Top Five Areas of Concern About the New Statutory Short Form Power of Attorney

Prior to September 1, 2009, New York's power of attorney form was simple to fill out and could be bought in local stationery stores without the need to go to an attorney. However, tabloid-worthy horror stories of agents misusing their power to steal from the aged and infirm led the legislature to react—and some might say overreact. A sweeping new financial-powers law took effect in New York on September 1, 2009, and it has created some unintended traps for residents.

1. ***Revocation***

By signing the new Statutory Short Form Power of Attorney, even one for a limited purpose or period, there is the potential to invalidate a previously executed general purpose power. The General Obligations Law, as amended, states that a new Statutory Short Form Power of Attorney automatically revokes any previously executed Powers of Attorney, while the previous law required an affirmative act to revoke an old power. Therefore, signing a new Power of Attorney in New York- even a limited power given to your real estate lawyer to conduct a closing in your absence, or to your son to handle your brokerage account—will automatically revoke any old powers, even the broader power you might have given to your spouse when you signed your will and other estate planning documents.

The new law contains no exceptions for powers executed in connection with day-to-day commercial transactions, such as stock powers, shareholder proxies, and powers given to creditors in connection with a credit transaction. This troubling and perhaps unintended extension of the protective principles of the new law to arm's length and other commercial transactions has the potential to significantly impede ordinary commercial activity within New York State.

To avoid the revocation problem, a statement indicating that the current Statutory Short Form Power of Attorney does not revoke any prior Powers of Attorney can be included in the Modifications Section (Section "g") of the Statutory Short Form Power of Attorney prior to execution. This nuance adds a level of complication that practitioners must be aware of and must discuss with their clients.

2. ***Ambiguity Regarding Scope of Gifting Authority***

The standard for the agent of gifting (which is listed under each of the three options, being (a) Grant of Limited Authority to Make Gifts, (b) Modifications, and (c) Grant of Specific Authority for an Agent to Make Gifts or Other Transfers to Him/Herself, of the Statutory Major Gifts Rider Form, "SMGR") is that, "The authority must be exercised pursuant to my (the principal's) instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest." (This sentence is also written into the Statutory Major Gifts Rider form in the "Caution to Principal" section). The principal may include language of Section "b" of SMGR, regarding the scope of the authority of gifting which he would like to grant to the agent. It is doubtful as to whether a principal can override the landmark case, *Salvation Army v. Ferrara* 2006 (7 N.Y. 3d 244 (2006)), in which the Court of Appeals limited the statutory gift-giving provisions and determined that the gift-giving authority given to, and any gifts made by, the attorney-in-fact, whether to the attorney-in-fact or others, had to be in the "best interests of the

principal," which was narrowly defined as gift giving authority to the attorney in fact which is allowed only if it is for "gift, income, inheritance, generation-skipping transfer, and estate tax purposes."

3. ***Capacity Requirements***

The new General Obligations Law specifically states that the "Principal must be capable of comprehending the nature and consequences of the act of granting, revoking, or amending a power of attorney or any provision in the POA." (GOL §5-1510(2)(b)). This is a codification of the common law.

It appears from the General Obligations Law, as amended, that the principal must have the capacity as one who enters a contract (see GOL §5-1501(3) for definition of capacity). This regulation seems now to require that the attorney presiding over the execution of the Statutory Short Form Power of Attorney must ensure the Principal has the capacity to sign the document, which now appears to be higher than the capacity required for a Last Will and Testament.

4. ***Agent's Compensation***

Unless specifically set forth in the Durable Statutory Power of Attorney, Modifications Section (g), an agent is not entitled to receive compensation from the assets of the Principal for responsibilities performed pursuant to a Power of Attorney, but is entitled to receive reimbursement for reasonable expenses incurred in connection with his or her duties. The details of the "reimbursement" have yet to be defined. This requirement will now necessitate that practitioners engage their clients in a discussion regarding the compensation of the agent which would logically have to be reasonable under the circumstances *e.g.*, breadth of work, size of assets, number of assets, etc.

5. ***Monitor Responsibilities and Compensation***

Under the General Obligations Law, as amended, a Principal can appoint a "monitor" in paragraph (i) of the new Power of Attorney New York Statutory Short Form who is entitled to request and receive records of transactions of the agent. The monitor does not have a fiduciary duty like the agent. The monitor is not entitled to compensation but, similar to the agent, a provision for compensation of the monitor can be added in the Modifications section (g) of the Power of Attorney.

The monitor has the ability to review the agent's acts without effort or expense of court proceeding (GOL §5-1509). However, if the agent refuses to comply with the monitor's request for records, the monitor may institute a special proceeding to compel the agent to produce the records, which can add significantly to the complexity of the Power of Attorney. Additionally, the statute is unclear as to where the funds should come from to institute the special proceeding. This will also necessitate that practitioners engage their clients in a discussion regarding the appointment of a monitor and the compensation of the monitor.

As you can see, there are some unintended pitfalls that have begun to surface and which we as practitioners must be aware.