

The New NY POA Law

John Hinchcliff
Estate Planning Council Presentation
September 10, 2009

Legislative History

- Problems with the old law:
 - Gifting
 - Retirement and other benefit programs
 - Case law developments

- Uniform Power of Attorney Act
 - Interstate issues

- Effective Date

Major Changes

- Presumption of Revocation for prior POA's
- Statutory Major Gift Rider
- Monitors
- Agent's signature required
- Plainer English and clearer instructions

The Old Form Versus the New

Old Form:



The Old Form Versus the New

New Form:



When POA Effective

- When signed/acknowledged by both Principal and Agent
 - Agent can sign any time, even years later, but MUST sign before POA is effective
- Important Information for the Agent
 - Ignorance no longer an excuse
 - Keep property separate & keep receipts
 - No gifts to yourself w/o SMGR

3d Party's Acceptance of POA

- No Third Party in NYS shall refuse “w/o reasonable cause” to honor statutory short form POA, including SMGR
 - Non-statutory POA still valid, but financial institutions not required to honor it
- “Reasonable Cause” defined by GOL
 - Not reasonable: “We require our own form...”
- Unlawful for 3d Party to refuse to honor
 - Special proceeding is exclusive remedy

Monitors

- “Monitor” defined: Person appointed with authority to request, compel and receive production of records
- Monitor has no fiduciary duty
- “Springing” Monitor
- Unanswered Questions:
 - What can Monitor do with records?
 - Who pays for the special proceeding to compel?

Special Proceedings by or against Agent

- Compel agent to produce records
- Determine validity of POA
 - Principal's capacity; issues of fraud, duress, etc.
- Determine agent's compensation, if any
- Approve records and transactions
- Remove agent or approve resignation
- Determine how multiple agents must act
- Construe any power
- Compel acceptance

Automatic Revocation

(e) This POWER OF ATTORNEY REVOKES any and all prior Powers of Attorney executed by me unless I have stated otherwise below, under "Modifications."

If you are NOT revoking your prior Powers of Attorney, and if you are granting the same authority in two or more Powers of Attorney, you must also indicate under "Modifications" whether the agents given these powers are to act together or separately.

10

Agent's Signature for Principal

- Statute requires disclosure of agency
 - "(name of agent) as agent for (name of principal)"
 - "(name of principal) by (name of agent) as agent"
 - Any similar written disclosure of agency relationship

11

Multiple Agents: Together/Separately

OLD
(If more than one agent is designated, CHOOSE ONE of the following two choices by putting your initials in ONE of the blank spaces to the left of your choice)
[] Each agent may SEPARATELY act.
[] All agents must act TOGETHER.
(If neither blank space is initialed, the agents will be required to act TOGETHER)

NEW
If you designate more than one agent above, they must act together unless you initial the statement below.
 My agents may act SEPARATELY.

- Agents may act separately if
- Prompt action required to avoid irreparable injury to principal's interest
 - Co-agent unavailable because of "absence, illness or other temporary incapacity"
 - Problems:
 - Only 1 agent signs; proof of need for prompt action, etc.
 - Multiple Agents who have not yet signed POA; is POA effective?

12

Durability and Springing POA

- New form creates Durable power “unless I have stated otherwise below, under “Modifications”
- No separate Springing POA form.
 - New POA form can be made into a Springing POA by using the Modifications provision.

13

Changes in the Powers

- (I) Personal relationships and affairs
- (I) Personal and family maintenance
 - OK to continue pattern of gifting to individuals and charities up to \$500 each/year
 - All other gifting subject to SMGR

14

Changes in the Powers

- (J) Benefits from military service
 - Old POA’s now read to include new meaning
- (J) Benefits from governmental programs or civil or military service
 - “Military service” in old forms now deemed to include new scope
 - Covers Medicaid applications

15

Changes in the Powers

- (K) Records, reports and statements
- (K) Health care billing and payment matters; records, reports, and statements
 - Does not allow access to all Protected Health Information
 - May allow access to some PHI under regs of SSA

16

Changes in the Powers

- For (C), (D), (F), and (L), relating to investments, bank accounts, insurance and retirement accounts:
 - Express prohibition on changing terms of trusts or beneficiary designations or account titles unless done under SMGR
 - No gifting or changing of estate plan by making joint accounts or changing bene designations, w/o SMGR

17

Statutory Major Gifts Rider

- Two steps required:
 - (1) Initial under (h) of main POA form
 - (2) Execute SMGR
- Execution requires both acknowledgement and 2 witnesses with EPTL Will formalities
- POA and SMGR must be executed together

18

Statutory Major Gifts Rider: Limited Gifts

- Initialing (a) allows gifts up to annual exclusion (\$13,000)
 - Allows twice the max as split gift when spouse consents
 - Allows agent to give consent to spouse's gift split
 - Gifts must be in PRINCIPAL's best interest
 - Does not by itself allow gifts to Agent

19

Statutory Major Gifts Rider: (b) Modifications

- Allows Principal to authorize
 - Gifts up to specified amount, or unlimited
 - Modify joint accounts, accounts in trust form
 - Modify bene designations, POD designations
 - Create, amend, terminate inter vivos trust
 - Income Only Trusts
- Power must be expressly granted

20

Statutory Major Gifts Rider: (c) Gifts to Agent

- Section (c) must be separately initialed
- Principal must specify authority for major gifts to agent
 - OK to cross-reference powers in (b)?
- Agent may only make gifts to him/herself if agent "reasonably deems" it to be in Principal's best interest

21
