

## TRUSTS AND ESTATES LAW

## Expert Analysis

# New York's New Statutory Power of Attorney

**O**n Dec. 15, 2020, Gov. Andrew Cuomo signed a series of amendments to General Obligation Law §§15-1501 et seq., effective June 13, 2021, which made significant changes to the requirements for statutory powers of attorney in the state of New York. The first of what have been at times humorously referred to as the New York Statutory “Short Form” Power of Attorney was first created in 1948 as an effort to avoid requiring the principal to spell-out in detail the powers that he was granting to his agent and instead permitted a short hand abbreviation of the powers being granted and relied on the full description of the power which could be found in the statute.

Since 1948 the New York statutory power of attorney has evolved. In 1975 provisions were added permitting a power of attorney to be durable—i.e., the powers granted to the agent survived the principal’s incompetence. In 1988, springing powers of attorney permitted the agent to act only if certain events, typically the principal’s incompetence, occurred. In 1996 principals were permitted to authorize their agents to make gifts to the principal’s family provided such did not exceed \$10,000. The 2009

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amendments introduced the “Statutory Gift Rider” and combined what had previously been three separate powers of attorney, non-durable, durable, and springing, into a singular durable power of attorney which could then be modified to become either non-durable or springing.

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- Elimination of the Statutory Gift Rider.
- Increase in the annual gifting amount.

- Ability to have a person other than principal sign the power of attorney.
- Elimination of the exacting wording requirement.
- Creation of a presumption that the power of attorney is valid.
- Clarification of health care and retirement benefit provisions.

**Elimination of the Statutory Gift Rider.** The use of the Statutory Gift Rider added an extra level of complexity to the execution of a power of attorney. Not only did the attorney (assuming one was employed to prepare and supervise the execution of the power of attorney) supervising the signing need to explain the various provisions of the rider, the Statutory Gift Rider was not really a “rider” since it was required to be separately executed before two witnesses and the signature of the principal was required to be separately acknowledged even though the power of attorney and the rider were required to be signed contemporaneously and the principal was required to initial a box on the statutory short form power of attorney referencing their use of the Statutory Gift Rider. The new statutory power of attorney permits the principal to initial the box adjacent to (I) in the granting provision giving his agent the power to make gifts totaling \$5,000, annually, to those individuals and charitable organizations that the principal customarily made gifts to. This section (I) has replaced the Statutory Gift Rider as previously required. What is not clear to the authors is whether the agent can

make gifts to himself, assuming the principal had customarily made gifts to the agent (see below).

**Increase in the Annual Gifting Amount.** The new statutory power of attorney increases what had been a \$500 cap on gifts made by the agent during the year to \$5,000. If the principal wishes his agent to make gifts of more than \$5,000 per year or to make gifts to himself (note the inconsistency between the language contained in section (g) of the new statutory power of attorney—Certain Gift Transactions—to the language adjacent to (I) in the grant of authority section) the principal can do so through use of the Modification section of the new statutory power of attorney.

**Ability To Have a Person Other Than the Principal Sign the Power of Attorney.** The revisions to the power of attorney law permit a person other than the principal to sign the power of attorney provided: (1) the power of attorney is dated and signed by such person, (2) in the presence of the principal, (3) such person does so at the direction of the principal, (4) that it is witnessed by two individuals that do not have an interest, (5) that the person signing on behalf of the principal writes or prints the principal's name and prints or signs his own name, and (6) that the signature of the person signing on behalf of the principal is acknowledged by a notary public. It should be noted that the notary may act as one of the witnesses, which was carried over from the previous Statutory Gift Rider law.

**Elimination of the Exacting Word- ing Requirement.** As amended, the power of attorney law eliminates the requirement that a statutory power of attorney contain the exact wording contained in the statute in order to be valid, and instead provides that if language in the power of attorney “substantially conforms” to the statute the power of attorney will be valid. A definition of “substantially conforms” is contained in GOL §§5-1501, subdivision 2(n), which

provides in substance that insignificant mistakes in wording, spelling, punctuation, formatting or type face, or the use of language that is essentially the same though not identical, will not invalidate a power or attorney. Furthermore, sections of the statutory power of attorney that are indicated as being optional can be omitted and replaced by the words “Intentionally Omitted.”

**Creation of a Presumption That the Power of Attorney Is Valid.** In an effort to avoid powers of attorney from being rejected by third parties without cause, the new provisions create the presumption that a power of attorney that is properly presented is valid. Third parties doing business in New York cannot reject a properly executed power of attorney unless they have reasonable

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cause. The recipient of a statutory power of attorney executed after June 12, 2021 will have 10 days in which to either honor the power of attorney that is presented or reject the power of attorney in a writing setting forth the reasons for the rejection. The agent, upon request of the third party, is permitted to certify any factual matter concerning the principal, the agent, or the power of attorney so as to rectify a rejection, and the third party is permitted to rely on such certification. The third party may also request and rely upon an opinion of counsel concerning the power of attorney. If a third party rejects a power attorney and receives a written response to their reasons for rejection, the third party has seven days to either honor the power of attorney or finally reject the power of attorney in a writing providing the written reasons for their rejection. If it

is determined that the third party did not act reasonably before rejecting the power of attorney, a court may award damages including attorney fees and costs. This provision is retroactive to powers of attorney executed prior to the effective date of the new provisions provided it was executed in accordance with the laws then in effect. Furthermore, the amendments provide that if a third party acts reasonably when accepting the power of attorney it will be protected against unauthorized acts of the agent.

**Clarification of Health Care and Retirement Benefit Provisions.** The amendments make it clear that powers relating to health care matters are limited to financial matters only and not health care decisions which are governed by a health care proxy. The amendments also make it clear that powers granted relating to retirement benefits are limited to investment decisions, payment options and the exercise of any elections that the principal may be able to make. However the agent may not change the designations of beneficiaries made by the principal unless such authority is expressly given in the Modifications section of the statutory power of attorney.

Whether the amendments made to New York's statutory short form power of attorney have satisfactorily addressed all of the issues remains to be seen. However, these amendments go a long way in restoring the simplicity to New York's statutory “Short Form” power of attorney, and nonetheless we can be sure there will be revisions again in the future.