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The Powerful Power of Attorney: Changes Coming in New York State

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Small but significant changes are coming soon to the New York State statutory power of attorney form effective June 13, 2021. By legislation passed on December 13, 2020 and signed into law by Governor Andrew Cuomo, all powers of attorney executed after June 13, 2021 in New York must meet certain updated criteria in order to be valid.

The New York form is notorious for its stringent language and execution requirements. The last time the requirements were amended in 2009 and then again in 2010, the state combined the then-current forms for durable, non-durable and springing powers of attorney into one, ballooning the statutory form to 14 pages, including a separate statutory gifts rider. (The omission of this rider is one of the key highlights of the public-policy driven edits to the new form.)

Key Changes

While revisions to the form of the New York State power of attorney have been under consideration for the past several years, the pandemic situation over the last fourteen months may have driven the legislature to finally update the form power of attorney to make it more efficient to execute and use. Once-fatal flaws in the preparation and execution of New York powers of attorney are now afforded some forgiveness in certain situations. Notably, a prior requirement was that the Statutory Short Form Power of Attorney must contain the exact wording set forth within the law. The new law provides that the wording which "substantially conforms" will be deemed acceptable, allowing for minor changes or errors in drafting. Currently, powers of attorney have and will continue to be rejected due to mistakes in the "exact wording." The new law also provides some built-in forgiveness for (i) an insignificant mistake in wording, spelling, punctuation or formatting, or the use of bold or italic type, or (ii) uses of language or formatting that is essentially the same as, but is not identical to, the statutory form, including utilizing language from a previous statute (Chapter 323). That being said, the best practice remains using the statutory form, if at all possible.

One change that is likely a direct result of the pandemic is the new rule that powers of attorney no longer need to be personally executed by the principal, if the power of attorney is signed on behalf of the principal by a person other than the agent in the principal's presence, and at the principal's direction. This aspect may be a game changer for seriously ill or infirm clients who wish to appoint agents by power of attorney, but whom may not be able to hold or effectively control a pen to sign for themselves.

The law now creates a presumption of validity for powers of attorney executed after June 13, 2021, and puts other parameters upon the acceptance or rejection of a form power of attorney which did not previously exist. A person who in good faith accepts an acknowledged and witnessed power of attorney without actual knowledge that the signature is not genuine, may rely upon the presumption that the signature is genuine. Similarly, a person who in good faith accepts an acknowledged and witnessed power of attorney without actual knowledge that the subject power is void, invalid, or terminated, or that the agent's authority is void, invalidated, or terminated, or that the agent is exceeding or improperly exercising the power of attorney may rely on the subject power of attorney.

Under the new legislation, there is a provision that all properly presented powers of attorney are valid, which prevents third parties from rejecting them without cause. Any party receiving a power of attorney executed on the new form has a ten-day window to either accept it or reject it in a writing setting forth the reasons for the rejection. Any person or institution asked to accept the power of attorney may

request either an affidavit of full force and effect certified by the agent, or an opinion of counsel as to any matter concerning the power of attorney, and may rely on such evidence without further investigation.

While the changes generally serve to simplify the process and to ensure that the principal's wishes may be carried out in spite of a minor error or issue with the presentation of the power of attorney, there are some additional requirements as well. The new law requires that powers of attorney now be witnessed by two persons who are not named in the instrument as agents or as permissible recipients of gifts thereunder. It should be noted that the person who takes the acknowledgement may also serve as a witness, which may simplify the execution. In the current form, the two-witness requirement was reserved for the Statutory Gifts Rider.

Real Estate Transaction Implications

Noting these changes and using the appropriate form will be of great importance to New York estate planning and real estate attorneys and others who often execute documents on behalf of their clients under modified powers of attorney related to a specific transaction. In real estate transactions, documents signed under power of attorney are required to be submitted for recording along with the original power of attorney itself. Real estate practitioners generally prepare a modified power of attorney on the statutory form in connection with a specific transaction. The form provides a section that allows for modifications to the powers of the agent, wherein the attorney would generally specify that the power of attorney is valid only with respect to the particular real estate (or cooperative apartment) transaction set forth. As a result, real estate attorneys find themselves preparing modified powers of attorney for clients on a relatively frequent basis, and will need to ensure that they are using the correct current form so that the documents (deeds, mortgages, etc.) will be accepted by the recorder and/or the cooperative managing agent. Failure to have the power of attorney properly executed on the correct form can and will result in a delay or adjournment of the scheduled closing for a real estate transaction, so this will be relevant on a regular basis.

It should be noted that validly executed powers of attorney which were on the then-current form executed on or prior to June 12, 2021, will remain valid.

Trust and Estate Implications

Some aspects of the new legislation that will make the jobs of client advisors and trust and estate attorneys easier are the following:

- **Presumption of Validity** Third parties doing business in New York can no longer reject a power of attorney that has been properly executed without reasonable cause. They have ten days to either honor or reject the power in a writing setting forth the reasons for the rejection. The agent can respond to rectify the rejection and the third party has another seven days within which to reject or honor the power of attorney. If it is later determined that the third party did not act reasonably in its rejection, a court may award damages including attorney fees and costs. Further, the amendments in the legislation provide that if a third party acts reasonably in accepting the power of attorney, it will be protected against unauthorized acts of the agent thereunder. This is an important addition as it expands the protection to third parties accepting an agent's authority under a power of attorney relying in good faith without knowledge of the principal's signature.
- **Annual Gift Increase** The prior power of attorney capped annual gifts allowed by the agent at $500; that has now been increased to $5,000. The principal can, of course, grant authority to make larger gifts or gifts to the agent himself in the Modifications section.
- **Healthcare and Retirement Benefits** The amended statute makes it clear that powers granted to the agent regarding retirement benefits are limited to only payment options and investment decisions. As with the previous form of power of attorney, the principal must expressly give the agent authority to change the beneficiary designation of retirement benefits if the principal wants the agent to have such a power. The amendment also makes it clear that any powers relating to healthcare are limited to payment and

financial matters only. Healthcare decisions are still governed by Healthcare Proxies and end of life decisions are still governed by Living Wills.

If you have questions or would like more information, please contact Bridget La Rosa (larosab@whiteandwilliams.com; 212.714.3067) for trust and estate matters and Kristen Andreoli (andreolik@whiteandwilliams.com; 212.631.1256) for real estate matters.

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