

Technical Corrections to the New Statutory Power of Attorney and Statutory Major Gifts Rider.

By Gary E. Bashian, Esq.*

On September 12, 2010, the Technical Corrections Act, signed by Governor Patterson August 15, 2010, will take effect, modifying the recently changed Statutory Short Form Durable Power of Attorney and General Obligations law in a number of important ways. All references to the statute herein are to the General Obligations Law.

These changes affect several areas, including: 1) allowable agents under the Statutory Power of Attorney, 2) terms of revocation, 3) changes to the Statutory Major Gifts Rider, 4) an agent's powers regarding Trusts and to engage in alternative dispute resolution, 5) requirements for third parties to accept an agent's power under the form, and 6) effective Powers of Attorney created in other states or jurisdictions.

Some of these changes are broad and uniform; others are more specific and directed.

Allowable Agents

1) Foremost, the types of allowable agents under the Statutory Power of Attorney have changed. Amendments to § 5-1502C now exclude a number of business or commercial entities from being able to act as an agent under the Statutory Power of Attorney. The powers which can be granted under this instrument to: creditors, financial brokers, corporate shareholders, financial institutions, condominium boards, partnerships, limited liability companies, real estate brokers, those who have been made agents to accept service on behalf of others, and a number of other entities have been disallowed. Attorneys will have to look to other devices in order to properly convey the powers of an individual to these classes of clients. Importantly, § 5-1508 has also been amended, and now limits agency powers, providing that: "any person, other than an estate or a trust, may act as an agent, co-agent or successor agent under a Power of Attorney.

Terms of Revocation

2) Notably, the formal requirements for revoking a Statutory Power of Attorney have changed as well. The execution of a new Statutory Power of Attorney no longer revokes any prior Power of Attorney previously executed by the principal. Additionally, for a principal to revoke the agent's authority by means other than a termination provision in the Power of Attorney form itself, the principal must now deliver the revocation to the agent in person, or by sending a signed and dated revocation by mail, courier, electronic transmission or facsimile, to the agent's last known address. Where a Power of Attorney has been recorded, the principal must also record a written revocation in the office in which the original Power of Attorney was recorded. Termination of an agent's authority, or of the Power of Attorney, is not

effective until the agent has received the revocation. An agent is deemed to have received a revocation when it has been delivered to the agent, or within a "reasonable time" after it has been sent by mail. There can now be concurrent agencies with overlapping powers. (see § 5-1511). § 5-1503 requires that the form itself be modified to include a provision revoking one or more powers of attorney previously executed by the principal.

Changes to the Statutory Major Gifts Rider

3) The powers and terms of the Statutory Major Gifts Rider have changed as well, including the powers to gift and the formal requirements regarding succession. The Statutory Major Gifts Rider (SMGR), has been retitled simply a "Statutory Gifts Rider" (SGR). Furthermore, the authorization to gift granted by the SGR must be initialed for the agent to make gifts in excess of \$500 in the aggregate, annually (see § 5-1502I). Successor agents, as appointed, cannot serve unless the primary agent is unable or unwilling to serve. (The acronym is now not a SMUGGER for SMGR, but SUGAR for SGR).

Agent's Powers regarding Trusts and Alternative Dispute Resolution

4) For Real Estate transactions (§ 5-1502A), chattel and goods transactions (§ 5-1502B), and bond, share & commodity transactions (§ 5-1502C) agents are now authorized to "create, modify or revoke a Trust" (unless such creation, modification or revocation is a gift transaction under § 5-1514); "to execute, acknowledge, seal and deliver any conveyance, goods or mortgage, lease, creation, revocation or modification of a Trust" (unless such creation, modification or revocation is a gift transaction under § 5-1514). Agents also have powers to submit matters to alternative dispute resolution with respect to a claim against the principal involving the above transactions for which they have been appointed.

For agency powers granted in regard to: banking transactions (§ 5-1502D), business operating transactions (§ 5-1502E), estate transactions (§ 5-1502G), claims and litigation (§ 5-1502H), and personal and family maintenance (§ 5-1502I), agents now have powers to submit to alternative dispute resolution with respect to a claim against the principal involving the above types of transactions.

Pursuant to § 5-1502L, powers granted for retirement benefit transactions now allow the agent to "prepare, execute, or deliver a Trust Agreement" (unless such Trust agreement is a gift under § 5-1514), and also have powers to submit to alternative dispute resolution with respect to a claim against the principal involving retirement benefit transactions.

Third Party Acceptance

5) § 5-1504, the provision governing requirements for third parties to accept an agent's power under the form, has been amended as well. Previously, where the Power of Attorney was presented to a third party, "it shall not be deemed unreasonable for a third party to require the agent to execute an acknowledged affidavit stating that the power of attorney is in full force and effect." Such an affidavit will be conclusive proof to the third party relying on the power of attorney that the power of attorney is valid and effective, and has not been

terminated or revoked. However, this new amendment requires that if the agent is a spouse, that the affidavit includes notice that the Power of Attorney expressly provides that in the event of a "divorce or an annulment as defined in...the Estate Powers and Trusts Law does not terminate the agent's authority thereunder, or the agent does not have actual notice that the marriage has been terminated."

For the Power of Attorney to be accepted for recording, it must be signed and acknowledged by the agent. "If two or more agents acting on behalf of the principal are required to act together, the Power of Attorney shall be accepted for recording as long as their signatures have been acknowledged." Similarly, when a "successor or co-agent authorized to act separately from any other agents presents a certified copy of a recorded Statutory Short Form Power of Attorney or Non-Statutory Power of Attorney with the agent's signature acknowledged, the instrument shall be accepted for recording."

Jurisdictional Comity

6) Lastly, Powers of Attorney executed in other jurisdictions by a New York domiciliary that comply with New York law, but that have been executed in another state or jurisdiction by a domiciliary of New York, are valid. Conversely, a Power of Attorney executed in New York by a domiciliary of another state in compliance with the law of the foreign state or jurisdiction, or the laws of New York, will also be considered valid in New York.

All practitioners should carefully review all of these amendments beyond this simple summary as the changing powers and format of this indispensable instrument will undoubtedly affect the way it is employed, and the manner in which it can be better used.

* Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association, presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section as vice chair of the Estate litigation committee, and a past chair of the Westchester County Bar Association's Trust & Estates Section. Mr. Bashian gratefully acknowledges the contributions of Andrew Frisenda, an associate at Bashian & Farber, LLP, for his assistance in the composition of this article.