

## Changes to New York's Power of Attorney Law Have Become Effective

June 17, 2021

Changes to New York's rule for powers of attorney for personal affairs became effective on June 13, 2021. Title 15 of Article 5 of New York's General Obligations Law establishes a "statutory short form power of attorney" by which a "principal" can designate an "agent" to act on the principal's behalf on a range of personal and financial matters by executing and acknowledging before a notary and two witnesses the prescribed statutory form. The revisions address criticisms of prior law, particularly the complexity of the previous statutory form and gifts rider and the procedure for the acceptance and rejection of the form by third parties.

### Substantial Conformity Instead of Exact Wording

Under prior law, the statutory short form was required to contain the exact wording of the form set forth in section 5-1513 of the General Obligations Law. The new law replaces the exact wording requirement with a substantial conformity standard, and provides that a power of attorney will substantially conform to the form set forth in section 5-1513 even if there are insignificant mistakes in wording, spelling, punctuation or formatting, or language that is essentially the same as but not identical to the statutory form. Additionally, failing to include language that is not relevant to a particular circumstance will not, in itself, mean that the power of attorney does not substantially conform to the requirements. Substantial conformity does not depend on the presence or absence of a particular clause.

### Execution Changes

The new law allows for someone other than the principal to sign the power of attorney on behalf of the principal, in the presence and at the direction of the principal, provided that the person signing may not be designated as the principal's agent or successor agent in the power of attorney. This is a meaningful change for people with disabilities who may not physically be able to execute the form on their own behalf.

The new law also requires that the power of attorney be signed, initialed and dated, with the signature of the person signing acknowledged as required for the conveyance of real property, and be witnessed by two disinterested persons (one of whom may be the notary and neither of whom may be named as agent or may be a permissible recipient of gifts) with the same formalities as a will (that is, the power of attorney must either be signed in the presence of the witnesses or acknowledged to each witness to have been signed by the principal or at the principal's direction). The statutory short form contains a statement of the witnesses expressly acknowledging that these execution requirements were followed.

Although powers of attorney properly executed under the law in effect at the time of the execution remain effective, powers of attorney in the form set forth in the prior law that are executed after the effective date of the new law (i.e., post-June 12, 2021) will not be effective unless the execution requirements of the new law are satisfied. As a practical matter, it is unlikely that a superseded form executed after June 12, 2021 would comply with the new execution requirements as the superseded form does not include blanks for two witnesses to sign, nor does it include the statement of the witnesses expressly acknowledging that the execution requirements were followed.

### No Separate Statutory Gifts Rider

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The revisions have eliminated the separate statutory gifts rider. Under the new law, the amount of gifts that an agent may be authorized to make with respect to personal and family maintenance matters increases from \$500 to \$5,000 per calendar year, and the principal may authorize gifting in excess of such amount in the “Modifications” section of the new power of attorney form.

#### **Procedures for Acceptance and Refusal of Powers of Attorney by Third Parties; Protections for Reliance on Power of Attorney**

The new law elaborates on prior section 5-1504 and establishes standards and adds protections for third parties who rely on a power of attorney without knowledge of any defect. The third party may rely on an agent’s certification of any factual matters or on an attorney’s opinion as to any matters of law concerning the power of attorney if the third party provides in writing the reason for the request. Once a third party reasonably accepts a power of attorney, the third party shall be held harmless from liability for a transaction conducted in reliance on the form.

The new law fixes a ten business day period from presentation of an original or attorney-certified copy of the properly executed power of attorney for third parties to either honor the form, reject the form in a writing that sets forth the reasons for rejection, or request that the agent execute an acknowledged affidavit stating that the power of attorney is in full force and effect. Thereafter, if the third party receives a written response to the reasons for the rejection, it will have seven business days after receipt of the writing to either honor the form or finally reject the form in a writing that sets forth the reasons for rejection. These time requirements are not imposed on the state Departments of Audit and of Health, public retirement systems and social service districts administering Medicaid and other public health insurance programs.

Powers of attorney and statutory gifts riders properly executed under the law in effect at the time of the execution remain effective. Third parties located or doing business in the state of New York may not refuse to honor a properly executed statutory short form power of attorney in accordance with the laws in effect at the time of execution, unless there is reasonable cause to do so. The revised law allows the court to award damages, including reasonable attorney’s fees and costs, if the court finds that the third party unreasonably refused to honor a power of attorney. The new law strikes a balance for third parties of being held harmless from liability for reasonable reliance on the statutory form and facing possible consequences of damages, fees and costs for the unreasonable rejection of the form.

#### **Conclusion**

The new law should address the concerns voiced by critics of the current law as it simplifies the form and execution process, sets forth clear standards and procedures for third party reliance and rejection of the form, and adds consequences for third parties acting unreasonably in refusing to honor an agent’s authority under the statutory form.

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