

“New Durable Statutory Power of Attorney Form Enacted With Major Changes Effective, September 1, 2009”

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On September 1, 2009, significant changes to the New York law of Durable Powers of Attorney will take effect.

The current statute in the General Obligations Law has a Durable Power of Attorney Statutory Short form, which has been in effect since January 1, 1997 and is a basic form in which you can add unlimited gift giving authority to the Power of Attorney within the form by initialing a box. In Salvation Army v. Ferrara, 2006 N.Y. Slip Op. 05156 (2006) the Court of Appeals restricted the statutory provisions and determined that the gift-giving authority including gift giving to the attorney-in-fact, 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, and estate tax purposes.

The new law, which was sought to be passed even before Ferrara, and was being proposed by the Law Revision Commission has now just been passed similar to what has been proposed for the last 4 to 5 years. It makes significant changes and namely, provides for unlimited gift giving including gifts to the attorney-in-fact so long as a document called a Statutory Major Gifts Rider, (SMGR), which is a separate form being a rider to the new Durable Statutory Power of Attorney is signed by two witnesses (similar to a will) and the SMGR also requires an acknowledgment. The Durable Statutory Power of Attorney must be signed, dated and duly acknowledged, not only by the principal, but now also signed by the agent before it is effective. NY G.O.L. §5-1501B subd.1(c).

If the principal wants the agent to have the authority to make gifts, the principal must initial a provision granting gift-making authority as well as execute the SMGR with two witnesses and an acknowledgment. Within the Durable Statutory Power of Attorney, the principal can designate a monitor who shall have the authority to request, receive, and compel the agent to provide a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal, to request and receive such records held by third parties, and to request and receive a copy of the Power of Attorney, unless specifically set forth in the Power of Attorney.

Unless specifically set forth in the Durable Statutory Power of Attorney, an agent is not entitled to receive compensation from the assets of the principal for responsibilities performed under 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. The authority to create and fund trusts is removed from NY G.O.L. §5-1502(c) and now appears as a specific provision in the statutory SMGR to “create, amend, revoke or terminate an intervivos trust.” The authority to create joint accounts or modify a “Totten Trust” beneficiary must be included in the SMGR. The same is true to change beneficiaries on retirement benefit plans. Certain small gifts, (\$500 each and under in a calendar year)

to individuals and charities, which continue a custom of the principal, can be made by the agent without a SMGR. NY G.O.L. §5-1502I subd. 14.

Within the SMGR, the attorney in fact can be authorized to give gifts to the principal's spouse, children and more remote descendants, and parents not to exceed the annual exclusion which is now \$13,000; the principal can also authorize gifts in excess of the annual exclusion and gifts to other beneficiaries using the SMGR; and the SMGR can authorize the agent to make gifts or transfers to him or herself. If the principal is very specific in the SMGR, the agent may make gifts to him or herself beyond the limits of the Ferrara case.

The SMGR can be tailor made however these changes impose much stricter requirements on what the principal is doing. This is an entirely new Power of Attorney form but the basic concept of the original form still exists and if the principal wants to make gifts to the attorney-in-fact or others there are specific rules to do so. A non-statutory Power of Attorney which contains gift-giving authority is still permissible provided it is signed by the principal and agent, acknowledged and witnessed by two witnesses. NY G.O.L. §5-1501B subd. 2

All attorneys at law involved in the preparation, execution, or acting as a witness or notary will need to be extra careful if any gift giving will be a part of the new Power of Attorney and Statutory Major Gifts Rider. We hope to have a form for you in an upcoming *Newsletter*.