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Power of Attorney **Statutory Overhaul** Set to Take Effect

Changes to creation and use are significant.

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NEW YORK STATE introduced the power of attorney (POA) in 1948 as a way to plan for the absence of servicemen and women in the armed forces during and after World War II.[1] It turned out that acceptance of powers of attorney, including their use in real estate transactions, became far more widespread than the original proponents ever considered.[2]

A major overhaul of the POA law that will take effect on Sept. 1, 2009,[3] dramatically changes how powers of attorney will be created and used. This article focuses on the POA changes that are most relevant to real estate practitioners.

The new statute, among other things, repeals General Obligation Law (NYGOL) §5-1501 and replaces it with new NYGOL §§5-1501, 5-1501A and 5-1501B. For the first time, the focus of the POA law is on the agent rather than the principal.[4]

The agent must now sign the POA and act with the standard of care of a prudent person dealing with the property of another.[5] This comports with the overarching themes of consumer protection, accountability and the reduction of opportunities for fraud, all of which have gained increased notoriety. With the present state of the economy and the daily reports of unprecedented financial exploitation and scandal, this amendment arrives at an opportune time. It follows several other recent enactments to foster honesty and transparency in the marketplace, such as the Property Condition Disclosure Act, Home Equity Theft Prevention Act, predatory lending laws and the Foreclosure Prevention and Responsible Lending Act.

The POA has always been an attractive arrangement for real estate transactions, as a tool of convenience for both the client and attorney. Frequently, it is the only way a transaction can close.

Under the new law, a POA will be radically different in form and substance from what practitioners are used to. For example, the distinction between a durable and nondurable POA has been eliminated. Every POA created after Sept. 1, 2009, will be durable, meaning that the POA will be unaffected by the principal's incapacity, unless otherwise expressly provided.

Creating a Valid Power of Attorney

Powers of attorney validly executed prior to Sept. 1, 2009, continue to remain valid and may be used after that date.[6] The new law applies only to powers of attorney executed on or after Sept. 1, 2009. However, if a new POA is executed after that date, even for a limited or specific purpose, all previous powers of attorney are automatically revoked.[7]

In order to create a valid POA after Sept. 1, 2009, the instrument must be typed or printed using a legible font at least 12 points in size.[8] It must be signed and dated by the principal and the agent, with both signatures acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.[9] The agent's signature, denoting acceptance of the appointment, is a prominent new requirement that creates a "cooling-off" period to give the principal more time to reflect upon the seriousness of granting such authority.

The principal and agent are not required to sign simultaneously or in the presence of each other, and a lapse of time between the acknowledgments of the signatures will not invalidate the POA. The statute does not state whether the order of the signatures has an impact on the validity of the document.

On one hand, one would think that the principal must sign first because the POA takes effect on "the date on which an agent's signature is acknowledged."[10] How could the POA take effect on the acknowledgment of the agent's signature (attesting to the acceptance of the delegation of power) if the principal has not signed it first?

On the other hand, one could say that the statute really means that the POA is effective only when the agent's signature is acknowledged, provided that the principal also signs the POA. The better practice is to have the principal sign first, even if this sequence of execution may be more time consuming.

One is not required to use the new statutory short form POA set forth in NYGOL §5-1513.[11] However, the statute is emphatic that every POA must "contain the exact wording" of paragraphs (a) and (n) of subdivision one of that section.[12]

Paragraph (a) warns the principal of the broad authority the document grants to the agent. It also expressly advises the principal of the right to revoke the POA.[13]

Paragraph (n) thoroughly explains the agent's function, fiduciary obligations and potential for liability for acting outside of the authority granted in the document.[14]

Paragraph (n) is the new centerpiece of the POA and it stands in sharp contrast to the current statute's silence about the agent's rights and responsibilities. No New York statute currently imposes a fiduciary duty on the agent for the benefit of the principal.[15] If fiduciary obligations exist, they are solely common law duties.[16] The drafters of the new law concluded that the common law responsibility of an agent was insufficient to prevent the recurring cases of abuse of power.[17] Therefore, they legislated specific fiduciary duties that must be enumerated in every POA.

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Major Gifts and Other Transfers

Current law does not differentiate powers of attorney on the basis of the value of the principal's assets or the agent's economic authority.

