have a major impact on drafting a valid POA and supplemental SMGR that meets the principal's estate planning or elder law objectives. It is critical for attorneys to ensure that they effectively incorporate the changes enacted through the new law into their practice areas. Since the effective date has moved to Sept. 1, 2009, attorneys have sufficient time to review the new law, work with statutory forms and attend educational classes. The New York State Bar Association has already announced that it will provide educational discussions at their spring meeting and the CLE program in May 2009.

Endnotes:

1. Senate Introductor's Memorandum in Support, Bill No. S4996B.
2. The agent's signature and its proper acknowledgment are required for a valid POA, and the date of acknowledgement is the effective date as to that agent. See GOL §5-1501B, subd. 3. Thus, the agent's signature and proper acknowledgment do not have to occur until such time as the POA is needed.
3. It is worthwhile to note that the new law provides for gifting without an SMGR as long as the non-statutory power of attorney complies with the requirements of subdivision 9 of GOL §5-1514. See GOL §5-1501B, subd. 2. However, the commission has stressed that the SMGR is the "preferred approach."
4. See GOL §5-1514, subd. 2.
5. See GOL §5-1514, subd. 3.
6. See GOL §5-1514, subd. 4.
7. GOL §5-1514, subd. 5.

8. Under the SMGR, if the principal gets divorced, the marriage is annulled or there is a declaration of nullity, the agent's authority to gift or make other property transfers to the former spouse is revoked unless otherwise provided. See GOL §5-1514, subd. 8. Moreover, if the authority to gift is revoked by this provision, such authority is revived upon remarriage to the former spouse. Id.

9. See GOL §5-1514, subd. 3(c).
10. GOL §5-1502F, subd. 1.
11. GOL §5-1502D, subd. 1.
12. GOL §5-1514, subd. 3(c)(9).
13. GOL §5-1514, subd. 9(a).
14. GOL §5-1514, subd. 9(b); See EPTL §3-2.1.
15. GOL §5-1514, subd. 9(c) and 9(d).

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