

Changes to New York's Power of Attorney Law

January 20, 2021

On December 15, 2020, Governor Andrew Cuomo signed legislation to amend the New York Power of Attorney Law, Sections 5-1501 through 5-1514 of the General Obligations Law, such changes to take effect on June 13, 2021. Title 15 of Article 5 of the 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 the prescribed statutory form. The new legislation addresses widespread criticism of the current law, particularly relating to the complexity of the current 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 the current law, the statutory short form must contain the exact wording of the form set forth in section 5-1513. Many practitioners deem this standard unnecessarily burdensome as minor mistakes or changes in wording could result in invalidity or rejection of the power of attorney by third parties. 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.

It is anticipated that a chapter amendment will be introduced in early 2021 with the same effective date as the new law, which will add the requirement of two disinterested witnesses (one of whom may be the notary and neither of whom may be permissible recipients of gifts) for all powers of attorney.

No Separate Statutory Gifts Rider

Under section 5-1514 of the current law, if a principal intends to grant the agent the power to make gifts above \$500, then the principal must expressly grant this authority in a separate statutory form that is acknowledged and witnessed by two witnesses simultaneously with the execution of the power of attorney. While the separate statutory gifts rider was intended to heighten the principal's awareness of the significance and possible consequences of granting gifting authority, many practitioners believe that the complexity of the form and execution requirements often lead to confusion (rather than awareness) and to improperly executed documents. 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, instead of executing the separate statutory gifts rider.

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

The new law elaborates on current 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. It is expected that the chapter amendment will exempt the Department of Health, including social services districts, from the time restrictions applicable to third parties.

Under both the current and new law, 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. However, in practice, under the current law, third parties could reject the power of attorney form or require use of their own form without consequence since there is no provision for sanctions for unreasonable refusal. The new 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.

Powers of attorney and statutory gifts riders properly executed under the law in effect at the time of the execution will remain effective after the new law comes into effect on June 13, 2021.

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