The new statute does. It provides for special treatment of powers of attorney involving "major gift transactions and other transfers."[18] These include every transfer, except transfers customarily made to individuals and charitable organizations of up to $500 per year, per recipient.[19] An agent may make a valid major gift or other transfer under a POA, only if the principal has executed a Statutory Major Gifts Rider (SMGR).[20] Thus the basic POA has become an instrument of nominal value, and certainly not very useful in real estate transactions.

The mechanics for creating a valid SMGR are more rigorous than the requirements for creating a valid POA. The SMGR must be:

1. typed or printed in a legible font at least 12 points in size;[21]
2. accompanied by a statutory POA in which the principal initialed the language authorizing the agent to make major gifts and other transfers of property;[22] and
3. signed and dated by the principal, with the signature of the principal acknowledged and witnessed by two subscribing witnesses, like a will.[23]

These demanding requirements are intended to ensure that the principal fully appreciates the serious nature of the decision to grant an agent "authority to take actions which could significantly reduce [your] property or change how [your] property is distributed at your death."[24]

Unlike the POA, the agent is not required to sign the SMGR. Rather, the new statute requires the POA and SMGR to be read together as a single instrument.[25] The drafters apparently relied on the single instrument rule, and the requirement that the POA and SMGR be executed simultaneously, in order to ensure that the new fiduciary obligations placed on the agent in the POA would apply to the expanded authority granted in the SMGR.

SMGR Key for Real Estate Transactions

The new statute does not directly address the question of whether real estate transactions require a statutory major gifts rider. One might incorrectly think that a basic POA is sufficient because the basic form still includes a check-off box for real estate transactions. However, simply checking off the box in the basic POA is not adequate.

Under the new statute, an agent is not permitted to "create, change or terminate [other] property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein" unless the authority is expressly granted in an SMGR or in a non-statutory POA that contains SMGR powers.[26] Therefore, it is hard to imagine a real estate transaction that would be possible under a basic POA.

Executing and delivering a deed, granting an easement, and entering into mortgage and mezzanine loan financing all have the capacity to "create, change or terminate…property interests…."[27] Accordingly, every real estate transaction, except those exempted by the customary $500 gift exception, may only be effectuated under a POA accompanied by an SMGR.

Include a Statement of Purpose?

Oddly, even though the new statute does not require the principal to include instructions or a statement of purpose in the "Modifications" section of the POA, under §5-1504 (1)(a)(9), title companies may refuse to recognize powers of attorney when such instructions or purpose are not included.[28]

Therefore, when an SMGR is used for real estate transactions, in addition to the execution requirements mentioned above, the principal should also insert specific instructions or a statement of purpose relating to the transaction in which the POA will be used.

Recording a Power of Attorney

RPL §294 authorizes the recording of a POA. Once recorded, there is constructive notice to all with respect to the agent's authority to act on behalf of the principal. Where a POA has been recorded, a written revocation pursuant to RPL §326 must be recorded to terminate the POA.[29] As in the past, the revocation of the POA does not invalidate any exercise of the power prior to the recording of the revocation.

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Surprisingly, however, even though one records an express revocation of the POA, the recording does not constitute constructive notice to third parties that the POA has been terminated.[30] Unless and until a third party has actual notice of the revocation, the principal will be bound if the third party acted in good faith on the recorded POA.[31]

This strange construct seems to be antithetical to the guiding principles behind the new law and could lead to a situation where a principal may be bound by the acts of a rogue agent, even after the recording of a revocation.

Technical Amendments Underway

On June 15, 2009, an additional amendment to the POA law passed the Assembly.[32] However, as of the press date of this article the Senate has not acted on the amendment.

Although it has been referred to as a "technical" amendment, it is really much more. Several important and logical changes will be implemented if this amendment is enacted, including:

(1) If a principal executes a new POA it will no longer automatically revoke a previous POA unless the principal gives written notice of its revocation to the agent named in the previous POA.[33] Thus, one can have multiple powers of attorney extant simultaneously.

(2) The definition of the SMGR is clarified to indicate that it is used for "all" (not "major") gift transactions or other transfers except the $500 customary gift.[34]

(3) The $500 gift exclusion will become a yearly aggregate amount for the agent to disburse.[35] Without this change, the exemption allows multiple gifts of up to $500 each to different donees without an annual aggregate limit.

Conclusion

The title of the new statute, "Statutory Short Form and Other Powers of Attorney for Financial Estate Planning," suggests that the true focus of this amendment is financial estate planning. However, the broad scope of the statute has the obvious potential to delay and complicate real estate transactions.

For assistance in making the transition to the new law, a checklist for powers of attorney to be used in real estate transactions can be downloaded from the authors' firm's Web site at http://www.ruskinmoscou.com/real_estate.htm.

1. The New York State Law Revision Commission. 2007 Recommendation on Proposed Revisions to the General Obligations Law Powers of Attorney. Page 8.
2. Id at 5 and 20.
3. 2009 N.Y. Laws ch. 4. S. 1728, A. 04392. Amends Chapter 644 of 2008. Originally, the effective date of the new POA law was scheduled for March 1, 2009. On Feb. 25, 2009, Governor Patterson signed into law a bill extending the effective date to Sept. 1, 2009. The justification for the extension was to provide the legal community with additional time to learn the new intricacies of the law. New York State Senate, Introducer's Memorandum in Support of A04392.
4. New York State Senate, Introducer's Memorandum in Support of S4996B.
5. The New York State Law Revision Commission. 2007 Recommendation on Proposed Revisions to the General Obligations Law Powers of Attorney. Page 26.
6. 2008 N.Y. Laws ch. 644 §21.
7. 2008 N.Y. Laws ch. 644 §19, 5-1511(6).
8. 2008 N.Y. Laws ch. 644 §2, 5-1501B(1)(a).
9. 2008 N.Y. Laws ch. 644 §2, 5-1501B(1)(b). See also N.Y. REAL PROP. LAW §§309, 309-a, and 309-b.
10. 2008 N.Y. Laws ch. 644 §2, 5-1501B(3)(a).
11. 2008 N.Y. Laws ch. 644 §2, 5-1501B(4).
12. 2008 N.Y. Laws ch. 644 §2, 5-1501B(1)(d).
13. 2008 N.Y. Laws ch. 644 §19, 5-1513(1)(a).
14. 2008 N.Y. Laws ch. 644 §19, 5-1513(1)(n).
15. The New York State Law Revision Commission. 2007 Recommendation on Proposed Revisions to the General Obligations Law Powers of Attorney. Pages 6, 15 and 24. New York State Senate, Introducer's Memorandum in Support of S4996B.
16. Id.
17. Id.
18. 2008 N.Y. Laws ch. 644 §2, 5-1501(13).
19. 2008 N.Y. Laws ch. 644 §19 5-1514(1). See also 2008 N.Y. Laws ch. 644 §10, 5-1502(I)(14).
20. 2008 N.Y. Laws ch. 644 §10, 5-1502(I)(14).
21. 2008 N.Y. Laws ch. 644 §19, 5-1514(9)(a).
22. 2008 N.Y. Laws ch. 644 §19, 5-1514(9)(c). The statute uses the term "initial" but we presume that the principal's signature instead of initials will be valid.
23. 2008 N.Y. Laws ch. 644 §19, 5-1514(9)(b). Unlike a statutory POA, the SMGR does have to be witnessed by two disinterested persons in the manner described in N.Y. EST. POWERS & TRUSTS LAW §3-2.1(a)(2). If one is using a non-statutory form, the POA may include the major gift powers if the POA is executed with the formalities of the SMGR.
24. 2008 N.Y. Laws ch. 644 §19, 5-1514(10).
25. 2008 N.Y. Laws ch. 644 §19, 5-1501(14) and (15). The SMGR also contains language indicating that it must be read with the POA as a single instrument.
26. 2008 N.Y. Laws ch. 644 §19, 5-1514(3)(c)(9).
27. Id.
28. 2008 N.Y. Laws ch. 644 §18, 5-1504 (1)(a)(9).
29. 2008 N.Y. Laws ch. 644 §19, 5-1511(4).
30. 2008 N.Y. Laws ch. 644 §19, 5-1511(5).
31. Id.
32. New York State Assembly Bill A08392.
33. Id at §2, 5-1511(6).
34. Id at §4, 5-1501(14).
35. Id at §5, 5-1513 (1)(f)(2)(I). If a principle appoints several agents, it appears that the annual limit is "per agent."